

# SENATE BILL REPORT

## SB 6110

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As of February 5, 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:** Senators Saldaña, Walsh, Darneille, Frockt, Zeiger, Van De Wege, Keiser, Hunt, Kuderer, Pedersen, Hasegawa and Billig.

**Brief History:**

**Committee Activity:** Labor & Commerce: 1/10/18, 1/22/18 [DP-WM, DNP, w/oRec].  
Ways & Means: 1/30/18.

**Brief Summary of 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.
- Prohibits ads or policies excluding applicants with criminal records.
- Authorizes the attorney general to enforce the Act and provides penalties.

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**SENATE COMMITTEE ON LABOR & COMMERCE**

**Majority Report:** Do pass and be referred to Committee on Ways & Means.

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

**Minority Report:** Do not pass.

Signed by Senator Braun.

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

Signed by Senator King.

**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 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 under WLAD. 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 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 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 preemployment 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 Bill:** Washington Fair Chance 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:

- hiring for a position with unsupervised access to a minor or a vulnerable adult or person;
- 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 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.

Null and Void Clause. If funding for the Act is not provided by June 30, 2018, the Act is null and void.

**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 (Labor & Commerce):** PRO: This bill is similar to the bill that passed the House. I have been working with business regarding retaining documents. This is really about many businesses that already do not include a box because they want to get the most qualified people. The cities of Seattle and Spokane have banned the box because they want to give a chance to the people who have done their time and allow them to re-integrate into society as soon as possible. One of the core principals of the Statewide Reentry Council is to make sure people face as few barriers as possible to successfully reenter into society. Being able to find employment helps people reenter society. It also helps public safety. Finding work helps people find housing and avoid reoffending. Without this bill, those who go through retraining have difficulty getting an interview. Individuals with criminal records are 50 percent less likely to get a call back or an offer. The box could cover a minor criminal background that creates a large road block. Businesses that do not use the box are the exception, not the rule. It protects employers from racial

discrimination claims. We hope there will be a continued conversation on the paperwork since there is not a statewide standard.

CON: This fails to take into consideration the challenges of small businesses. Those small businesses that have retained the box have done so for legitimate business purposes. For example a small business that works with the government and is prohibited from sending individuals to locations with criminal records. There are only ten jurisdictions and D.C. that have adopted a private sector ban the box. In five of those cases, they have exempted very small employers.

OTHER: We would like to see statewide consistency both in regulation and the paperwork. This would help small businesses that operate and cross over into other jurisdictions.

**Persons Testifying (Labor & Commerce):** PRO: Senator Rebecca Saldaña, Prime Sponsor; Chris Poulous, Statewide Reentry Council; Bob Cooper, Fair Chance Coalition.; Heidi Sharpe, People Ready; Holly Chisa, NW Grocery Association.

CON: Patrick Connor, NFIB, Washington.

OTHER: Bob Battles, AWB.

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

**Staff Summary of Public Testimony (Ways & Means):** PRO: The bill would help people reintegrate back into society. The state reaps more benefits than the bill would cost the state.

CON: The bill does not provide security brokers the same protection as others because they are not considered financial institutions. Small business owners will have to make significant changes to their hiring practices.

**Persons Testifying (Ways & Means):** PRO: Bob Cooper, Washington Fair Chance Coalition; Christopher Poulos, Statewide Reentry Council.

CON: Patrick Connor, National Federation of Independent Businesses, Washington.

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

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