

Fair Chance Act Update

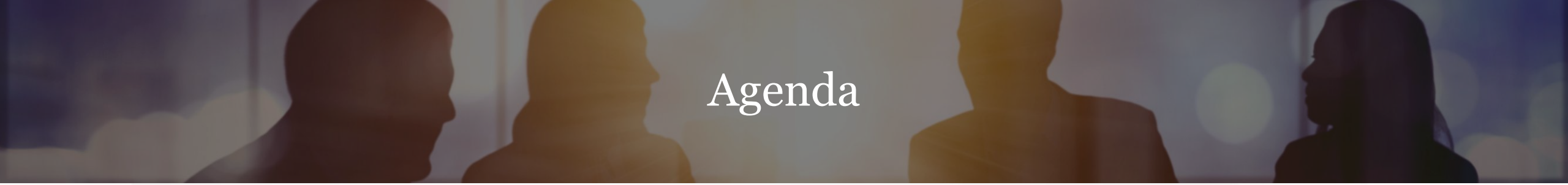
PRESENTED BY

Jared Van Kirk

PRESENTED FOR

45th Annual Civil Service Conference

Foster Garvey



Agenda

- Introduction
- Background
- Legal Landscape
- Fair Chance Act 2018
- Fair Chance Act Exemptions
- Fair Chance Act Amendments
- Actions
- Questions

Introduction

- Expanded Fair Chance Act effective July 1, 2026 (January 1, 2027, if fewer than 15 employees)
- Applies to public agencies
- Applies to applicants/hiring process and current employees
- When no exemption applies, significant changes to:
  - Hiring process
  - Applicant notices and disclosures
  - Permissible consideration and use of criminal history
- Significantly increased administrative sanctions through AG enforcement

Background

- **2012**: EEOC publishes (updated) “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions”
- **2013**: Seattle’s Fair Chance Employment Ordinance applies to employers with employees in Seattle (non-public, except city)
- **2018**: Washington Fair Chance Act
- **2026**: Amended Fair Chance Act effective for most employers
- **2026**: EEOC moves to rescind Enforcement Guidance



Legal Landscape
EEOC

- 2012 Enforcement Guidance addresses “disparate treatment” and “disparate impact” claims to challenge discriminatory use of criminal history
  - Using similar criminal history differently based on protected class
  - Neutral hiring policy that disproportionally affects protected class, unless job related, consistent with business necessity, and no less discriminatory alternative practice
  - Individualized assessment as core of business necessity: (1) nature and gravity of offense, (2) time passed since offence/completion of sentence, (3) nature of job. Suggesting specific factors to consider after affording opportunity to provide information
- Will likely be rescinded soon, but legal theories and risk of claims/adverse decisions will remain



Legal Landscape
FCRA/WA FCRA

- FCRA and WA FCRA regulate how employers obtain and use consumer background checks for employment decisions, including hiring
- Before obtaining report: give stand-alone written notice and disclosures, and obtain written authorization
- Before adverse action:
  - Notice – include copy of report and "A Summary of Your Rights Under the Fair Credit Reporting Act," and parallel WA requirements
  - Opportunity to correct – "Reasonable" time to provide information before adverse action (commonly discussed as minimum of five business days)
- After adverse action:
  - Notice – include contact information for company providing report and notice of other consumer rights regarding reports



Legal Landscape
Mandatory Background Checks

- WSP background checks mandatory for many state licensed professions, public safety positions and prospective employees or volunteers who may have unsupervised access to children, individuals with disabilities and/or vulnerable adults
  - Also require advance notice to applicant, applicant disclosures and notice after report received
- Other background check requirements under federal/state law or federal contracts

Fair Chance Act 2018

- No posting or recruitment that categorically excludes applicants with criminal record
- No policy or practice to categorically or automatically exclude applicants with a criminal record
- No inquiry into criminal record or criminal background check until determining that applicant is “otherwise qualified” for position (“Ban the box”)
- Applies to adverse actions against applicants and current employees
- Applies to public agencies, training programs and other staffing/employment agencies
- Significant exemption categories



Fair Chance Act
Exemptions

- Employer hiring a person who will or may have unsupervised access to children under the age of eighteen, a vulnerable adult (74.34 RCW) or a vulnerable person (RCW 9.96A.060)
- Employment by a general or limited authority Washington law enforcement agency (RCW 10.93.020) or by a criminal justice agency (RCW 10.97.030(5)(b))



Fair Chance Act
Exemptions (continued)

- Employer expressly permitted or required under federal or state law to inquire into, consider or rely on information about applicant or employee criminal record for employment
- Employer with respect to a position entailing work under a federal contract that specifically prohibits people with criminal records from working under that contract
- Employer seeking a nonemployee volunteer
- Entity required to comply with the rules or regulations of a self-regulatory organization, as defined in section 3(a)(26) of the *Securities Exchange Act*

Fair Chance Act
"Unsupervised Access" Exemption

- Employer hiring a person who will or may have unsupervised access to children under the age of eighteen, a vulnerable adult (74.34 RCW) or a vulnerable person (RCW 9.96A.060)
  - Implicates specifics of a position, duties and policies. Some jobs may be case by case
  - Extends to positions that **might** foreseeably involve being unsupervised with children/vulnerable adults
  - No court or agency decision construing "unsupervised." Best interpretation from parallel statutory definitions: likely means not in the presence of another employee or volunteer or any relative or guardian

Fair Chance Act
"Law Enforcement" Exemption

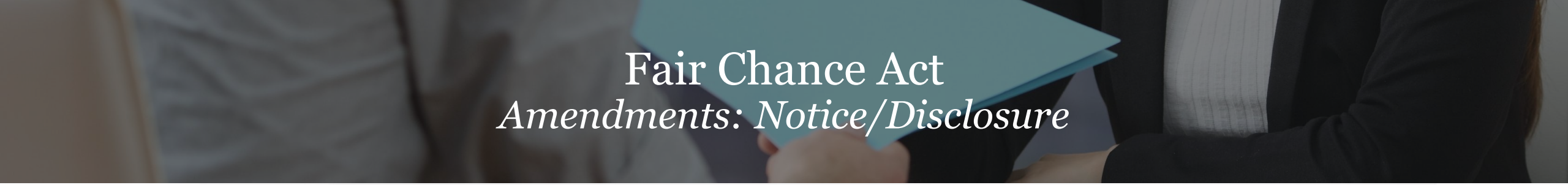


- Employment by a general or limited authority Washington law enforcement agency (RCW 10.93.020) or a criminal justice agency (RCW 10.97.030(5)(b))
  - General authority agency defined in part as having "primary function" of detecting and apprehending "persons committing infractions or violating the traffic or criminal laws in general"
  - Limited authority agency defined in part as having "one of its functions" detecting and apprehending "persons committing infractions or violating the traffic or criminal laws relating to limited subject areas"
  - Criminal justice agency defined in part as agency that administers criminal justice pursuant to statute or executive order and "allocates a substantial part of its annual budget to the administration of criminal justice"



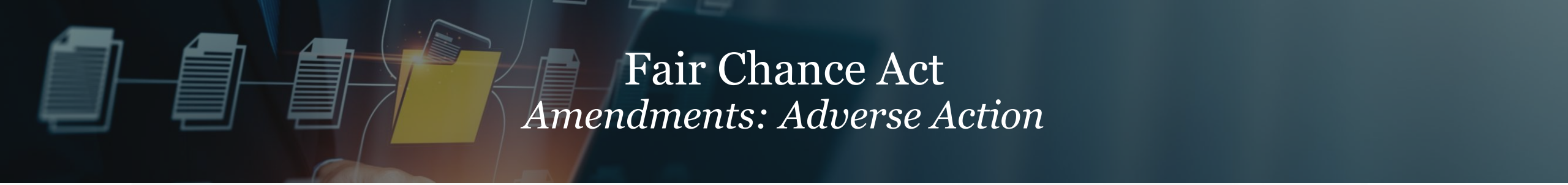
Fair Chance Act
Amendments

- **Timing/Conditional Offer**. Cannot inquire or receive information about applicant criminal record until after making conditional offer of employment.
- **Protected History**. No adverse employment action based solely on arrest record or juvenile conviction record.
  - Sole exception is an adult arrest where individual is on bail or released on their own personal recognizance pending trial



Fair Chance Act
Amendments: Notice/Disclosure

- Employer may disclose that position is subject to background check after conditional offer of employment
- Applicant may voluntarily disclose, without solicitation, criminal history information
- In either case, employer must **immediately**:
  - Inform applicant in writing of key FCA provisions; and
  - Provide applicant attorney general's *Fair Chance Act* guide (https://www.atg.wa.gov/fair-chance-act)



Fair Chance Act
Amendments: Adverse Action

No "adverse action" based on "adult conviction record" unless there is a "legitimate business reason."

- **Adverse Action**: Rejecting an otherwise qualified applicant, or terminating, suspending, disciplining, demoting or denying promotion to an employee
- **Adult Conviction Record**: Criminal conviction, but also any record of or information related to a conviction or other finding adverse to the subject, including citations, arrest records, certain types of dismissals (i.e., insanity or incompetency) and probable cause statements associated with underlying conduct leading to conviction



Fair Chance Act
Amendments: Adverse Action (continued)

- **Legitimate Business Reason**: Good faith belief after individualized assessment that nature of criminal conduct underlying adult conviction record will:
  - Have a negative impact on applicant or employee fitness or ability to perform the position sought or held; or
  - Harm or cause injury to people, property, business reputation or business assets considering (and documenting) **all** of these factors:
    - Seriousness of the conduct underlying adult conviction record;
    - Number and types of convictions;
    - Time elapsed since the conviction, excluding periods of incarceration;
    - Any verifiable information related to individual's rehabilitation, good conduct, work experience, education and training, as provided by the individual;
    - Specific duties and responsibilities of the position sought or held; and
    - Place and manner in which the position will be performed.



Fair Chance Act

Amendments: Adverse Action (continued)

Adverse Action Process:

1. Provide any applicant notice/disclosures
2. Obtain criminal record information only after conditional offer of employment
3. Pre-adverse action notice and opportunity to correct/explain:
   - Notify applicant or employee and identify specific record relied on
   - Hold position open for minimum two business days to give reasonable opportunity to correct or explain record or to provide information regarding rehabilitation, good conduct, work experience, education and training
     - **Note**: FCRA requirements (including notice and standard five business day period) where consumer background check has been obtained



Fair Chance Act
Amendments: Adverse Action (continued)

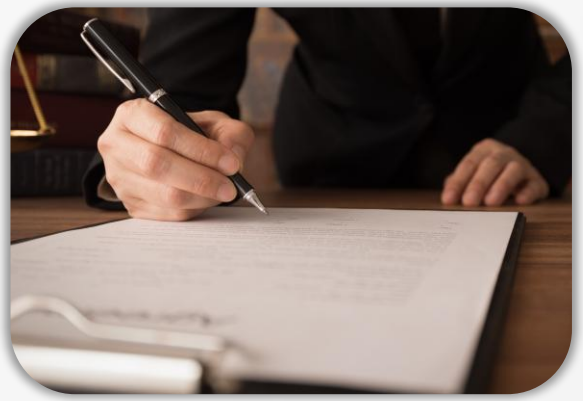
Adverse Action Process (continued):

5. Conduct good faith individualized assessment under legitimate business reason standard
6. Decision Notice: Provide applicant or employee written decision that specifically documents reasoning, assessment of each legitimate business reason factor, impact of the conviction on position or business operations, and consideration of any information individual provided
   - **Note**: FCRA notice requirements where consumer background check has been obtained

Fair Chance Act
Amendments: Enforcement



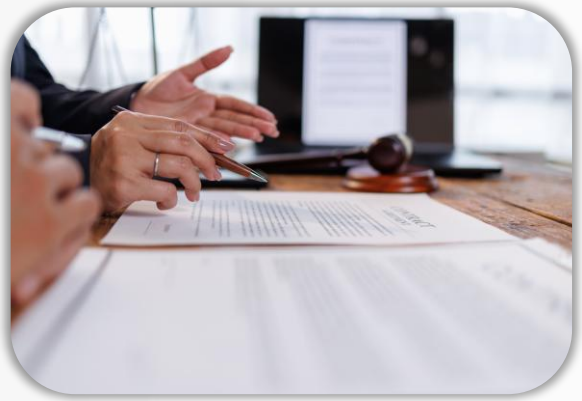
No private right of action



Enforcement by Attorney General



Administrative sanctions from $0-$15,000 for repeat violations, per instance



Attorney General suit for penalties, unpaid wages, damages, costs and attorney's fees

Actions

- **Identify scope of exemptions**. Determine positions that are or could be subject to FCA (i.e. not exempt).
- **Review hiring process and applications**. Remove criminal record inquiries. Consider disclosure requirements. Build in required timelines.
- **Create inadvertent disclosure notice**. Be prepared in case of applicant disclosure.
- **Revise conditional offer letters and background check forms**. Condition offers on criminal history inquiry/background check. Ensure background check authorizations are compliant.



Actions

- **Create individualized assessment process**. Prepare process for applicants and employees that covers all statutory factors, explains legitimate business reason, and produces written decision.
- **Create/audit pre-adverse action and decision notices**. Should exist for FCRA commercial background checks. Will be needed for applicants and employees.
- **Train HR, interviewers and hiring authorities**.

Questions?

Thank you.



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