

Insights, News & Events

WASHINGTON STATE “BANS THE BOX”

Insights

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Washington has joined a growing list of states and cities to restrict criminal history inquiries in the hiring process with adoption of the Washington Fair Chance Act (2SHB 1298), signed into law on March 13, 2018. Beginning June 7, 2018, state law will prohibit public and private employers from asking about arrests or convictions until after an applicant is determined otherwise qualified for a position.

The Fair Chance Act will apply to all Washington employers including public agencies, private individuals, businesses, contractors, temporary staffing agencies, and training and apprenticeship programs, as well as job placement, referral, and employment agencies. Here’s what you need to know about the new restrictions to make sure your policies and practices are in compliance before June 7.

WHAT DOES THE FAIR CHANCE ACT MEAN FOR WASHINGTON EMPLOYERS?

The Fair Chance Act imposes three primary restrictions on employers. Specifically, once the law takes effect, you can no longer:

- ask or obtain or obtain information about a job applicant’s criminal record, either orally or in writing, until after determining that the applicant is otherwise

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qualified for the position (meaning the applicant meets the basic criteria for the position as stated in the advertisement or job description);

- advertise job openings in a way that excludes people with criminal records from applying (for example, ads that state “no felons” or “no criminal background” or convey similar messages will no longer be permitted); and
- implement any policy or practice that automatically excludes individuals with a criminal record from consideration prior to an initial determination that the applicant is otherwise qualified for the position. Prohibited practices include rejecting an applicant for failure to disclose a criminal record prior to initially determining the applicant is otherwise qualified.

ARE THERE ANY JOB OR EMPLOYER SPECIFIC EXCEPTIONS TO THE FAIR CHANCE ACT?

Yes. The Fair Chance Act prohibitions do not apply to employers hiring a person who will or may have unsupervised access to children under 18 years old, a vulnerable adult, or a vulnerable person. Further, it will not apply to any employer, including a financial institution, expressly permitted or required under federal or state law to inquire into or consider information about an applicant’s criminal record for employment purposes. Moreover, general or limited authority law enforcement agencies and certain criminal justice agencies will be exempt from the prohibitions. Finally, employers seeking nonemployee volunteers will not be restricted by the new law.

CAN EMPLOYERS STILL ASK ABOUT AN APPLICANT’S CRIMINAL BACKGROUND BEFORE HIRING AN APPLICANT?

Yes. You may inquire into or obtain information about criminal records after you initially determine that the applicant is otherwise qualified. In other words, you will not be able to use background checks as an initial

screening tool, but you may conduct checks later in the process (assuming you comply with all other federal, state, or local laws, such as Washington's Fair Credit Reporting Act).

ARE EMPLOYERS REQUIRED TO HIRE APPLICANTS WITH PRIOR CRIMINAL CONVICTIONS?

No. The Act imposes no affirmative action obligation on employers to hire applicants with a criminal conviction, or accommodate applicants or employees with a criminal record or those facing criminal charges.

ARE THERE PENALTIES FOR VIOLATING THE ACT?

Yes. While the Fair Chance Act does not give individuals the right to file a lawsuit against an employer for violating the Act, the Attorney General will have the authority to investigate and take action, from requiring education to monetary penalties ranging from \$750 to \$1,000 per violation, depending on whether it is a repeat violation.

WHAT ABOUT LOCAL LAWS?

The new law does not preempt, or eliminate, any local laws also related to criminal inquiries in the hiring process, such as those already covering Seattle's or Spokane's Washington employers. That means that employers recruiting workers for those cities will also need to meet the local requirements.

For example, Seattle's law specifically requires that employers must tell the applicant which criminal records the employer is relying on to make a no hire decision and give the applicant an opportunity to respond or correct the information.

WHAT SHOULD WASHINGTON EMPLOYERS DO TO COMPLY?

Here are some immediate steps to consider before the June 7 effective date:

1. Update your job applications to remove questions about criminal history.
2. Review job postings to ensure there is no prohibited language along the lines of “no felons” or “no criminal background” or other words that convey similar messages like “must have clean driving record.” If you believe there is a job specific exception that might apply, check with an attorney first.
3. Educate recruiters and hiring managers that questions regarding criminal history are prohibited at the initial screening stage.
4. If your company’s standard practice is to request a third party to conduct a background check on applicants, you must adjust the timing of these inquiries so that they are not initiated until after an initial qualification screening.
5. Review internal procedures for considering an applicant’s criminal record to comply with Washington and federal laws regarding the same. This includes examining factors like recentness of the arrest or conviction, whether it reasonably relates to the job duties of the position being sought (i.e., the applicant was convicted of embezzlement and is applying for a bookkeeping position), the seriousness of the underlying criminal conviction, and the number and types of convictions.

For more information about lawful use of criminal history in hiring or how this new law will affect your organization, contact any attorney in our [Seattle office](#) at (206) 682-2308 or your regular Fisher Phillips attorney.

This Legal Alert provides an overview of a new specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

