



## Washington “Bans the Box” and Imposes New Limitations on the Use of Criminal Background Checks During the Hiring Process

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On March 13, 2018, Governor Jay Inslee signed into law the Washington Fair Chance Act (“WFCA”) which prohibits inquiries regarding applicants’ conviction histories until the employer has determined if an applicant is “otherwise qualified” for a position. Part of a legislative trend known as “ban the box,” the WFCA aims to end the practice of employers categorically excluding applicants with arrests or convictions from consideration for employment. Currently, a total of ten states have adopted similar laws. Under the new Washington law, which is effective June 6, 2018, an employer may only ask about a person’s arrest or conviction history once the employer has made the initial determination that the applicant is qualified (i.e., meets the basic criteria for the position). The law applies to private and public-sector employers in the State of Washington with a few exceptions.

### ***Employers are prohibited from:***

- Advertising job openings in a manner that excludes people with arrest or conviction records from applying, such as using advertisements that state “no felons,” “no criminal background,” or that otherwise convey similar messages;
- Asking any question orally or on a written employment application or another hiring document about an applicant’s arrest or conviction record, until after the employer has initially determined that the applicant is qualified for the position. This prohibition includes information obtained through a standard criminal background check, or otherwise obtaining information about criminal arrests or convictions;
- Having a policy or practice of automatically disqualifying or categorically eliminating applicants based on their prior criminal arrest or conviction. Before any decision is made about the relevance of a criminal conviction or arrest, employers must decide if the applicant is otherwise qualified, meaning that an applicant meets the basic standards as set out in the job description or ad; and
- Outright rejecting or disqualifying an applicant if they do not disclose a criminal record before the employer has initially decided if the applicant is qualified for the position.

### ***Exceptions:***

While the WFCA is broad in scope and application, the law recognizes that in some circumstances a person’s criminal history may itself disqualify them for a job. The law does not apply to:

- Any employer who is hiring for a position that will or may have unsupervised access to children under the age of 18 or a vulnerable adult or person (as Washington law defines that phrase);



- An employer, such as a financial institution, that is expressly permitted or required under federal or state law to inquire into, consider, or rely on information about an applicant's or employee's criminal record for employment purposes;
- Various law enforcement agencies or criminal justice agencies in Washington;
- Any employer seeking a nonemployee volunteer; or
- Any entity required to comply with the rules or regulations of a self-regulatory organization, as defined by the Securities Exchange Act.

The WFCRA is not intended to interfere with or diminish any collective bargaining agreements in unionized workplaces.

### ***Enforcement and Penalties***

The WFCRA does not provide for a private cause of action. Instead, the Washington State Attorney General's Office has the authority to investigate possible violations and assess fines, including penalties, costs, and attorneys' fees.

The maximum penalties are as follows: a notice of violation for the first violation; a fine of \$750 for the second violation; and a fine of \$1,000 for each subsequent violation.

### ***Local Laws***

The WFCRA does not preempt, or eliminate, any local laws also related to criminal inquiries in the hiring process. Employers in Seattle, for example, will need to continue to inform an applicant if a no-hire decision was based on a criminal record and allow the employee to respond and correct the information.

### ***Practical Considerations***

The WFCRA does not require that employers hire applicants with criminal arrests or convictions. Instead, the law prohibits the use of criminal records as an *initial screening tool*. Once an employer has made an initial determination of whether an applicant is otherwise qualified, the employer can conduct a criminal background check as the next phase of the hiring process. The employer may use that information in making a hiring decision. Employers are reminded to comply with all other federal, state, and local laws in conducting these background checks.

In anticipation of WFCRA becoming effective in June, employers should:

- Revisit all job postings to ensure there are no statements such as "felons need not apply," "no criminal background," or other phrases that convey a message that you categorically exclude all applicants with criminal backgrounds from hire. However, if you have a job for which one of the exceptions listed above applies, we recommend that you consult with an employment attorney regarding the hiring process and advertising for that position.



- Update all job applications to remove any questions about criminal arrest or conviction history.
- Educate supervisors and others involved in the hiring process that during the initial hiring process they may not ask questions about a person’s criminal background.
- Revise all policy manuals that may discuss the use of criminal background checks in hiring so they are consistent with the WFCRA.
- Reconsider a one-size-fits-all approach to the use of criminal background histories in hiring.

A final point, apart from the new Washington law, the Equal Employment Opportunity Commission (“EEOC”) takes the view that reliance on criminal background disproportionately affects certain ethnic minorities, and that the records themselves may result from discriminatory treatment in the criminal justice system. This view has led the EEOC to challenge employers who generally inquire about applicants’ criminal histories. All criminal laws are not the same: some proscribe conduct that by its very nature indicates a person’s predisposition to violence, while others are not violent offenses. Certain crimes may have greater relevance to specific job responsibilities. Rather than excluding anyone with a criminal record, employers should consider the circumstances of the crime, the number and type of convictions, the time between completion of sentence and the application, and the effect, if any, that the applicant’s criminal record would have on his or her ability to perform the job (e.g. a prior conviction for theft may reasonably relate to a cashier position).

Summit attorneys are available to answer inquiries and provide assistance in implementing the WFCRA or in helping with any other labor and employment law need.