

## State Rules Register Alert

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### State of Washington Ban-the-Box

With the passage of [HB 1298](#), the State of Washington has joined the growing list of states that have enacted ban-the-box laws. This law becomes effective on June 7, 2018. Unfortunately, this state law does not pre-empt any city or county law that provides greater protection, i.e. more restrictions on employers. It does pre-empt those laws that are less restrictive. Thus, this allows a patchwork of laws that is nearly impossible follow. (Note that NAPBS is aware of these types of situations and as an Association does attempt to persuade states to enact uniform laws for the entire state.)

#### Timing

When can an employer ask about a criminal record? Inquiring is after ***the employer initially determines that the applicant is otherwise qualified for the position.*** What does that mean? Clearly there is no bright line identified that assures an employer: "now you can order the criminal background screen." A conditional offer is not necessary - which is the case in most of the recent enactments. The issue is what does "otherwise qualified" mean? It is defined as: ***the applicant meets the basic criteria for the position as set out in the advertisement or job description without consideration of a criminal record.***

While this is an attempt to describe a time when a criminal report may be ordered or the consumer asked about his/her criminal history, it is less than clear. An employer wants certainty that their process is "legal". While a criminal history inquiry appears to be allowed before a formal conditional job offer it would seem wise to wait until such offer is made. This is a time where it is clear that the employer believes the applicant is "qualified." What is often forgotten is that the EEOC believes that criminal records should not be ordered before job offer is made. This is not a law or regulation but "guidance." Employers should not order criminal records until after the job is offered unless there is good reason to do it sooner. If so, the employer should document when it decided the applicant was "otherwise qualified."

Also prohibited are any absolute disqualifications that categorically disqualify an applicant. However, this has been the law for many decades.

#### Exclusions

- Those hiring those who will have unsupervised access to children, a vulnerable adult or any vulnerable person as defined by state law.
- Financial institutions that are required to inquire, consider, or rely upon information about criminal information.
- Law enforcement.
- Non-employee volunteer.
- Those required to check criminal records under the Securities and

Exchange Act.

What is missing in the exclusions are other types of employers, who are required by law to obtain a criminal background check. Some of these employers have requirements that often have disqualifying convictions. This undoubtedly creates a real conflict for some employers.

The law does touch on an issue when applying the FCRA "employment purposes" to volunteers. This law doesn't apply to "non-employee volunteer." This term is not defined but it may apply to the reality that there are at least two categories of volunteers. There are those "do-gooders" for positions like soccer coaches, event helpers, Special Olympics or serving on a charitable board. But, there are other volunteers that actually perform work from charity. This could be the church secretary; supervisor of "pink ladies" at the local hospital, etc. These people perform a necessary job that the organization needs in order for it to be operational. These people fall within this law. This being said, for the CRA it is impossible to know which category a volunteer falls into as it is fact specific to the position. As such all volunteers are treated historically falling with in "employment purpose," So this may be a distinction without a difference.

## **Enforcement**

There is not Private Cause of Action for violation of this law. No person can sue for a violation of this law. Only the attorney general may enforce the law.

Best Regards  
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