

# The use of criminal history in hiring

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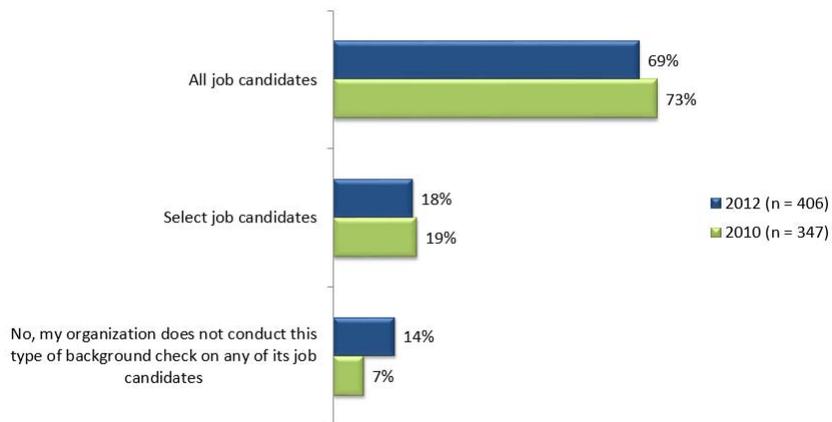
## Why conduct criminal records check?

- ▶ Safety of other employees, customers and/or third parties entering their premises;
- ▶ Safeguard property (theft, embezzlement, etc.);
- ▶ Comply with state laws requiring background checks;
- ▶ Evaluate and assess overall applicant trustworthiness;
- ▶ Exercise of government power and acting as city official; and
- ▶ Negligent Hiring Claims

## Reservations about conducting criminal records check

- ▶ Millions of Americans have a criminal record
- ▶ Even more have been arrested
- ▶ Criminal history information can be inaccurate
- ▶ EEOC – Disqualifying job applicants based on criminal history has disparate impact on African-American and Hispanic men

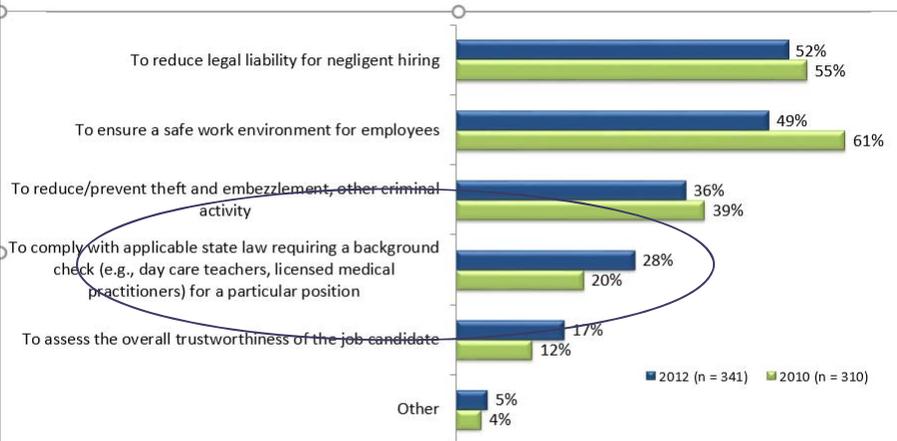
Does your organization, or an agency hired by your organization, conduct criminal background checks for any job candidates?



Note: Respondents who answered "not sure" were excluded from this analysis. Percentages may not equal 100% due to rounding.

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**What are the primary reasons your organization conducts criminal background checks on job candidates?**



Note: Percentages do not equal 100% due to multiple response options. Respondents were asked to select top two options.

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## Ban the Box

The "box" refers to the question on job applications that asks applicants whether or not they have ever been convicted of a crime. Ban-the-box laws require employers to remove this question—as well as any other queries about criminal history—from job applications.

**As an employer, I pledge...**

**To hire and support the formerly incarcerated**

**To support the elimination of any restrictions on participation that may exclude the formerly incarcerated**

**To encourage others to also institute fair hiring practices**



## When to ask about criminal history

Observe due measure, for right timing is in all things the most important factor.

-Hesiod

To every thing there is a season, and a time to every purpose under the heaven . . .

-Ecclesiastes

## Washington Fair Chance Act chapter 49.94 RCW

Until after initially determining that an applicant is otherwise qualified . . .

- No questions about criminal history on application
- No advertisements that exclude people with criminal records
- No policy or practice that automatically or categorically excludes those with criminal history

## Otherwise qualified

“... meets the basic criteria for the position as set out in the advertisement or job description without consideration of a criminal record”

## What is a “criminal record”

"Criminal record" includes any record about a citation or arrest for criminal conduct, including records relating to probable cause to arrest, and includes any record about a criminal or juvenile case filed with any court, whether or not the case resulted in a finding of guilt.

## Exceptions

- Law enforcement
- Prosecutors and prosecution staff
- expressly permitted or required under any federal or state law (e.g. teachers, county treasurer)
- Employee who will or may have unsupervised access to:
  - Children under 18
  - Vulnerable Adults
  - Vulnerable Persons

## Exceptions, cont'd

- Non-employee volunteers
- i.e. coaches, parks programs, senior programs

## Vulnerable Adult vs. Vulnerable Person

### Vulnerable Adult

- Over 60 and
- Inability to care for self; or
- Incapacitated; or
- Developmental disability; or
- Lives in assisted living facility or similar; or
- Receiving services in-home

### Vulnerable Person

- adult of any age
- lacks the functional, mental, or physical ability to care for himself or herself

## Violations

- Applicant can't sue you (under this law)
- Exclusive remedy is enforcement by AG's Office
  - 1<sup>st</sup> Offense – education and notice of violation
  - 2<sup>nd</sup> Offense -- \$750
  - 3<sup>rd</sup> Offense -- \$1,000

**3 Information About this Complaint**

\*Is this a Fair Chance Act / Ban the Box complaint? Put another way, does this complaint involve an employer asking about a job applicant's criminal record before determining if the applicant was otherwise qualified for the position, or automatically excluding an applicant because of their criminal record?

No  Yes

\*Is this complaint about an employer's job advertisement?

No  Yes

\*Is this complaint about an employer's job application?

No  Yes

\*Is this complaint about an employer's hiring process other than the job advertisement or job application?

No  Yes

For what position did the applicant apply?

\*Was the applicant hired for the job?

No  Yes  Unknown

**4 Documents**

You may upload 5 files with a total file size limit of 20 megabytes, including a copy or photo of any job advertisement or blank job application form about which you are complaining.

Accepted Document Types: TXT, DOC, DOCX, XLS, XLSX, PDF  
Accepted Image Types: JPG, PNG, GIF

Upload Attachments:

## Is this really a change for Washington?

Existing statutory requirement that when considering a felony conviction – chapter 9.96A RCW

(1) conviction must *directly relate* to the position of employment sought, and

(2) be less than ten years old

Cities/Counties may not disqualify an applicant solely based on felony conviction.

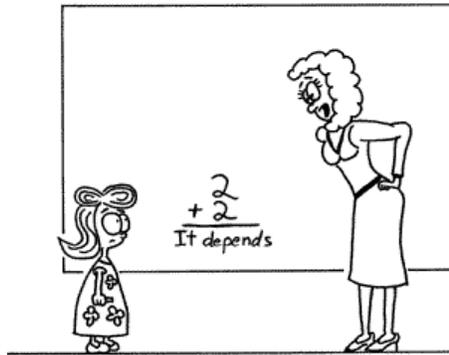
## *Respondeat Superior*

- “Let the master answer”
- Employer liability for employee acts only when employee is acting in scope and course of employment

## Negligent Hiring

Except for negligent hiring –

- (1) Employer knew or should have known that the employee was unfit; and
- (2) Retaining employee was proximate cause of plaintiff's injury



"Suzie, this is math, not the law."

## Negligent Hiring

Duty limited to others endangered by tasks, premises, or instrumentalities entrusted to an employee

Background check should focus on the types of danger that are likely

Garbage truck driver vs. Librarian

## Negligent Hiring - Victim foreseeable and employer liable

### Tacoma Dome T-Shirt Security

- assault occurred on work premises
- guard on the job when he contacted victim
- victim approached the guard for information because of the guard's position

Applicant did not report any criminal record or work-related misconduct on job application, but employer did not check any references or investigate inconsistent statements on job application . . . Applicant had convictions for Rob 2, Theft 3, Criminal Trespass, NVOL, and had outstanding warrants

*Carlsen v. Wackenhut*, 73 Wn. App. 247 (1994)

## Negligent Hiring - Victim not foreseeable

### Manual laborer (rehab vacant apartments)

- not hired to work with potential victims
- rape did not occur on work premises
- job duties did not facilitate or enable defendant to commit rape

Employer aware employee had been convicted of child molest in Texas, but victim not foreseeable

*Betty Y. v. Sameeh Al Hellou, Gibson, and Wise Real Estate Investments, Inc.*, 98 Wn. App. 146 (1999).

## Negligent Hiring - Victim foreseeable and employer NOT liable

### High school teacher

- alleged sexual relationship off-premises
- employer checked all previous employers and conducted more than one interview with applicant
- Plaintiff did not introduce any evidence indicating teacher was unfit to be a teacher

Court holds hiring process sufficient as a matter of law

*Scott v. Blanchet High School*, 50 Wn. App. 37 (1987)

## EEOC and Title VII

Title VII prohibits employment discrimination based on race, color, religion, sex and national origin.

The U.S. Equal Employment Opportunity Commission (EEOC) is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee.

The EEOC has the authority to investigate charges of discrimination against employers who are covered by the law.

## Disparate Treatment

An employee or job applicant who is a member of a protected class is treated differently than other employees who are not in the protected class.

## EEOC Disparate Treatment

The EEOC looks for

- Biased statements
- Inconsistencies in the hiring process, e.g., more criminal record information requested of those in the protected group
- You should be able to defend against disparate treatment

## Disparate Impact

An employment practice or policy that has a disproportionately adverse effect on members of the protected class as compared with non-members of the protected class.

Facially neutral employment practice can be discriminatory under Disparate Impact theory

Plaintiff need not prove intentional discrimination

## EEOC on Disparate Impact of use of criminal history in hiring decisions

National data . . . supports a finding that criminal record exclusions have a disparate impact based on race and national origin. The national data provides a basis for the Commission to further investigate such Title VII disparate impact charges.

“An employer's evidence of a racially balanced workforce will not be enough to disprove disparate impact.”

According to the EEOC, based on any adverse impact against a protected group (e.g., African Americans, Hispanics), an employer “needs to show that the policy operates to effectively link specific criminal conduct and its dangers with the risks inherent in the duties of a particular job.”

What policy will meet EEOC approval?

Must be ---

“job related” and

“consistent with business necessity”

Even if it is, a Title VII plaintiff may still prevail by demonstrating that there is a less discriminatory “alternative employment practice” that the employer refused to adopt.

## Bad Reputation

The EEOC will consider whether the employer has “a reputation in the community for excluding individuals with criminal records,” thus determining whether applicants were discouraged from applying in further support of a potential adverse finding against the employer.

### The *Green* Factors

“Job related” and “consistent with business necessity”

- The nature and gravity of the offense or conduct;
- The time that has passed since the offense, conduct and/or completion of the sentence;

and

- The nature of the job held or sought.

*Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8<sup>th</sup> Cir. 1977)

## Nature and Gravity of Offense

Harm caused by a crime and the elements of the crime may be relevant to concerns about risks in a particular position.

Harm of theft = property loss

Harm of DUI = danger on road

Harm of Assault = possible propensity to violence

## Time passed since offense

Green Court -- permanent exclusions from all employment based on any and all offenses were not consistent with the business necessity standard.

Does the risk of recidivism go down over time?

Washington – Public employers governed by RCW 9.96A.020

## Nature of Job Held or Sought

Nature of job's duties (e.g. lifting boxes, counting money)

Circumstances under which job is performed (level of supervision, interaction with co-workers, presence of vulnerable individuals)

Environment in which job is performed (warehouse, private home, vehicle)

Critical to have good and current description of essential functions of the job

Linking criminal conduct and essential functions of the job is necessary to show business necessity because it "bear[s] a demonstrable relationship to successful performance of the jobs for which it was used."

## Criminal Justice Positions

Nature of Job requires some criminal records check

- Federal and state requirements for access to criminal justice information databases
- Carry firearms
- Access to vulnerable individuals/private settings
- Access to drugs, money, valuables
- Brady Rule considerations

## Individual may show he/she should not be excluded based on criminal record

- (1) Criminal record is inaccurate
- (2) Facts and circumstances of the offense or conduct
- (3) Number of offenses (i.e. offense was isolated incident not indicative of individual's character)
- (4) Conviction is old/youthful indiscretion (remember RCW 9.96A.020)
- (5) Individual has performed same or similar work for a different employer with no problems
- (6) Good employment history before and after the offense
- (7) Rehabilitation efforts, e.g., education/training;
- (8) Employment or character references
- (9) Individual is bonded under a federal, state, or local bonding program

## Individualized Assessment not required

While the EEOC suggests that an employer may have exposure for not conducting an individualized assessment, the Updated Guidance clarifies that an individualized assessment is not required by Title VII, explaining:

Title VII ... does not necessarily require individualized assessment in all circumstances. However, the use of individualized assessments can help employers avoid Title VII liability by allowing them to consider more complete information on individual applicants or employees, as part of a policy that is job related and consistent with business necessity.

## Individualized Assessment - 3 steps

- (1) inform the applicant that he or she may be excluded based on the past criminal conduct;
- (2) provide an opportunity to the individual to establish that the exclusion should not apply; and
- (3) consider whether the individual assessment shows that the policy should not be applied to the applicant.

## Steps to take under Washington Law

Is conviction “directly related” to job sought?

Is conviction less than ten years old?

“Directly related” not the same as *Green* factors

Safest course -- analyze *Green* factors or give applicant chance to explain

## Washington Exceptions

- Law enforcement
- DSHS employees dealing with children and vulnerable adults
- Certain occupations for crimes against children
- Health care licensing, teacher licensing

## Driving Occupations

- CDL required?
- What type of vehicle? (or do you really care?)
- State law does not address misdemeanors
- Traffic tickets?

## Final Thoughts

Make sure that job descriptions are up-to-date and reflect requirements where criminal history may have a bearing.

What is the likelihood the person will present a danger/risk on the job?

How serious is that danger?

Make sure you have a process for disqualified applicant to challenge finding

### 9.96A.020

#### Employment, occupational licensing by public entity – Prior felony conviction no disqualification – Exceptions.

(1) Subject to the exceptions in subsections (3) through (5) of this section, and unless there is another provision of law to the contrary, a person is not disqualified from employment by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations, nor is a person disqualified to practice, pursue or engage in any occupation, trade, vocation, or business for which a license, permit, certificate or registration is required to be issued by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations solely because of a prior conviction of a felony. However, this section does not preclude the fact of any prior conviction of a crime from being considered.

(2) A person may be denied employment by the state of Washington or any of its counties, cities, towns, municipal corporations, or quasi-municipal corporations, or a person may be denied a license, permit, certificate or registration to pursue, practice or engage in an occupation, trade, vocation, or business by reason of the prior conviction of a felony if the felony for which he or she was convicted directly relates to the position of employment sought or the specific occupation, trade, vocation, or business for which the license, permit, certificate or registration is sought, and the time elapsed since the conviction is less than ten years. However, for positions in the county treasurer's office, a person may be disqualified from employment because of a prior guilty plea or conviction of a felony involving embezzlement or theft, even if the time elapsed since the guilty plea or conviction is ten years or more.

(3) A person is disqualified for any certificate required or authorized under chapters

28A.405 or 28A.410 RCW, because of a prior guilty plea or the conviction of a felony crime specified under RCW 28A.400.322, even if the time elapsed since the guilty plea or conviction is ten years or more.

(4) A person is disqualified from employment by school districts, educational service districts, and their contractors hiring employees who will have regularly scheduled unsupervised access to children, because of a prior guilty plea or conviction of a felony crime specified under RCW 28A.400.322, even if the time elapsed since the guilty plea or conviction is ten years or more.

(5) The provisions of this chapter do not apply to issuance of licenses or credentials for professions regulated under chapter 18.130 RCW.

(6) Subsections (3) and (4) of this section as they pertain to felony crimes specified under RCW 28A.400.322(1) apply to a person applying for a certificate or for employment on or after July 25, 1993, and before July 26, 2009. Subsections (3) and (4) of this section as they pertain to all felony crimes specified under RCW 28A.400.322(2) apply to a person applying for a certificate or for employment on or after July 26, 2009. Subsection (5) of this section only applies to a person applying for a license or credential on or after June 12, 2008.

Jon Walker is the Marysville City Attorney. Prior to this he worked for the City of Tacoma and the Kitsap County Prosecuting Attorney's Office advising on a wide range of municipal issues, litigating on both the defense and enforcement side for his clients, and prosecuting felony crimes. He received his J.D. with honors in 1996 from the Georgetown University Law Center.