

SENATE BILL REPORT

ESSB 5312

As Passed Senate, March 7, 2017

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: Commerce, Labor & Sports: 2/01/17, 2/01/17 [DPS, w/oRec].

Floor Activity:

Passed Senate: 3/07/17, 25-24.

Brief Summary of Engrossed First Substitute Bill

- Enacts the Washington Fair Chance Act (Act).
- Prohibits employers from making inquiries related to criminal records until after initially determining the applicant is qualified for the position.
- Prohibit ads or policies excluding applicants with criminal records.
- Authorizes the Attorney General to enforce the Act.
- Preempts the entire field of employment laws related to criminal records and matters covered in the bill.
- Provides that inconsistent local laws and ordinances are preempted and repealed.

SENATE COMMITTEE ON COMMERCE, LABOR & SPORTS

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.

Majority Report: That Substitute Senate Bill No. 5312 be substituted therefor, and the substitute bill do pass.

Signed by Senators Baumgartner, Chair; Braun, Vice Chair; Keiser, Ranking Minority Member; King and Wilson.

Minority Report: That it be referred without recommendation.

Signed by Senators Conway, Hasegawa and Saldaña.

Staff: Susan Jones (786-7404)

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 Rules. Under WLAD, the Human Rights Commission (HRC) has issued, in rule, a preemployment 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 preemployment inquiries related to arrests and convictions. Under the fair preemployment 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 preemployment 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 preemployment inquiries.

Exemptions. Exempt from these rules are 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.

Summary of Engrossed First Substitute Bill: Washington Fair Chance Act. The Act is enacted. 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—ads that state "no felons," "no criminal background," 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 of qualification.

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

Exemptions. Exemptions apply with respect to:

- hiring for a position with unsupervised access to a minor or a vulnerable adult or person;
- hiring for a position related to services at or delivery to a residential property, except persons certified or licensed under the business and profession laws;
- permitted or required inquiries, including by a financial institution, under any federal or state law;
- certain law enforcement or criminal justice agencies; and
- a nonemployee volunteer.

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

- 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 prohibit an employer from declining to hire an applicant or from terminating an employee with a criminal record;
- to discourage or prohibit an employer from adopting more protective policies; or
- to create a private right of action to seek damages or remedies of any kind.

The Act provides exclusive remedies.

AGO's Enforcement. The Attorney General's Office (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 1st violation, which must allow a 90-day period to correct the violation before a second violation is assessed;
- up to \$750 for the 2nd 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.

State Preemptions. The state preempts the entire field of employment laws related to criminal records and other matters covered in the Act. Local governments may only enact related laws that are specifically authorized by state law and are consistent with the Act. Local laws and ordinances in existence are preempted and repealed.

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.

Staff Summary of Public Testimony on Proposed Substitute: *The committee recommended a different version of the bill than what was heard.* PRO: In America, we are about second chances. We say we want to rehabilitate people who go to jail but having to check a box on an application can prevent a person from getting a job, being self-supporting, and supporting family members. Although they are no longer behind bars, they continue to serve a sentence once they are out of prison, especially when the crime was committed years ago or when they were young. This can cause recidivism because they may resort to crime to

put food on the table. The bill gives people a second chance. The bill does not require that the employer hire the person, only that they wait until after they initially determine the person is otherwise qualified to consider that information. If we put money in their pockets, they put money into the economy. Seattle has a similar ordinance. Employers were blanketly disqualifying people; they were missing out on qualified people who had just made a mistake. They wouldn't look deeper. Some of these have racial undertones. A job is the best way to avoid recidivism. The bill is trying to give people a fair chance and provide an overlooked pool of people that because of screening may not get looked at right now. Hopefully, this will benefit our communities and make them safer. This bill is a small but significant step in the effort for job employment and criminal justice reform. The bill still clearly says you can choose not to hire someone if they have a criminal background but you can't do that at the outset. You have to give them a first chance to make a first impression to show that they are qualified. There are some exemptions for jobs that deal with children and if you are going to someone's home where it would be reasonable and efficient to screen those people out from the beginning. This is another mandate on small business—but a reasonable one. Many businesses have already voluntarily taken off the box. It creates more opportunities for both business and people that want to work to connect without this false box that keeps them from moving forward. This is working in Seattle without compromising public safety. Local jurisdictions should be able to deal with local needs. It would allow CROP to be fully implemented.

CON: The needs, obligations, and time for small business owners is very different than large businesses. The larger the business, the less likely they are to use the box. Businesses with under 25 employees have less time for the hiring process. People with criminal history could use a cover letter to tell their story. People can get a certificate of restoration of opportunity. The burden should be on the applicant not the owner who is just trying to run a business. There should be a common sense liability shield.

OTHER: The preemption may be a concern. Getting in front of an employer helps. While incarcerated, people may prepare inside to not become a burden but it is hard to find permanent employment. Even after additional education, it can be hard to get a job. People get frustrated and may end up back in prison. If preemption is removed, large cities could do more, like required face to face interviews first, which helps to make a difference in hiring. Large cities are often where these people go because there are services. Broad preemption feels political. Enforcement is set in Civil Rights Division of the AGO because it is cost effective. The box can be racially discriminatory. Other states have this like, Texas, New York, California - 30 total. Prison is like a contract. Once it is fulfilled, society should allow them back in and to pull their own weight. This bill allows simple human dignity and removes barriers. This avoids paying taxes to take care of these people.

Persons Testifying: PRO: Senator Michael Baumgartner, Prime Sponsor; Nicholas Powell, citizen; Rhona Taylor, Columbia Legal Services.

CON: Patrick Connor, NFIB/Washington.

OTHER: Senator Rebecca Saldana, Sponsor; Layne Peavey, I Did The Time; Dana Drew, I Did The Time; Kurtis Robinson, I Did The Time; Nick Federici, Pioneer Human Services;

Eric Schallon, Green Diamond Resources; Carrey Retlin, WA Statewide Reentry Council; Bob Cooper, WA Fair Chance Coalition; Tonya Tolliver, I Did the Time.

Persons Signed In To Testify But Not Testifying: No one.