

A Fair Chance at Understanding the New Washington Fair Chance Act

Over 1 million Washington residents have some sort of criminal background. Many are active job seekers. For those job seekers, their criminal background can be a near-insurmountable barrier to employment.

Over the past few years, numerous states and cities—including Seattle in 2013 and Spokane last November—have passed legislation prohibiting criminal history inquiries and background checks until after an applicant’s job qualifications have been evaluated. On March 13, 2018, Gov. Jay Inslee signed into law the Washington Fair Chance Act, joining this trend. This new law is expected to take effect on June 6, 2018.

What does the new law mean for employers? The law regulates when in the hiring process a background check or inquiry into an applicant’s criminal history may be made. Thus, the new law prohibits questions in employment applications asking if the applicant has ever been convicted of a crime. Employers may not conduct a criminal background check or ask about an applicant’s criminal record until after the employer has made an initial determination that the applicant is otherwise qualified for the position. And employers may not advertise employment openings in a way that excludes people with criminal records—for example, including “no felons,” or “no criminal background” in a job posting.

There are two things the new law does NOT require. First, it does not force an employer to hire anyone. Second, background checks and questions about criminal or arrest records are still allowed; only the timing of those checks has changed.

There are a few jobs that are excluded from the new requirements, including (1) jobs with unsupervised access to children or vulnerable adults and (2) jobs where state or federal law expressly permits or requires an inquiry into an applicant’s criminal record for employment purposes. This second exclusion includes certain jobs in financial institutions and law enforcement agencies.

Notably, the new law allows cities and counties to maintain laws that are more protective of job applicants with criminal backgrounds. Thus, employers with employees in Seattle must continue to remain in compliance with the City’s Fair Chance Employment Ordinance. Although there are many similarities between Seattle’s ordinance and the new state-wide law, there are some important differences of which employers should be aware. For example, Seattle’s ordinance applies to both applicants and current employees. And the Seattle ordinance only permits adverse employment decisions based on an applicant or employee’s criminal background when there is a legitimate business reason to do so.

Finally, a separate but related question is what an employer may do with information about an applicant's criminal record once that information is properly collected. In 2010, the Equal Employment Opportunity Commission published guidance detailing how policies that categorically reject applicants based on their criminal background may disparately impact persons of color, and may result in discrimination claims under Title VII and other discrimination statutes. The EEOC recommends employers conduct an individualized assessment for applicants with a criminal background before making a hiring decision. Under this guidance, employers should consider:

- The duties of the job and the environment in which the job is performed;
- The nature and seriousness of the crime(s);
- The number of offenses;
- The amount of time that has passed since the conviction;
- The age of the applicant at the time of arrest, conviction, or release from prison;
- The applicant's employment or character references (if any); and
- Any other information related to the individual's rehabilitation or good conduct since their arrest(s) or conviction(s).

Conducting an individualized assessment can serve to protect business interests while also avoiding losing out on quality applicants. With almost one-in-five Washingtonians having some sort of criminal background, a more individualized approach in deciding whether to hire an individual with a criminal background seems to be in everyone's best interest.

This article was written by Steven Fawcett, an employment lawyer at Gordon Thomas Honeywell. The employment lawyers at GTH are prepared to assist you with questions on this new development in Washington State employment law.