

# SENATE BILL REPORT

## 2SHB 1298

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As of February 24, 2018

**Title:** An act relating to prohibiting employers from asking about arrests or convictions before an applicant is determined otherwise qualified for a position.

**Brief Description:** Prohibiting employers from asking about arrests or convictions before an applicant is determined otherwise qualified for a position.

**Sponsors:** House Committee on Labor & Workplace Standards (originally sponsored by Representatives Ortiz-Self, Manweller, Haler, Sells, Kilduff, Frame, Gregerson, Kagi, Tarleton, Jinkins, Stanford, Appleton, Ormsby, Senn, McBride, Santos, Lovick, Bergquist, Farrell and Young).

**Brief History:** Passed House: 2/07/18, 52-46.

**Committee Activity:** Labor & Commerce: 2/19/18, 2/21/18 [DPA, w/oRec].

Ways & Means: 2/24/18.

### Brief Summary of Amended Bill

- Enacts the Washington Fair Chance Act.
- Prohibits employers from making inquiries related to criminal records until after initially determining the applicant is qualified for the position.
- Prohibits ads or policies excluding applicants with criminal records.
- Authorizes the attorney general to enforce the Washington Fair Chance Act and provides penalties.

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### SENATE COMMITTEE ON LABOR & COMMERCE

**Majority Report:** Do pass as amended.

Signed by Senators Keiser, Chair; Hasegawa, Vice Chair; Conway, King, Kuderer and Saldaña.

**Minority Report:** That it be referred without recommendation.

Signed by Senators Braun and Wilson.

**Staff:** Susan Jones (786-7404)

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*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.*

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## SENATE COMMITTEE ON WAYS & MEANS

**Staff:** Claire Goodwin (786-7736)

**Background:** Preemployment Inquiries and Ads. Job applicants with arrests or criminal backgrounds may face barriers to employment. Some employers ask job applicants about arrests and convictions and exclude those applicants from the interview process. Some employers post employment ads stating that felons or those with criminal backgrounds should not apply.

Washington State Law Against Discrimination (WLAD). Under the WLAD, a person has the right to be free from discrimination related to a protected status, such as race, national origin, sex, veteran or military status, sexual orientation, and disability. An employer may not discriminate against a person because of the person's protected status. WLAD applies to employers that employ eight or more employees, but does not apply to any religious or sectarian organization not organized for private profit.

Taking certain actions because of a protected status are considered unfair practices. With respect to employers, these practices include:

- refusing to hire the person;
- discharging or barring the person from employment;
- discriminating against the person in compensation or in other conditions; or
- circulating any statement, ad, or using any application form, or making any inquiry regarding prospective employment, expressing any limitation, or discrimination.

There are limited exceptions related to bona fide occupational qualifications and other circumstances.

Human Rights Commission (HRC) Rules. Under WLAD, the HRC has issued, in rule, a pre-employment inquiry guide, which gives certain examples of fair and unfair inquiries related to job applicants. Under the rules, employers and employment agencies must comply with the rules except when there is:

- a bona fide occupational qualification;
- a voluntary affirmative action; or
- a federal law or regulation requirement.

If one or more of the above conditions apply, the inquiries must be accompanied by a written explanation of their purpose.

Arrests and Convictions. The HRC rule provides fair and unfair pre-employment inquiries related to arrests and convictions. Under the fair pre-employment inquiries, the rule provides that because statistical studies regarding arrests have shown a disparate impact on some racial and ethnic minorities, and an arrest by itself is not a reliable indication of criminal behavior, inquiries concerning arrests must include whether charges are still pending, have been dismissed, or led to conviction of a crime involving behavior that would adversely affect job performance, and whether the arrest occurred within the last ten years. Any inquiry that does not meet these requirements is considered an unfair pre-employment inquiry. With respect to convictions, inquiries concerning convictions, or imprisonment, are considered to

be justified by business necessity if the crimes inquired about relate reasonably to the job duties, and if such convictions, or release from prison, occurred within the last ten years. Inquiries that do not meet these requirements are not considered justified by business necessity and are considered unfair pre-employment inquiries.

Exemptions. Law enforcement agencies and state agencies, school districts, businesses and other organizations that have a direct responsibility for the supervision, care, or treatment of children, mentally ill persons, developmentally disabled persons, or other vulnerable adults are exempt from these rules.

Other States and Seattle Ordinance. 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:** Washington Fair Chance Act (Act). Under the Act, an employer may not:

- include any question on any employment application, inquire either orally or in writing, receive information through a criminal history background check, or otherwise obtain information about an applicant's criminal record until after the employer initially determines that the applicant is otherwise qualified for the position;
- advertise employment openings in a way that excludes people with criminal records from applying such as ads that state no felons or no criminal background; or
- implement any policy or practice that automatically or categorically excludes individuals with a criminal record from consideration prior to an initial determination of qualification.

After the initial qualification determination, the employer may inquire into or obtain information about a criminal record. Definitions are provided.

Exemptions. Exemptions apply with respect to:

- a nonemployee volunteer; and
- any entity required to comply with regulations of a self-regulatory organization under the Securities and Exchange Act.

Limitations. The Act may not be interpreted, applied, or construed:

- to interfere with collective bargaining agreements;
- to diminish or conflict with requirements of state or federal law, including the Civil Rights Act; the federal and state Fair Credit Reporting Acts; and regarding unsupervised access to children or vulnerable persons;
- as imposing an employer obligation to provide accommodations or job modifications for an applicant or employee with a criminal record or who is facing pending criminal charges;
- to discourage or prohibit an employer from adopting more protective policies;
- to interfere with local governments provided greater protections; or
- to create a private right of action to seek damages or remedies of any kind.

The Act provides exclusive remedies.

Attorney General's Office (AGO) Enforcement. The AGO has the authority to:

- investigate violations on its own initiative or in response to complaints;
- educate the public about compliance with the Act;
- adopt rules including specifying penalties; and
- pursue administrative sanctions or a lawsuit for penalties, costs, and attorneys' fees.

The AGO must use a stepped enforcement approach, by first educating violators, then warning them, and then taking action, including legal and administrative. Maximum penalties are:

- a notice of violation and offer of agency assistance for the first violation;
- up to \$750 for the second violation; and
- up to \$1,000 for each subsequent violation.

Severability and Conflict Provisions. There is a severability clause. Also, if there is a conflict with requirements that are a prescribed condition to an allocation of federal funds to the state, the conflicting part of the Act is generally inoperative and rules adopted must meet federal requirements for the receipt of federal funds.

**EFFECT OF LABOR & COMMERCE COMMITTEE AMENDMENT(S):** Adds securities entities required to comply with rules and regulations of a self-regulatory organization as authorized by Congress to the list of exemptions to the provision prohibiting employers from inquiring about criminal backgrounds, advertising, and having policies to exclude individuals with criminal backgrounds.

**Appropriation:** None.

**Fiscal Note:** Available.

**Creates Committee/Commission/Task Force that includes Legislative members:** No.

**Effective Date:** Ninety days after adjournment of session in which bill is passed. Includes a null and void clause.

**Staff Summary of Public Testimony on Second Substitute House Bill (Labor & Commerce):** *The committee recommended a different version of the bill than what was heard.* PRO: The bill makes sure people get a fair chance. A man was 18 when he drank too much, stole candy from a machine, and put graffiti on a wall. Now he cannot get in the door and he just want a chance to tell his story. People want to be able to support their families. There is no mandate on hiring someone with a criminal background. The House bill without the preemption is better. We should not encapsulate someone's life into a box. A question about criminal background has a range of behavior and people assume the worst of the range. This is the top priority for the Statewide Reentry Council. I had a criminal background and got to serve in the Obama White House because of a change in policy but had trouble finding housing. If people cannot get a job, it drives them into the underground economy. Incarceration rates have increased, while crime has decreased. The stigma of a criminal

record causes problems. People have skills and want to contribute. More than a dozen states and a number of local governments ban the box. All students deserve equal opportunities. Ban the box reduces recidivism.

CON: The passage rate in the House went down from last year. Only ten states ban the box for the private sector and one-half exclude small businesses. Small businesses often do not have an HR person. The owners have to do the hiring. There should be an amendment that excludes businesses that can prove that there is a criminal background requirement for certain licenses or bonding. This avoids false hope for the applicant and wasted time.

OTHER: The securities industry needs a specific exemption. Eight of the ten states have exemptions for the securities industry. FINRA requires all applicants to complete a 40 page application. The bill change would require violations of the application requirement.

**Persons Testifying (Labor & Commerce):** PRO: Representative Lillian Ortiz-Self, Prime Sponsor; Bob Cooper, Washington Fair Chance Coalition; Christopher Poulos, Executive Director, Statewide Reentry Council; Graciela Nunez, Washington State Labor Council, AFL-CIO; Morgan Lakey, Washington Community and Technical College Student Association.

CON: Patrick Connor, National Federation of Independent Business.

OTHER: Bill Stauffacher, Securities Industry and Financial Markets Association.

**Persons Signed In To Testify But Not Testifying (Labor & Commerce):** No one.

**Staff Summary of Public Testimony on Amended Bill (Ways & Means):** PRO: Ninety-five percent of people in prison are coming home. They want to be successful and need a chance to get a job. The Equal Opportunity Commission says that judging people based on a little box may be racial discrimination. One-quarter of Americans have a criminal background. Incarceration has increased despite crime declining. This is consistent with laws in other states and counties.

**Persons Testifying (Ways & Means):** PRO: Bob Cooper, Washington Fair Chance Coalition; Eric Gonzalez, Washington State Labor Council, AFL-CIO.

**Persons Signed In To Testify But Not Testifying (Ways & Means):** No one.