

GUIDE TO CRIMINAL RECORDS AND EMPLOYMENT IN WASHINGTON STATE



This guide provides general information about the rights and responsibilities of people with a criminal record who are looking for a job. It is not intended to provide legal advice.

If you have a specific problem related to criminal records and employment, you should contact an attorney. See the "Resources" section for more information.

**SECOND
CHANCES**

**Seeking Fair Treatment
for People with
Criminal Records**

I. HOW SHOULD I ANSWER QUESTIONS ABOUT MY CRIMINAL BACKGROUND ON AN APPLICATION?

Answer accurately.

You should answer employment application questions accurately. Most employers run criminal background checks. If you do not answer an employer's questions accurately, it can easily find out from other sources.

More importantly, an employer may legally deny you the job or fire you because you gave inaccurate information. This is true even if you shouldn't have been disqualified by your criminal record. You may not be fully protected by anti-discrimination laws unless you answer the employer's question accurately.

Many people do not know what is in their criminal record. There may also be mistakes in your record. You should first get a copy of your criminal history report, so that you may answer application questions accurately and correct mistakes. For more information on how to get a copy of your criminal history report, see the ACLU of Washington's "Guide to Getting and Reading Criminal History Reports."

•Should I give more information than the employer asks for?

Employers ask all sorts of questions about criminal histories. Some employers ask if you've ever been convicted of any crime. Some will ask if you've been convicted of specific types of crimes — violent crimes, for example. Some will only ask about convictions that are within a specific time period—like 7 years.

Whatever the employer asks, you should answer accurately. But what if you have something on your record that the employer's question doesn't cover? For example, what if an employer only asks about convictions that are within the last 7 years, but you have a conviction that is 15 years old?

You are not legally obligated to disclose information that an employer does not ask for. But, even if you do not disclose it, the employer may find out about it. There is no easy solution to this problem. When deciding whether to disclose additional information, you may want consider:

- ▶ the age and nature of the conviction;
- ▶ the type of job and how the conviction relates to it;

- ▶ whether the employer will conduct a background check; and
- ▶ whether the employer will give you a chance to explain your situation.

•What do I say about vacated or sealed cases?

It depends on the type of case. A “sealed” case is one where the court records are not available to the public. A “vacated” case is one where, after a person has completed his or her sentence and met other conditions, the court withdraws a guilty plea or judgment, and then dismisses the case.

If you have a **juvenile conviction** for which the case records have been **sealed**, you do not need to disclose it. According to state law, if juvenile case records have been sealed, the case is treated as if it does not exist and you can answer that it never happened.¹

If your case has been **vacated** under Washington law, state law gives you the right to say that you have never been convicted in that case.² In addition, the Washington State Patrol will not report your vacated conviction. But, the court records of the case will still be open to the public and information from the records could be reported on background checks. If you have a vacated case, talk to an attorney about how to proceed with employment applications.

Records of adult convictions are generally open to the public, and can typically be reported in employment background checks, even if they are many years old. These convictions may not appear in background checks if you have had your record sealed. Sealing is rare, but may happen in extraordinary circumstances. Talk to an attorney if you are interested in learning more about sealing court records.

•What can a private employer ask me about convictions?

Private employers may ask about convictions, even ones that are many years old. According to regulations created by the Washington Human Rights Commission, employers should not ask about convictions unless the convictions (1) are related to the job and (2) occurred within the last 10 years.

Employers may also ask about **juvenile adjudications**. Juvenile court records are not confidential in Washington.

•What can a private employer ask me about arrests?

Private employers may ask if you have ever been arrested, even if the charges against you were eventually dismissed. But, the employer must investigate whether you actually committed the conduct for which you were arrested.

Under Washington law, employers asking about arrests must also ask whether:

- ▶ charges are still pending or have been dismissed
- ▶ the arrest led to a conviction of a crime that would adversely affect job performance, and
- ▶ the arrest occurred within the last 10 years. ³

•What can government employers ask me about?

Some public or government employers are governed by additional rules.

For example, the City of Seattle will not consider arrest records. ⁴ So, Seattle City agencies should not ask you if you've ever been arrested.

In addition, neither **City of Seattle nor King County** will do a background check until after deciding a person is qualified and extending a conditional offer of employment.

This rule only applies to jobs with Seattle or County government agencies. It does not apply to private employers in the city, state agencies, or government jobs in other cities or counties.

II. HOW DO EMPLOYERS GET AND USE BACKGROUND CHECKS?

•What sources can an employer use to find out about my background? What will the employer find out from each source?

There are many different types of background checks, and the same information may not be available from all sources. Employers may find out about your criminal history through:

- ▶ **Washington State Patrol Criminal History Reports:** The Washington State Patrol collects and reports criminal history information for Washington State. It will report all adult and juvenile convictions in Washington courts, no matter how old the conviction is. The Washington State Patrol will not report sealed or vacated convictions. Anyone, including employers, can purchase a copy of a Washington State Patrol Criminal History Report
- ▶ **Consumer Reporting Agency Reports:** There are hundreds of companies that gather information (including records from courts, law enforcement agencies, and jails) and then compile it into background check reports. They are often called “consumer reporting agencies” or “CRAs.” Many CRAs report information from more than one state. Any employer can pay a CRA to get background checks.
- ▶ **FBI Reports:** The FBI collects and reports criminal history information for all states and the

federal government, but does not report all juvenile convictions. The FBI does not report cases if the court records have been sealed, but it does report cases that have been vacated. The FBI limits access to its criminal history records. They are not available to the general public, and can only be accessed by the individual, law enforcement, and employers who are authorized by law.

► **An Employer's Own Investigation:** An employer may also choose to conduct its own investigation into your criminal history. Court records remain public unless they are sealed, so an employer could learn about your criminal history by searching court records.

• **Do I have a right to know whether an employer is doing a background check on me?**

Usually yes. If an employer does its own investigation, you don't have a right to know about the investigation. But, if an employer uses a consumer reporting agency, you have a right to know that it is doing the background check.

The federal Fair Credit Reporting Act (FCRA) says that **before an employer can request a background check from a CRA, it must get your consent in writing.** The employer must also notify you in writing, in a separate document, that the report may be used to deny you employment.

• **Do I have a right to know if an employer is going to deny me a job based on a background check?**

Yes. Before an employer takes adverse action (for example, denies you a job, refuses to promote you, or fires you) based on a criminal record, **it must notify you that it has decided to act based on the background check.**

The notice must include

- A copy of the background report that the employer used
- A document called "A Summary of Your Rights Under the Fair Credit Reporting Act"⁵

Again, an employer must give you the notice before it takes the action, to give you time to dispute anything in the background check. There is no set time that must pass between the notice and the employer taking action against you, but courts have said that an employer who gives between 5 and 14 days notice before denying a job has acted reasonably.⁶

These rules apply even if an employer has other reasons to reject you. So long as the background check was part of the employer's decision, the employer has to follow federal law and

give you notice.

Finally, **once an employer has taken adverse action against you** because of a background check, it has to issue a second notice. The notice does not need to be written, but it must include

- ▶ The name, address, and phone number of the CRA that supplied the report
- ▶ A statement that the CRA that supplied the report did not make the decision to take the adverse action and it cannot give specific reasons for the decision; and
- ▶ A notice of your right to dispute the accuracy or completeness of any information in the report
- ▶ A notice of your right to an additional free consumer report from the agency within 60 days, if you request one.

•Do I have a right to get a copy of any background check that an employer uses?

Yes. If an employer has denied you a job based on a background check performed by a CRA, the federal Fair Credit Reporting Act says you are entitled to get a copy of the background check. If the employer did not offer you one, you should request it.

If an employer hasn't done a background check, but you would like to learn what may be in a background check, you may get a copy of your criminal history report from the Washington State Patrol or FBI. For more information about how to get those reports, see the ACLU of Washington's Guide to Getting and Reading a Criminal History Report.

•Do I have a right to request that a consumer reporting agency stop reporting something in my criminal history?

Yes, if it is inaccurate or cannot be legally reported.

Federal law requires CRAs to make sure that information in reports is complete, up to date, and as accurate as possible. So, you can usually get a CRA to stop reporting information that is incorrect or misleading.

State and federal law limit what can be reported to most employers.

Federal law says that CRAs cannot report:

- ▶ Arrests that are older than seven years, if the arrest did not result in a conviction;⁷
- ▶ Other negative information (except for convictions) older than seven years.

Washington law also says that CRAs cannot report:

- ▶ Convictions older than seven years.
- ▶ Juvenile convictions, if you've turned 21.⁸

•How do I remove or change incorrect information in a background check?

If the information that is being reported is incorrect, you should write a letter to the organization that produced the report. Your letter should explain why the report is incorrect and explain the correct information. You should attach a copy of the report (with the incorrect information circled) and any documents showing the correct information.

If a CRA is reporting information that it cannot legally report, you should contact a lawyer for assistance. See the “Resources” section for more information.

•How should a CRA respond to a request that it correct information in a background check?

If you complain to a CRA that its background check contains inaccurate information:

- ▶The CRA must conduct an investigation on the dispute **within 30 days** of you contacting them. ⁹
- ▶The CRA must consider any information you submit with your complaint.¹⁰
- ▶If, after 30 days, the CRA determines that the information is inaccurate or cannot verify that the information is accurate, it must delete or modify the information. ¹¹
- ▶The CRA must implement reasonable procedures to ensure that deleted information doesn't get re-inserted into future reports.
- ▶The CRA **must notify any employer** that received the inaccurate or unverified information within the past two years (or any others who received the information in the past six months) that the information has been deleted. The CRA is only required to do this **after you make a request**. ¹²

•What if an employer or CRA doesn't follow the law about background checks?

There are legal consequences for employers and CRAs that don't follow the requirements of the FCRA. If you think an employer or CRA has violated the FCRA, you should:

- ▶Talk to an attorney. The FCRA allows people to sue employers in state or federal court for certain violations. If the suit is successful, people may recover damages.
- ▶Report the violation to the Fair Trade Commission. The law allows the FTC, other federal agencies, and states to sue employers who don't comply with the law's provisions. To file a complaint you should either call toll-free, 1-877-FTC-HELP (1-877-382-4357), or go online to <https://www.ftccomplaintassistant.gov/>

III. MAY AN EMPLOYER DENY ME A JOB BECAUSE OF MY CRIMINAL RECORD?

Employers cannot legally refuse to consider any application from anyone with a criminal record. But, if an employer considers your application individually, it may legally deny a job depending on the type of criminal record you have and the type of job you applied for.

•Can an employer deny me employment because of a conviction?

It depends. The EEOC recommends that employers develop “targeted screens” to determine whether a conviction is related to the job. They recommend that employers consider:

- ▶The nature and seriousness of the crime
- ▶The duties of the job and environment where the job is performed
- ▶The time that has passed since the conviction

If, after considering these factors, the employer determines that a conviction is job related, it can deny you a job based on the conviction.

•Should an employer consider my individual circumstances before denying me a job because of a conviction?

Yes. The EEOC recommends that before an employer denies a job because of a conviction, the employer should give the individual the opportunity to provide additional information. This is called an **individualized assessment**.

The federal Equal Employment Opportunity Commission recommends employers do an individualized assessment and consider:

- ▶The facts or circumstances surrounding the offense
- ▶The number of offenses that you have
- ▶Your age at the time of conviction or release from prison
- ▶Evidence that you’ve had similar jobs in the past
- ▶Your employment history
- ▶Education, training, or other efforts at rehabilitation
- ▶Employment or character references
- ▶Whether you can be bonded under a federal, state, or local program.

•**Can an employer deny me employment because of an arrest?**

The fact that you have been arrested does not prove that you committed a crime. Because of that, the EEOC says that an employer cannot deny you employment simply because you have been arrested. But, an employer can legally make an employment decision based on the conduct underlying the arrest, if the conduct involved makes you unfit for the job.

•**What should I do if an employer illegally denies me a job based on a criminal record?**

If you have been denied employment because of a criminal record that is not related to the job, you should contact an attorney for advice on filing a state or federal discrimination claim.

There are many federal, state, and local agencies that investigate employment discrimination claims. Some of those agencies are:

a. Equal Employment Opportunity Commission

Federal claims are first filed with the EEOC. The EEOC can only accept a complaint if:

- ▶It is filed within 300 days of the discriminatory action; and
- ▶The employer has 15 or more employees

If the EEOC agrees that you have been discriminated against, it will schedule a “conciliation” session with the employer. If conciliation is successful, the employer may agree to compensate you and change its practice.

If conciliation is not successful, or if the EEOC does not agree that you have been discriminated against, it will authorize you to file suit in federal court. If you win a federal court case, you may be entitled to hiring/reinstatement, back/front pay, injunctive relief to change the employer’s policy, and attorney’s fees.

You can reach the EEOC’s regional office in Seattle at:

EEOC Seattle Field Office
909 First Avenue, # 400
Seattle WA 98104
1-800-669-4000
<http://www.eeoc.gov/employees/charge.cfm>.

b. Washington State Human Rights Commission

State claims can be filed with the Washington State Human Rights Commission (HRC). HRC will

only accept a claim if:

- ▶ The complaint is filed within 6 months of the discriminatory act; and
- ▶ The employer has more than 8 employees.

Like the EEOC, HRC will investigate the claim and, if it finds discrimination, schedule a conciliation session with the employer. If conciliation is successful, the employer may agree to compensate you and change its practices. You can reach the HRC at:

State Human Rights Commission
1-800-233-3247
[http://www.hum.wa.gov/ComplaintProcess/
Index.html](http://www.hum.wa.gov/ComplaintProcess/Index.html)

c. King County Office of Civil Rights

If the employer is in King County, you can file a complaint with the King County Office of Civil Rights (KCOCR). KCOCR will investigate your claim and can help you and the employer find a solution. You can reach KCOCR at:

King County Office of Civil Rights
Chinook Building, 401 5th Ave # 215
Seattle, WA 98104
206-296-7592
[http://www.kingcounty.gov/exec/CivilRights/
FileComplaint.aspx](http://www.kingcounty.gov/exec/CivilRights/FileComplaint.aspx)

d. Seattle Office of Civil Rights

If the employer is in the city of Seattle, you can also file a complaint with the Seattle Office of Civil Rights (SOCR). SOCR will also investigate discrimination complaints and try to work with you and the employer to come to an agreement. SOCR can be reached at:

Seattle Office of Civil Rights
810 3rd Ave, # 750
Seattle, WA 98104
206-684-5400
<http://www.seattle.gov/civilrights/howtoocr.htm>

IV. RESOURCES

If you have questions about employment and criminal records, or if you believe your rights have been violated, you should contact the ACLU for more information.

Due to limited resources, we are generally not able to provide representation in individual cases, but we will provide you with information and referrals. You can reach us at 206.624.2180 or through our Website: www.aclu-wa.org

SOURCES

¹RCW 13.50.050(14)(a).

²RCW 9.94A.637(3).

³See Washington Administrative Code (“WAC”) 162-12-140. These regulations do not apply to law enforcement agencies, school districts, and businesses that supervise, care for, or treat children or vulnerable adults. They also do not apply to companies with fewer than eight employees.

⁴Seattle Personnel Rule 10.3. These rules does not apply to all positions. For example, law enforcement agencies and agencies which work with children and vulnerable adults are exempt.

⁵You can get a copy of the summary here: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>

⁶See *Johnson v. ADP Screening and Selection Services, Inc.*, 768 F.Supp.2d 979 (D. Minn. 2011) (14 days); *Obabueki v. Int'l Bus. Machines Corp.*, 145 F.Supp.2d 371 (S.D.N.Y. 2001) (5 days)

⁷15 U.S.C. § 1681c(a)(2). These rules do not apply to reports prepared for employers where the annual salary of the job you are seeking is \$75,000 or more

⁸RCW 19.182.040(f). These rules do not apply to reports prepared for employers where the annual salary of the job you are seeking is \$20,000 or more

⁹15 U.S.C. § 1681i(a)(1)(A).

¹⁰15 U.S.C. § 1681i(a)(4).

¹¹15 U.S.C. § 1681i(a)(5).

¹²15 U.S.C. § 1681i(d).

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