

HOUSE BILL REPORT

ESSB 5312

As Reported by House Committee On: Labor & Workplace Standards

Title: An act relating to prohibiting certain employers from including any question on an application about an applicant's criminal record, inquiring either orally or in writing about an applicant's criminal records, or obtaining information from a criminal background check, until after the employer initially determines that the applicant is otherwise qualified.

Brief Description: Prohibiting certain employers from including any question on an application about an applicant's criminal record, inquiring either orally or in writing about an applicant's criminal records, or obtaining information from a criminal background check, until after the employer initially determines that the applicant is otherwise qualified.

Sponsors: Senate Committee on Commerce, Labor & Sports (originally sponsored by Senators Baumgartner, Saldaña, Walsh, Billig, Angel, Hasegawa, Keiser, Chase, Zeiger, Rolfes, Ranker, Fain, Frockt, Conway, Wellman, Darneille, Pedersen and Miloscia).

Brief History:

Committee Activity:

Labor & Workplace Standards: 3/21/17, 3/28/17 [DPA].

Brief Summary of Engrossed Substitute Bill (As Amended by Committee)

- Prohibits an employer from, among other things, including any question on an application or inquiring into an applicant's criminal background until after the employer initially determines that the applicant is otherwise qualified for the position.
- Exempts certain employers from the prohibition.
- Authorizes the Attorney General to enforce the provisions and impose penalties.

HOUSE COMMITTEE ON LABOR & WORKPLACE STANDARDS

Majority Report: Do pass as amended. Signed by 4 members: Representatives Sells, Chair; Gregerson, Vice Chair; Doglio and Frame.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Minority Report: Do not pass. Signed by 3 members: Representatives Manweller, Ranking Minority Member; McCabe, Assistant Ranking Minority Member; Pike.

Staff: Trudes Tango (786-7384).

Background:

Under the Washington Law Against Discrimination, the Human Rights Commission has issued, in rule, a preemployment inquiry guide that provides examples of fair and unfair inquiries of job applicants.

Inquiries concerning arrests will generally be considered fair if the inquiry is limited to arrests within the last 10 years and includes whether charges are pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance. Inquiries about convictions will generally be considered fair and justified by business necessity if the inquiry is limited to crimes that reasonably relate to the job duties and that have occurred within the last 10 years.

Exempt from the rule are law enforcement agencies, state agencies, school districts, businesses, and other organizations that have a direct responsibility for the supervision of children, persons with disabilities, and vulnerable adults.

At least 24 states have adopted laws that limit an employer's ability to inquire into a job applicant's criminal history during the application stage. There are several local jurisdictions that have adopted similar policies. For example, Seattle's ordinance, which went into effect in 2013, limits criminal history questions on job applications and criminal background checks until after an employer conducts an initial screening to eliminate unqualified applicants.

Summary of Amended Bill:

An employer may not:

- include any question on an application for employment, inquire either orally or in writing, receive information through a criminal history background check, or obtain information about an applicant's criminal record until after the employer initially determines that the applicant is otherwise qualified for the position (meaning the applicant meets the basic criteria for the position as stated in the advertisement or job description). Once the employer has initially determined that the applicant is otherwise qualified, the employer may inquire into or obtain information about criminal records and consider an applicant's criminal record in a hiring decision;
- advertise job openings in a way that excludes people with criminal records from applying. Ads that state "no felons" or "no criminal background" or convey similar messages are prohibited; or
- implement any policy or practice that automatically or categorically 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.

The prohibitions do not apply to:

- employers hiring a person who will or may have unsupervised access to children under 18 years of age, a vulnerable adult, or a vulnerable person;
- any employer, including a financial institution, who is expressly permitted or required under federal or state law to inquire into or consider information about an applicant's criminal record for employment purposes;
- employment by a general or limited authority law enforcement agency or by certain criminal justice agencies;
- employers seeking nonemployee volunteers; or
- employers hiring for positions that include:
 - services to be performed at or in a residential property, excluding all persons certified or licensed under the chapters governing licenses of business and professions;
 - solicitation at or in a residential property of products or services; or
 - residential delivery services.

The act may not be construed or interpreted to:

- prohibit an employer from declining to hire an applicant with a criminal record or from terminating the employment of an employee with a criminal record;
- diminish or conflict with any requirements of state or federal laws, including the federal Civil Rights Act of 1964, the federal Fair Credit Reporting Act, the state Fair Credit Reporting Act, and state laws regarding unsupervised access to children and vulnerable persons;
- impose an obligation on an employer to provide accommodations or job modifications to facilitate the continued employment of an applicant or employee with a criminal record or who is facing pending charges;
- discourage or prohibit an employer from adopting more protective policies; and
- create a private right of action for damages or remedies of any kind.

The Office of the Attorney General (AG) is responsible for enforcement. The AG may: investigate violations on its own initiative or in response to a complaint; pursue administrative sanctions or file a lawsuit for penalties, costs, and attorneys' fees; and adopt rules to implement the act.

In exercising its enforcement powers, the AG must use the following stepped enforcement approach:

- first violation—a notice of violation and offer of agency assistance (with a requirement for a 90-day period to correct the violation before a second violation is assessed);
- second violation—monetary penalty up to \$750; and
- subsequent violations—monetary penalty of up to \$1,000 for each subsequent violation.

"Criminal record" includes any record about a citation or arrest for criminal conduct. It includes records relating to probable cause to arrest and records of juvenile cases filed with any court, regardless of whether the case resulted in a finding of guilt.

The act is known as the Washington Fair Chance Act.

Amended Bill Compared to Engrossed Substitute Bill:

The amended bill removes the preemption provision.

Appropriation: None.

Fiscal Note: Available.

Effective Date of Amended Bill: The bill takes effect 90 days after adjournment of the session in which the bill is passed.

Staff Summary of Public Testimony:

(In support) A broad coalition that includes business and labor groups and community groups were involved in this bill. This bill works in tandem with the Certificate of Restoration of Opportunity (CROP) bill the Legislature passed recently and would give people a chance to explain their circumstances. Without this bill, CROP does not make sense. The preemption provision is an issue; this bill should set a floor rather than a ceiling on what employers can do. Discriminating against applicants without doing any further inquiry does not serve the employer or the applicant. An employer's hiring decision should be based on an applicant's skills. After the initial screening, employers can still conduct background checks and refuse to hire the person.

(Opposed) Small businesses should be exempt; they do not have the resources and staffing to go through applications and conduct multiple interviews. Not allowing an employer to ask the question would result in the employer having to bring in applicants for interviews even when the employer would not be able to hire that person. A bill on background checks exempts local jurisdictions from paying for those background checks because of the expense, which shows that there are expenses involved in screening.

(Other) The bill should include an exemption for employers in the securities industries. This would be a good bill without the preemption clause.

Persons Testifying: (In support) Tara Simmons, Civil Survival and Statewide Reentry Council; Bob Cooper, Washington Fair Chance Coalition; and Sandra Distelhorst, League of Women Voters.

(Opposed) Patrick Conner, National Federation of Independent Business.

(Other) Bill Stauffacher, Securities Industry and Financial Markets Association; and Eric Gonzalez, Washington State Labor Council and American Federation of Labor–Congress of Industrial Organizations.

Persons Signed In To Testify But Not Testifying: None.