

## New Seattle Law Limits Use of Criminal History in Hiring

By Shannon J. Lawless

Last June, the City of Seattle passed a law limiting employers' ability to use criminal history information in hiring and employment decisions. Proponents hailed the law as giving a second chance to people with criminal records and preventing discrimination against racial minorities, who make up a disproportionate number of those incarcerated. Opponents criticized the law as imposing undue restrictions on employers.

The law's protections apply to all job applicants, employees, and independent contractors who perform at least 50% of their services within Seattle city limits. It takes effect on November 1, 2013, so employers should act quickly to make sure they are in compliance with these key points:

### **Initial screening: "Ban the box"**

During the initial screening process, employers cannot perform a criminal background check or even ask about an applicant's criminal history (e.g., by asking applicants to check a box on their application indicating whether they have a criminal history).

### **After initial screening: limited use of criminal history**

After an initial screening has been completed, employers can perform criminal background checks, but their ability to use the information in these reports is subject to certain requirements.

Employers cannot take any adverse employment action based solely on an arrest record. "An arrest is not proof that a person has engaged in unlawful conduct," the law cautions. Employers can take action based on the underlying conduct that led to an arrest, but only if they have a "legitimate business reason." Similarly, before taking any adverse employment action based on criminal history, the employer must have a legitimate business reason,

"Legitimate business reason" has a detailed legal definition. Essentially, the person's arrest record must either negatively impact the employee's ability to perform their job or threaten harm to people, property, business reputation, or business assets. In deciding whether a legitimate business reason exists, the employer must consider a number of factors, including seriousness of crime, time elapsed since it occurred, any evidence of rehabilitation, and details of job sought.

If the employer determines it has a legitimate business reason for taking an adverse action based on arrest record or criminal history, it must inform the employee or applicant about the relevant information and give the applicant a reasonable opportunity to explain or correct it. If the employer decides to go ahead, the position must be held open for two business days after notifying the employee about the adverse action.

### **Enforcement by investigation and fines**

The Seattle Office of Civil Rights has sole enforcement authority over the new law. An employer will receive a warning for the first violation. Subsequent violations will lead to fines between \$750 to \$1000 per offense, plus attorney fees. The Seattle Office of Civil Rights can investigate an employer regardless of whether or not a complaint has been filed.



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Ryan, Swanson & Cleveland, PLLC  
1201 Third Avenue, Suite 3400  
Seattle, WA 98101-3034

[www.ryanswansonlaw.com](http://www.ryanswansonlaw.com)

## **Seattle is part of a nationwide trend**

The Seattle law is not the only opportunity for employers to run into legal trouble by using criminal history when making employment decisions. The Equal Employment Opportunity Commission (EEOC) currently has a strong focus on the use of criminal background checks and history. EEOC guidelines caution that any criminal background checks or questions about criminal history should be related to the position sought. When an employer acts on this criminal information, the employer should individually assess the details of the conviction and how it will affect the employer and employee's performance (similar to the "legitimate business reason" requirement in Seattle). In June, the EEOC filed suit against two major employers alleged to have violated these principles.

Additionally, employers using criminal background checks should be careful to comply with the Fair Credit Reporting Act. This federal law requires employers to provide a special disclosure when they will use a criminal background check and obtain the employee's written authorization to do so. Another disclosure is required if the employer decides to use the information in a criminal background check to take adverse action against the applicant or employee. The Fair Credit Reporting Act provides for damages of \$100 to \$1000 for each willful violation, so failure to comply can be costly.

## **Conclusion**

The most straightforward action that employers can take to follow the new Seattle law is not to inquire about criminal history or use criminal background checks during the initial application phase when hiring.

Employers who plan to use criminal history information later in the hiring process or to make decisions about current employees should consider contacting an attorney. Important points to discuss are (1) when and how to use this information, (2) what disclosures to make when using it, and (3) what records to keep to protect the employer in the case of a lawsuit or investigation.

*Shannon Lawless is an associate practicing in Ryan, Swanson & Cleveland, PLLC's Employment Rights, Benefits and Labor Group. She can be reached at 206.654.2211 or [lawless@ryanlaw.com](mailto:lawless@ryanlaw.com).*