



Employment Law Note

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Washington Beefs Up Its “Ban-the-Box” Law



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The “ban-the-box” movement is a civil rights initiative aimed at preventing employers from asking about an applicant’s criminal background history until later in the hiring process. Formerly, it was common practice to, for example, include questions such as “have you ever been convicted of a felony?” on job applications. However, advocates and activists have argued that the best way to reduce recidivism, and rehabilitate offenders, is to stably employ such applicants. This movement eventually gained traction; in a 2012 guidance, the EEOC endorsed removing the criminal-conviction question from job applications. By 2018, several states – including Washington – enacted laws prohibiting the use of criminal background checks during the early hiring process. And, in 2025, the Washington legislature considerably expanded its “ban-the-box” protections; this note will explore what those changes are, and the implications for employers moving forward.

Washington “Bans the Box” in 2018

The Washington Fair Chance Act, enacted in 2018, proscribes employers from procuring an applicant’s criminal record until *after* the employer has made the initial determination that the candidate is otherwise qualified for the position. This means employers cannot include questions about prior criminal history in employment applications, post job listings that deter people with criminal records from applying (such as: “felons need not apply”), ask questions about a candidate’s criminal background in job interviews, or utilize background checks during the candidate’s initial screening.

In the statute’s original form, an employer could inquire into a candidate’s criminal record *after* making an initial determination that the candidate was otherwise qualified for the job. At that point, the employer could – now having access to the candidate’s full background – decide not to extend an offer. An employer was not required to substantiate or explain its reasoning – to the candidate, or anyone else.

The statute, intended to be “educational” in nature, provided no private right of action to job candidates. In other words, a rejected applicant could not sue an employer for deciding not to hire them based on their criminal record. Instead, employers found to violate the statute could be fined up to \$1,000 in penalties to Washington’s attorney general for each violation. The statute exempted employers who sought applicants that would or may have unsupervised access to children or vulnerable adults, financial institutions, and law enforcement agencies.

HB 1747’s Amendments

Last year, the Washington legislature amended the Fair Chance Act. The amendments, which went into effect in July 2026 for employers with 15 or more employees, have significantly expanded the statute’s strictures in a number of ways.

First, the timing for when an employer may legally inquire into a candidate’s criminal record has changed. Employers must now wait until after extending a conditional job offer before asking about, or requesting, a candidate’s criminal record.

Previously, employers were required only to wait until determining whether the candidate was otherwise qualified. The new standard moves the inquiry until later in the hiring process, and makes the conditional offer a key procedural step and compliance issue. Importantly, if an employer rejects a candidate because of a criminal record, the employer must rescind the conditional offer rather than (as before) simply decline to make one in the first place. That rescission is significant, because it constitutes a tangible adverse employment action – meaning employers are at increased exposure for lawsuits.

Second, and relatedly, rescinding a job offer because of a criminal record is no longer a straightforward process. Before an employer can properly revoke a conditional offer of employment, the employer must provide notice to the candidate of their decision not to move forward. This

notice must include a copy of the specific criminal record or document utilized by the employer in making the adverse decision. Then, the employer must hold the job open for two business days to afford the candidate the opportunity to correct or explain the record. If the record is accurate, the candidate may still rebut the employer's decision with evidence of the candidate's rehabilitation, good behavior, work experience, and other countervailing merits.

If the employer insists on moving forward with the rescinded offer or other adverse employment action (such as declining to promote, demoting, or terminating an existing employee because of a criminal record), it must furnish another notice explaining its final decision, including documentation supporting the employer's reasoning. The final notice must detail the relevant statutory factors at play, including how hiring the candidate will negatively impact business operations. Finally, the notice must explain how the candidate's rebuttals (if any) about their rehabilitation and good conduct are unpersuasive, or are otherwise insufficient to overcome the difficulties that would be imposed on the employer's business. In other words, an employer's mere insistence that it cannot trust or hire a convicted felon – *no matter the crime* – is insufficient to avoid violating the law. The employer's decision must be substantiated with evidence and argument.

Third, the statute has significantly increased the penalties for noncompliant employers. Now, an employer may be fined \$1,500 for the first violation, \$3,000 for the second violation, and \$15,000 for every subsequent violation. Further, the penalty must now be payable to the candidate. If there is no job applicant, as in situations where an

employer posts noncompliant job listings, the penalty is retained by Washington's attorney general.

Fourth, should a candidate voluntarily disclose – without solicitation from the employer – that they have a criminal record, the employer must immediately (1) inform the applicant in writing of their rights under the Fair Chance Act and (2) provide the applicant with the attorney general's fair chance act guide for employers and employees.

Employers hiring for positions involving the unsupervised care of children or vulnerable adults, financial institutions, and law enforcement agencies, are still exempted from the statute. In addition, the amendments now exempt employers hiring for a position to work under a federal contract that forbids people with criminal records from working under the contract.

Finally, although applicable at present only to employers with 15 or more employees, the amendments will apply to employers with fewer than 15 employees beginning January 1, 2027.

Recommendations for Employers

Employers should review their practices relating to the use of criminal background checks in hiring, retention, promotion, and termination. This includes reviewing draft job postings, interview questions, pre-hire communications, draft offers of employment, handbooks, and recruiter practices. Employers may also consider training all personnel involved in hiring, promoting, retaining, or terminating candidates, especially personnel involved in ordering background reports. Employers with questions about their obligations under the amended Fair Chance Act are encouraged to contact Sebris Busto James.

For more information about this month's Employment Law Note
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