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# Management Alert

## Washington State's New Ban-the-Box Law Completes the West Coast Trend

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***Seyfarth Synopsis:*** *The Washington Governor has just signed a new law prohibiting employers from inquiring about an applicant's criminal history before the applicant is deemed "otherwise qualified" for the position sought.*

On March 13, 2018, Washington state Governor Jay Inslee signed the Washington "Fair Chance Act," which will prohibit employers from asking about arrests or convictions before an applicant is determined otherwise qualified for the position sought. Now, all west coast states, and some west coast cities (such as Los Angeles, Portland and Seattle), have ban-the-box laws, with Oregon enacting a statewide law effective January 1, 2016, and California following suit, with its comprehensive law effective January 1, 2018. Washington employers should immediately assess whether they are covered by the new law and, if so, whether they need to update their employment applications and other pre-hire screening policies. The Fair Chance Act is effective June 6, 2018.

### Coverage

The new law broadly defines employer to include "public agencies, private individuals, businesses and corporations, contractors, temporary staffing agencies, training and apprenticeship programs, and job placement, referral, and employment agencies."

However, the law will not apply to:

- Any employer hiring a person who will or may have unsupervised access to children under the age of 18 or a vulnerable adult or person as defined elsewhere in state law;
- Any employer, including a financial institution, who is expressly permitted or required under any federal or state law to inquire into, consider, or rely on information about an applicant's or employee's criminal record for employment purposes;
- Certain law enforcement or criminal justice agencies;
- Employers seeking non-employee volunteers; or
- Any entity required to comply with the rules or regulations of a self-regulatory organization, as defined in section 3(a)(26) of the Securities and Exchange Act.

### Unlawful Practices

The law will make it unlawful for an employer to (1) include any question on any application for employment, (2) inquire either orally or in writing, (3) receive information through a criminal history background check, or (4) otherwise obtain

information about an applicant's criminal record (arrests or convictions) until ***after*** the employer initially determines that the applicant is "otherwise qualified" for the position. An applicant is considered "otherwise qualified" if he or she meets the basic criteria for the position as set out in any job advertisement or job description without consideration of a criminal record. Only after the employer deems the applicant to be "otherwise qualified" may it inquire into or obtain information about the applicant's criminal record. Any policy or practice that automatically or categorically excludes applicants with a criminal record before they have been deemed "otherwise qualified" is unlawful.

Further, employers may not advertise any job openings in a way that excludes people with criminal records from applying. In this regard, jobs advertisements must not state "no felons" or "no criminal background," or have similar messages.

The law makes clear that it should not be viewed as requiring any employer to "provide accommodations or job modifications in order to facilitate the employment or continued employment of an applicant or employee with a criminal record or who is facing pending criminal charges."

Notably, the law will have no impact on existing local laws that provide "additional protections to applicants or employees with criminal records" and will not prohibit local governments from enacting such laws in the future. Thus, the new state law will have no impact on the more restrictive Seattle ban-the-box law that became effective in 2013.

## Enforcement

The law does not provide an aggrieved individual with a private right of action against a covered employer. Rather, the state attorney general will have the power to enforce the law which will include the authority to, among other things, investigate violations and seek remedial relief for an aggrieved individual, issue written civil investigative demands, adopt rules implementing the law (including rules specifying applicable penalties) and pursue administrative sanctions or a lawsuit in court for penalties, costs and attorney's fees.

The law provides for a "stepped enforcement approach," which means the attorney general will have the authority to initially educate an employer found in violation of the statute, then warn them, and then, if violations continue, take legal, including administrative, action. Penalties range and will start with a notice of violation and offer of agency assistance for the first violation, and then can result in monetary penalties up to $750 for a second violation and up to $1,000 for each subsequent violation.

## Next Steps

Most immediately, Washington employers should determine whether they need to revise job applications, interview guidelines, and policies and procedures for criminal background checks.

Employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of credit history information and the fair credit reporting laws.

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