Seattle
Office of Labor Standards

City of Seattle ● Fair Chance Employment Ordinance (SMC 14.17)

Questions and Answers

Seattle's Fair Chance Employment Ordinance (formerly called the Job Assistance Ordinance) limits the ways employers can use conviction and arrest records for hiring and employment decisions for employees working at least 50% of their time in Seattle. The City of Seattle's Office of Labor Standards administers this ordinance, providing outreach, technical assistance and enforcement services to workers and employers.

Our Questions and Answers document addresses some of the most common questions about this ordinance. This version includes updates of existing guidance and explanation of new requirements resulting from the Wage Theft Prevention and Labor Standards Harmonization Ordinance that was signed into law on December 17, 2015 and went into effect on January 16, 2016.

Do you have a question that isn't covered by this Q&A? Visit our Fair Chance Employment web page. Call 206-684-4500 or reach us electronically:

- Workers with questions and complaints – submit an inquiry form
- Employers with requests for technical assistance – send an email to laborstandards@seattle.gov

A. General Information

1. What does the Fair Chance Employment ordinance do?

The ordinance regulates the use of criminal history in employment decisions.

- Prohibits categorical exclusions in job ads.
- Prohibits criminal history questions on job applications and criminal background checks until after an employer conducts an initial screening to eliminate unqualified applicants.
- Requires an opportunity for the applicant or employee to explain or correct criminal history information, and for the employer to hold the position open for at least two business days once they have notified the applicant that the employer plans to take an adverse action.
- Requires a legitimate business reason to deny a job based on a conviction record.

2. **Why is this ordinance needed?**

City Council passed the ordinance for three reasons:

- **This issue impacts us all.** The incarceration rate of the United States has tripled since 1980 and is seven times its historic average. An estimated one in every three adults in the United States has a criminal record.
- **Racial equity.** Racial disparities in incarceration rates have resulted in devastating impacts on communities of color. African Americans are 3.8% of Washington's population but account for nearly 19% of the state's prison population. Native Americans are 1.8% of the state population but account for 4.3% of the state's prison population. Racial disparities in incarceration rates mean that blanket exclusions from employment based on criminal history have a disparate impact on communities of color.[1]
- **Public safety.** Reducing adverse employment actions against people with criminal records will support those individuals, strengthen communities, reduce recidivism and crime, reduce racial disparities in the criminal justice system, lower the cost of criminal justice and save tax dollars.

3. **Does having a job really help reduce the likelihood that someone will re-offend?**

Yes. Employment is a key factor in reducing recidivism and improving public safety. For example:

- According to an Illinois study that followed 1,600 individuals recently released from state prison, only 8% of those who were employed for a year committed another crime, compared to the state's 54% average recidivism rate.[2]
- In one study of former prisoners in Ohio, Texas and Illinois, researchers found that people who were employed and earning higher wages after release were less likely to return to prison during their first year of release.[3]
- The Justice Policy Institute compared state-level employment rates with crime rates and found that on average, states with the highest levels of unemployment had higher violent crime rates than states with lower unemployment levels. Increased employment and increased wages are associated with lower crime rates.[4]

4. **When did the ordinance take effect?**

The ordinance took effect on November 1, 2013.

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[1] For more information, please *see Washington State Department of Corrections* website at: http://www.doc.wa.gov/aboutdoc/statistics.asp

[2] American Correctional Association, 135th Congress of Correction, Presentation by Dr. Art Lurigio (Loyola University) Safer Foundation Recidivism Study (Aug. 8, 2005).

[3] Christy Visher, Sara Debus & Jennifer Yahner, Employment after Prison: A Longitudinal Study of Releasees in Three States, Justice Policy Center Research Brief (Oct. 2008), available at http://www.urban.org/UploadedPDF/411778_employment_after_prison.pdf

[4] Aliya Maseelall, Amanda Petteruti, Nastassia Walsh & Jason Ziedenberg, Employment, Wages and Public Safety, Justice Policy Institute (Nov. 2007) at 2-4, available at http://www.justicepolicy.org/images/upload/07_10_REP_EmploymentAndPublicSafety_AC.pdf.

5. **Are there other laws like this in Washington State?**
   Yes. Since 1973, the State of Washington and its counties, cities, towns, municipal corporations, or quasi-municipal corporations must comply with state law (e.g. RCW 9.96A) regarding employment of people with prior arrest conviction records. The law says that a person cannot be denied a job solely based on a felony conviction. A person may be denied a job if the conviction directly relates to the job and if less than ten years have passed since the conviction.

6. **Does the Ordinance impact existing state and federal laws relating to criminal records?**
   No. Employers must still follow state and federal law. In the event of a conflict, state and federal requirements supersede the requirements of the Seattle Ordinance. However, where there is no conflict and the Seattle ordinance adds more protections than state and federal requirements, the Seattle ordinance takes precedence and employers must follow those additional requirements.

   The relevant state and federal laws include Title VII of the Civil Rights Act of 1964; the federal Fair Credit Reporting Act, 15 U.S.C. 1681; the Washington State Fair Credit Reporting Act, RCW 19.182; the Washington State Criminal Records Privacy Act, RCW 10.97; and state laws regarding criminal background checks, including those related to individuals with access to children or vulnerable persons, RCW 43.43.830, *et seq*.

B. Employers

1. **Does the ordinance apply to all employers?**
   The Ordinance applies to employers with one or more employees working inside Seattle city limits. The law also applies to job placement, referral and employment agencies that place individuals in jobs within Seattle city limits.

   The ordinance does <u>not</u> apply to the U.S. government; the State of Washington, including the legislature and the judiciary; or any county or local government other than the City of Seattle. However, the State of Washington and its counties, cities, towns, municipal corporations, or quasi-municipal corporations must comply with state law (RCW 9.96A) with regard to employment of people with prior arrest or conviction records.

2. **Does the ordinance apply to companies that are headquartered or located outside of the City of Seattle?**
   Yes. The ordinance applies to employee positions within Seattle, regardless of the location of the employer, corporation, or headquarters. The employer must adhere to the ordinance for employee positions that perform a substantial part (at least 50% of the time) of their employment services in Seattle.

C. Job Applicants and Employees

1. Does the ordinance apply to all applicants and employees?

The ordinance applies to job applicants, candidates and employees who work within Seattle City limits. "Employee" includes any individual who performs any services for an employer, when the physical location of such services is in whole or in substantial part (at least 50% of the time) within Seattle. *See* questions C. 4-812 through 16 for more details.

2. Does the ordinance apply to volunteers?

No.

3. Are independent contractors considered employees, and does the ordinance apply to them?

No. The ordinance only applies to employees. Whether an individual is an employee or independent contractor is determined by the "Economic Realities Test" that is used by the Fair Labor Standards Act (FLSA) and the Washington State Minimum Wage Act (MWA). If there is a dispute regarding a worker's status, the employer is responsible for proving that the worker is an independent contractor rather than an employee (i.e., the law favors employee status and an employer must prove otherwise). Under the Economic Realities test, factors for distinguishing an employee from an independent contractor include:

- Is the work an integral part of the employer's business?
- Does the worker's managerial skill affect the worker's opportunity for profit or loss?
- How does the worker's relative investment compare to the employer's investment?
- Does the work performed require special skill and initiative?
- Is the relationship between the worker and the employer permanent or indefinite?

For more information on the "Economic Realities" test, *see* the United States Department of Labor Administrator's Opinion 2015-1.

4. Does the ordinance apply to employees who work from multiple locations inside and outside of Seattle?

The ordinance may apply depending on the circumstances. The ordinance applies to employees who work in Seattle at least 50% of the time. For example:

Example #1: An employer's business is located in Portland, OR. One of the positions is required to work in Seattle three of every four weeks throughout the year. The employee returns to Portland for the fourth week of each month throughout the year. The ordinance applies to this position because the employee works in Seattle 75% of the time.

Example #2: A Seattle-based business employs one full-time position in Bellevue, WA, for four of the five work days each week. The ordinance does not apply to this position because the employee works outside of Seattle 80% of the time. The ordinance does apply to this employer's other employees who work in Seattle at least 50% of the time.

Example #3: A transport company employs drivers who make deliveries throughout the region, including Seattle. The drivers work 40 hours/week.

- One full-time driver's position follows a regular route that includes 20 hours/week within Seattle. The ordinance applies to this employee because he works in Seattle 50% of the time.
- Another full-time driver's position follows a regular route that includes only one day a week in Seattle. The ordinance does not apply to this employee because she works in Seattle less than 50% of the time.
- A third full-time driver's position follows an irregular route that moves in and out of Seattle with no set schedule. The ordinance may or may not apply to this employee. The employer will need to make a good-faith estimate of the percentage of time this position works in Seattle to determine if the ordinance applies.

5. Does the ordinance apply to individuals who work from their homes or another location in Seattle (telecommuting)?

The Ordinance may apply depending on the circumstances. Employees who work 50% or more of their time by telecommuting from a location within the City of Seattle are covered by the Ordinance. For example:

Example #1*:* An employee works for a business based in Everett, WA. The employee telecommutes from her home in Seattle on two days a week throughout the year. She works in Everett on the other three days of the week. The Ordinance does not apply to this employee because she works outside Seattle for 60% of the time.

Example #2: An employee works for a business based in Tacoma, WA. The employee telecommutes from his home in Seattle three days a week throughout the year. He works in Tacoma the other two days of the week. The Ordinance applies to this employee because he works in Seattle for 60% of the time.

Example #3: A Seattle-based tour company employs tour guides for three months each year. The guides work half of the time in Seattle during those three months. The Ordinance applies to these employees because they work in Seattle 50% of the time.

6. Does the ordinance apply to employees who are temporary workers?

The Ordinance may apply depending on the circumstances. For example, a Seattle-based outdoor display company employs several positions for 6-month contracts.

- One position is contracted to work two months in Seattle and four months in Olympia, WA. The Ordinance does not apply to this position because the employee will work in Seattle only 33% of the time.
- Another position is contracted to work two months in Olympia and four months in Seattle. The Ordinance applies to this position because the employee will work in Seattle 67% of the time.

7. **Does the ordinance apply to employees who travel through (but do not stop in) Seattle for business?**
   The ordinance likely does not apply to employees who travel through Seattle. For example, an employee splits her work time between Kent, WA, and Shoreline, WA. She stops in Seattle for gas en route to her two work sites. This employee is not covered by the ordinance, since her time in Seattle is incidental to her work.

8. **How does an employer or employee determine "a reasonable expectation" that 50% or more of the employee's work will be in Seattle?**
   An employee or employer may look to past years to determine whether the employee should reasonably expect the employee to work 50% of the time in Seattle. If the position or employer is new, the person may evaluate the job description and expected work of the individual, including the location of the work, to determine if it is reasonable to expect employees to work 50% of their time in Seattle.

9. **Are there some jobs or positions that are not subject to the Ordinance?**
   Yes. The Ordinance does ***not*** apply to individuals whose job duties or prospective job duties include:

   - Law enforcement;
   - Policing;
   - Crime prevention;
   - Security;
   - Criminal justice;
   - Private investigation services.

   Additionally, the law does not apply to individuals who will or may have unsupervised access to the following individuals during the course of their employment:

   - Children under sixteen years of age;
   - Individuals with developmental disabilities; or
   - Vulnerable adults.

   Example #1 – unsupervised access: A summer camp is hiring for two positions:

   - One opening seeks a counselor who will be responsible for 7 young adults with developmental disabilities, including their sleeping arrangements. In this scenario, it is likely that the counselor will have unsupervised access to individuals with developmental disabilities. The Ordinance does <u>not</u> apply to this position, since it includes unsupervised access to individuals with developmental disabilities.
   - The other opening seeks a general maintenance worker to make repairs to the facilities as needed throughout the summer. The Ordinance applies to this position, since it does not include unsupervised access to developmentally disabled individuals.

Example #2 – unsupervised access: A non-profit organization provides mental health services to children younger than 16 and vulnerable adults. The organization is hiring for two positions.

- One opening seeks a mental health therapist who will conduct one-to-one counseling sessions. The Ordinance does not apply to this position because the person in this position will have unsupervised access to children younger than 16 and vulnerable adults.
- The other opening seeks a front lobby receptionist whose job duties do not include unsupervised access to children younger than 16 and vulnerable adults. The Ordinance applies to this position, because this position will not have unsupervised access to children under age 16 or vulnerable adults.

10. When an employer uses a third-party recruiting firm, who is responsible for a violation – the firm or the employer?

Both the employer and the third-party recruiting firm must comply with the Ordinance, and both may be responsible for a potential violation. To determine parties' responsibility in specific situations, OLS would review the actions and decisions of the firm and employer, as well as any agreement between the two entities.

11. Does the ordinance apply to employment decisions of employers who are legally required to obtain a bond for their business?

Yes. Employers facing mandatory bonding requirements (under state and federal law or administrative regulation) must follow all aspects of the ordinance for hiring and employment decisions, including an individualized assessment of an applicant or employee's criminal record, evaluation of the potential impact of the criminal record on bondability and consideration of all legitimate business reason factors. However, if there is a direct conflict between the ordinance and the mandatory bonding requirements, then the state and federal laws or administrative regulations supersede ordinance requirements.

12. Does the ordinance apply to employment decisions of employers who wish to obtain a non-mandatory bond for their business?

Yes. Employers who wish to secure non-mandatory bonds for their business must follow all ordinance requirements for hiring and employment decisions, including an individualized assessment of an applicant or employee's criminal record, evaluation of the potential impact of the criminal record on bondability and consideration of all legitimate business reason factors.

Example: A fidelity bond is a form of insurance that protects businesses from losses incurred by the dishonest acts of employees. Employers who wish to secure a fidelity bond must consider each applicant's criminal record on a case-by-case basis. If a criminal record will negatively impact bonding, an employer may consider this outcome during their analysis of the legitimate business reason factors. Employers also should consider options to mitigate the impact of criminal records such as temporary fidelity bonds provided at no charge by the Washington Bonding Program. More information about this free program is available from the Washington Employment Security Department (http://www.wa.gov/esd/oes/bond/).

D. Job Postings

1. What are the Ordinance's requirements about job postings?

Job postings for work to be performed within Seattle cannot automatically or categorically exclude individuals with any arrest or conviction record. Examples of statements that convey categorical exclusions include but are not limited to:

a. "No felons need apply"
b. "No criminal background"
c. "Clean Criminal Record."
d. "Must have clean driving record"

Because of the chilling effect on job applicants with criminal history, employers should not use language such as "applicants must successfully pass background check". If an employer uses such language, it is best practice to assure applicants that the background check will be conducted in accordance with Seattle's Fair Chance Employment Ordinance, SMC 14.17, as follows:

"Applicants must successfully pass background check, which will be conducted in accordance with Seattle's Fair Chance Employment Ordinance, SMC 14.17. Applicants will be given a chance to explain or correct background information and provide verifiable information of good conduct and rehabilitation."

2. Can an employer tell an applicant that a background check will need to be completed during the hiring process?

Yes. An employer can inform applicants and employees that it will conduct a criminal background check. However, employers are encouraged to adopt the following practices when informing individuals that they will conduct background checks:

a. Wait to inform applicants that a background check will be conducted until after applicants have been initially screened for minimum qualifications;
b. Include information on advertisements and applications that mention the rights of applicants under the ordinance – for example:

"Hiring process involves background check of conviction and arrest records in compliance with Seattle's Fair Chance Employment Ordinance, SMC 14.17. Applicants will be provided an opportunity to explain and correct background information."

E. Job Applications

1. Can an employer ask about conviction and arrest records on a job application?

No. An employer may only ask about conviction and arrest records after an initial screening of applications to eliminate unqualified applicants.

2. **Can an employer conduct a criminal background check on a job applicant?**
   Yes, but only after the employer has completed an initial screening of applications to eliminate unqualified applicants.

3. **What is an initial screening?**
   An initial screening is a review of an applicant's qualifications to ensure that the applicant possesses the minimum qualifications that are necessary for the job. Depending on the employer's hiring process, an initial screening may be a first review of written applications for minimum qualifications or a verbal conversation with an applicant about their education or work experience.

4. **Does the ordinance limit how far back an employer can look into an applicant's history?**
   No. However, the employer must consider the length of time that has passed since the conviction, conduct, or charge. *See* Question F. 6 below for examples of reasonable timeframes and studies.

F. Using Conviction and Arrest Records in Employment Decisions

1. **What is an arrest record?**
   An arrest record is information that a person has been detained, taken into custody, or otherwise restrained by a law enforcement agency or military authority due to an accusation or suspicion that the person committed a crime.

2. **Can a person be denied employment, disciplined, fired, or demoted because of an arrest record?**
   No. The ordinance prohibits employers from rejecting an otherwise qualified job applicant, or taking an adverse employment action (for example, discharging, suspending, disciplining, demoting, or denying a promotion) solely on the basis of an arrest record.

3. **Can a person be denied employment, disciplined, fired, or demoted based on conduct related to an arrest?**
   Yes. An employer may reject a job applicant or take an adverse employment action (for example, discharging, suspending, disciplining, demoting, or denying a promotion) based on conduct related to an arrest provided there is a legitimate business reason. The legitimate business reason analysis is discussed in Question F. 7.

4. **What sources of information can an employer rely upon to determine conduct related to an arrest record?**
   Employers may rely upon information from sources such as: (1) self-disclosure by the employee or applicant; (2) an official government record, such as a police report, probable cause statement, or other court record; or (3) a publicly available media report.

5. **Can a person be denied employment, disciplined, fired, or demoted based on pending criminal charges?**
   Yes. An employer may reject a job applicant or take an adverse employment action (for example, discharging, suspending, disciplining, demoting, or denying a promotion) based on pending criminal charges provided there is a legitimate business reason. The legitimate business reason analysis is discussed in Question F. 7.

6. **Where can an employer learn about pending criminal charges?**
   Employers may consult criminal history record information furnished by a credit reporting agency or government records, such as official court or law enforcement records.

7. **What is a legitimate business reason for rejecting an applicant or taking an adverse action against an employee due to criminal history, pending criminal charges, or conduct related to an arrest?**
   The Ordinance requires that employers consider certain factors to determine whether there is a legitimate business reason for rejecting an applicant or taking an adverse action against an employee due to criminal history, pending criminal charges, or conduct related to an arrest. A legitimate business reason exists if the employer, after considering the following factors, believes in good faith that the criminal conduct underlying a conviction or charge will either:
   a. Have a negative impact on the employee's or applicant's fitness or ability to perform the position sought or held, or
   b. Harm or cause injury to people, property, or business assets.

   The factors that the employer must consider are:
   - The seriousness of the underlying criminal conviction or pending criminal charge;
   - The number and types of convictions or pending criminal charges;
   - The time that has elapsed since the conviction or pending criminal charge, excluding periods of incarceration;
   - Any verifiable information provided by the individual related to his/her rehabilitation or good conduct;
   - The specific duties and responsibilities of the position sought or held;
   - The place and manner in which the position will be performed.

8. **How does an employer show that a legitimate business reason exists?**
   It depends on the specific facts and circumstances. In an investigation, OLS's assessment would be based on the totality of circumstances for the specific case. An employer should document all actions taken and why they were taken. Employers should retain all documents related to the hiring process, including notes from interviews, job description, applications and information provided by applicants.

9. **How do employers demonstrate that a good faith belief exists?**
   Employers must provide sufficient evidence to show that they considered the factors listed in the definition of a legitimate business reason (*see* Question F. 7 above). Employers can provide documentation of the decision process, including the records on which they relied and other relevant information, such as the job description or verifiable information provided by the applicant or employee. It is a good idea to document the decision-making processes and the steps taken to comply with the ordinance.

10. **How do employers decide how much weight to place on verifiable information provided by an applicant or employee?**
    Employers must demonstrate that they have considered any verifiable information provided by the applicant or employee that relates to the individual's rehabilitation or good conduct. This includes the applicant's or employee's own statement explaining the record or action. Employers should be able to explain how and why they put weight on any given piece of verifiable information and document their decisions.

11. **Why does an employer need to consider the "time elapsed" since criminal conduct?**
    Studies show that the amount of time elapsed since the criminal conduct can impact the likelihood of an individual re-offending in the future. Therefore, the "time elapsed" factor is relevant to whether a legitimate business reason exists to exclude an applicant or take an adverse action against an employee. Here are some examples. Please note that in all instances, the employer also must consider the other factors listed in question F.7 above.

    Example #1 – misdemeanor 15 years ago*:* Jackson, a 35-year-old man, is applying for a job at an architectural firm. Fifteen years ago, Jackson was convicted of malicious mischief (a gross misdemeanor) for tagging the outside of a mom and pop grocery store. Jackson did not spend any time in jail but was on probation for a period of time. Jackson has not engaged in any other criminal conduct since then.

    Analysis: Due to the long time since the conviction, the "time elapsed" factor would not strongly support the employer's claim of a legitimate business reason to exclude Jackson from consideration.

    Example #2 – misdemeanor six months ago*:* Devon, a 25-year-old woman, is applying for an assistant property manager position. Six months ago, Devon was convicted of three counts of prostitution. Devon's sentence requires rehabilitation classes and completion of community service hours. Devon is currently on active probation.

    Analysis: Because the time elapsed since the conduct is short, the "time elapsed" factor may support a legitimate business reason.

Example #3 – felony conviction two years ago: Jayden, a 40-year-old man, applied for a clerk's job at a grocery store. Two years ago, Jayden was released from jail after serving a three-year sentence for felony assault. Six years ago, he was charged with urinating in public and possessing an open bottle of alcohol in a public park. Jayden committed three other assaults more than ten years ago. He has not had any subsequent run-ins with the criminal justice system.

Analysis: The ordinance allows the employer to consider the time elapsed since conviction, excluding periods of incarceration. In this example, Jayden served three years in prison for the most recent conviction and has been out for two years. The "time elapsed" since the last conviction factor may support a legitimate business reason. However, it may not support a legitimate business reason for the ten-year-old assaults or the six-year-old municipal offenses.

12. Does an employer need to consider an applicant who lied about conviction or arrest records?

If an employer receives information from an applicant or employee that is inconsistent with the information the employer receives in a criminal history report, the employer must still give the applicant or employee an opportunity to correct errors by following the legitimate business reason analysis, before taking any adverse action.

The employer does not need to follow this process if the applicant or employee intentionally misrepresents this information. To ensure compliance, an employer should allow the applicant or employee an opportunity to correct this information. Background checks are not always accurate and may contain misleading information, mischaracterize the seriousness of offense or disposition of the offense, mismatch identities, or include sealed information.[5]

13. Why must an employer consider a certificate of rehabilitation as part of the verifiable information process?

An employer must consider a certificate of rehabilitation because, even after a person receives a certificate of rehabilitation for a conviction, the conviction may still appear on the person's criminal history report. The employee or applicant has a right to respond to, correct or explain the information that the employer receives on the criminal history report.

For example, Jane was convicted of assault. After serving her sentence and living in the community without committing crimes for a period of time, Jane received a certificate of rehabilitation for the assault conviction. When Jane applied for a job with R Company, the assault conviction appeared on Jane's criminal history report. R Company must give Jane an opportunity to respond to the information, explain it, and correct it, which includes permitting Jane to provide a certificate of rehabilitation and any other verifiable information (SHRR 80-120).

[5] *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses.* April, 2012. National Consumer Law Center

14. What studies provide guidance on the likelihood of re-offense over time?

The following studies examine the likelihood of re-offense over time:

- Alfred Blumstein and Kiminori Nakamura, *Redemption in the Presence of Widespread Criminal Background Checks,* 47 CRIMINOLOGY 327 (2009). The study concluded that there may be a "point of redemption" for individuals arrested for certain offenses (i.e., a point in time where an individual's risk of re-offending or re-arrest is comparable to individuals with no prior criminal record) if they remain crime-free for a certain number of years.

- Megan C. Kurlychek, Robert Brame & Shawn D. Bushway, *Enduring Risk? Old Criminal Records and Predictions of Future Criminal Involvement*, 53 CRIME & DELINQUENCY 64 (2007). The study analyzed juvenile police contacts for an aggregate of crimes for 670 males born in 1942 and concluded that the risk of a new offense approximates that of a person without a criminal record after seven years.

- Megan C. Kurlychek, et al., *Scarlet Letters and Recidivism: Does an Old Criminal Record Predict Future Offending?*, 5 CRIMINOLOGY & PUB. POL'Y 483 (2006). The study evaluated juvenile police contacts and arrest dates from Philadelphia police records for an aggregate of crimes for individuals born in 1958. It concluded that the risk of recidivism decreases over time, and that six or seven years after an arrest, an individual's risk of re-arrest approximates that of an individual who has never been arrested.

- Keith Soothill & Brian Francis, *When do Ex-Offenders Become Like Non-Offenders?*, 48 HOWARD J. OF CRIM. JUST., 373, 380-81 (2009). The study examined conviction data from Britain and Wales. It found that the risk of recidivism declined for groups with prior records and eventually converged within 10 to 15 years with the risk of those of the non-offending comparison groups.

15. What do studies say about how the age of a person at the time of the offense impacts the likelihood of recidivism?

The following studies examine how the age of the person at the time of offense may impact the likelihood of re-offense:

- Shawn Bushway et al., *The Predictive Value of Criminal Background Checks: Do Age and Criminal History Affect Time to Redemption?*, 49 CRIMINOLOGY 27, 52 (2011). The study found that recidivism rates tend to decline as ex-offenders' ages increase, and that an individual's age at conviction is a variable that has a "substantial and significant impact on recidivism." For example, the 26-year-olds in the study, with no prior criminal convictions, had a 19.6% chance of reoffending in their first year after their first conviction, compared to the 36-year-olds who had an 8.8% chance of reoffending during the same time period, and the 46-year-olds who had a 5.3% chance of reoffending.

- Patrick A. Langan & David J. Levin, *Bureau of Justice Statistics, U.S. Dep't of Justice, Special Report: Recidivism of Prisoners Released in 1994* (2002), http://bjs.ojp.usdoj.gov/content/pub/pdf/rpr94.pdf. The study found that, although 55.7% of ex-offenders aged 14 to 17 released in 1994 were reconvicted within three years, the percentage declined to 29.7% for ex-offenders aged 45 and older who were released the same year.

When considering the age of the person at the time of offense and making employment decisions, SOCR cautions employers to be mindful of age discrimination laws.

16. What do studies say about the employability of adolescents with convictions?
The following study discusses the employability of individuals who had convictions as adolescents.

- Brent W. Roberts et al., *Predicting the Counterproductive Employee in a Child-to-Adult Prospective Study*, 92 J. APPLIED PSYCHOL. 1427, 1430 (2007), http://internal.psychology.illinois.edu/~broberts/Roberts,%20Harms,%20Caspi,%20&%20Moffitt,%202007.pdf The study found that among New Zealand residents from birth to age 26, "[a]dolescent criminal convictions were unrelated to committing counterproductive activities at work [such as tardiness, absenteeism, disciplinary problems, etc.]. According to the results of the study, people with an adolescent criminal conviction record were less likely to get in a fight with their supervisor or steal things from work.

G. EMPLOYER REQUIREMENTS - Before Taking Adverse Action Based on a Criminal History Report

1. Do employers need to give the applicant /employee a chance to explain or correct information about their criminal history?
Yes. Before taking an adverse action based on the conduct relating to an arrest, a conviction or a pending criminal charge, the employer shall let the applicant / employee know the information they are relying on and give the person a reasonable opportunity to explain or correct that information.

2. How much can an employer follow up with the sources of "verifiable information," such as a social worker, parole officer, health care provider, etc. that an applicant or employee provides?
The Ordinance requires employers to consider any verifiable information provided by the applicant/employee. Employers should consult with legal counsel, human resources or conduct research to determine whether following up with certain professionals would be a violation of other city, state or federal laws.

3. **Can an employer ask an applicant for medical information that would otherwise be protected by HIPPA or other laws?**
   HIPPA (the Health Insurance Portability and Accountability Act of 1996) prevents covered entities such as healthcare providers from disclosing private information about medical history. An applicant/employee would need to give permission to their healthcare provider in order to have them provide medical information to an employer.

   Employers should consult with legal counsel, human resources, or conduct research to determine if asking an applicant for this information would violate other city, state, or federal laws, like the Americans with Disabilities Act and Genetic Information Nondiscrimination Act.

4. **Are there requirements for how an employer notifies an employee of a possible adverse action (e.g. failure to hire, termination) based on criminal history information?**
   The ordinance does not specify methods of notification. It does indicate that the employer must inform the individual in the manner most likely to reach the applicant or employee in the shortest amount of time.

   It is a good idea to use the method of communication that will reach the applicant or employee most quickly, depending on the circumstances. This could include email, telephone, U.S. Postal Service, or in-person communication. The employer should inform the applicant or employee of the information and records and provide the applicant or employee an opportunity to review the information and records.

5. **Does an employer need to hold the position open while the applicant or employee explains the information or corrects wrong information?**
   Yes. Employers must hold open the position for a minimum of two business days after notifying the applicant / employee that they will be making an adverse business decision solely on the basis of conduct relating to an arrest, a conviction or a pending criminal charge, and provide a reasonable opportunity for the person to respond, correct or explain that information. After two business days, employers may hold open a position until questions about an applicant's criminal conviction history or a pending charge are resolved. However, employers are not required to do so beyond the two days.

6. **If the employer decides not to hire the applicant for a reason other than the applicant's criminal history, does the employer need to perform a legitimate business reason analysis?**
   No. The Ordinance requires that an employer perform a legitimate business reason analysis if the employer is making the decision solely based on the applicant's criminal history. However, if the employer makes its hiring decision based in part on the applicant's criminal history, it is a good idea to analyze and document that decision.

H. Types of Criminal Records

1. **Does an applicant need to report a sealed or expunged record if the employer requests criminal history information?**
   Seattle's Fair Chance Employment Ordinance does not address conviction records that have been the subject of an expungement, vacation of conviction, sealing of the court file, pardon, annulment or other equivalent procedure. Washington State laws do address vacated and sealed records and what an employee needs to report. For more information on the laws addressing vacated or sealed records contact the ACLU Second Chances Program at http://aclu-wa.org/secondchances.

2. **What about the conduct that led to an arrest that was later sealed or expunged? Can an employer ask about that?**
   Yes. If an employer wants to consider the conduct related to any arrest, the employer has to follow the process outlined in the Ordinance. The employer may not consider the conduct related to the arrest until after the initial screening.

3. **Does the ordinance apply to juvenile records?**
   Yes, the ordinance applies to juvenile records.

I. (UPDATE) Employer Notice and Posting Requirements

1. **What are the notice and posting requirements of the FCE ordinance?**
   As of April 1, 2016, employers must display a **workplace poster,** updated annually, in a conspicuous and accessible location where any of their employees work. Employers must display the poster in English and in the primary language(s) of the employees at the particular workplace. OLS is responsible for creating the poster, providing annual updates by December 1st of each year, and translating it into different languages.

2. **How do employers comply with the workplace poster requirement if employees telecommute or work off-site with no central work location?**
   If display of the poster is not feasible, including situations when the employee works remotely or does not have a regular workplace, employers may provide the poster on an individual basis in an employee's primary language in a physical or electronic format that is reasonably conspicuous and accessible.

3. **How do employers comply with the workplace poster requirement for out-of-town employees who work in Seattle on an occasional basis?**
   For employees who work in Seattle on an occasional basis, employers must comply with the workplace poster requirements reasonably in advance of their first period of work in Seattle.

4. **Where can employers get the workplace poster?**
   The workplace poster is available electronically on our publications webpage in printable color and black and white versions.

J. Retaliation

1. Does the ordinance prohibit retaliation?

Yes. Retaliation is illegal. Employers are prohibited from taking an adverse action or discriminating against employees who assert, in good faith, rights protected by the FCE ordinance. These rights include (but are not limited to):

a. Informing an employer, union or legal counsel about alleged FCE violations;
b. Filing a complaint about alleged FCE violations;
c. Participating in an investigation of alleged FCE violations;
d. Informing other employees of their FCE rights.

K. (UPDATE) Enforcement

1. Complaints

a. How does the Office of Labor Standards enforce the FCE ordinance?

OLS enforces the FCE ordinance using a variety of methods (e.g. 30 Day letter, Compliance Letter, or Director's Charge) depending on the severity of the alleged violation. For all methods, OLS enforcement procedures:

- Provide options for nondisclosure of worker identity to the maximum extent possible;
- Address individual and company-wide allegations of noncompliance;
- Require employers to provide written evidence of compliance;
- Seek to quickly remedy violations, provide a full remedy to workers, impose civil penalties and fines, when appropriate, and provide employer education.

If evidence shows noncompliance, OLS will seek a settlement agreement that includes a full remedy for all workers (i.e., back wages plus interest), civil penalties and fines when appropriate, an agreement to comply in the future, and monitored compliance. Depending on the circumstances, settlement agreements may also constitute a first violation of the ordinance.

If evidence shows noncompliance and OLS is not able to reach a settlement agreement, then the office will issue a "Director's Order" that states the amount due for each violation. If the employer does not comply with the Director's Order within 30 days, OLS will initiate collection proceedings which can include, among other actions, filing liens, garnishments, revoking a business license and requiring an employer to publically display a "Failure to Comply" notice.

b. How does a person file a complaint?

Employees can contact OLS by phone, in-person and on-line:

- 206-684-4500.
- 810 Third Avenue, 3rd floor, in downtown Seattle.
- On-line complaint form.

c. Will the Office of Labor Standards disclose a complainant's identity to the employer?
No, to the extent possible under the law.

d. How long does a person have to file a complaint?
A person can file a complaint up to three years after the occurrence of the alleged violation.

Note: The three-year statute of limitations began on July 14, 2015, as the result of amendments to the ordinance that went into effect on January 16, 2016.

e. What types of violations will be investigated?
OLS will investigate any violation of the ordinance, including but not limited to:

- Job postings with a categorical exclusion against applicants with a conviction or arrest record;
- Job applications with questions about conviction or arrest records;
- Asking any questions about conviction or arrest records before conducting an initial screening;
- Failure to follow ordinance procedures before taking an adverse action based solely on criminal history report;
- Failure to have a legitimate business reason for denying a job based solely on criminal history report;
- Failure to comply with workplace poster requirements;
- Retaliation.

f. Can an aggrieved party (job applicant or employee) file a law suit against an employer for FCE violations?
No.

g. Can a represented employee file a complaint with OLS as well as filing a union grievance?
Yes.

2. Investigations

a. What can parties expect in an investigation?
The Office of Labor Standards is a neutral, fact-finding agency. OLS does not take sides or advocate for one party against another in matters while they are under investigation. All services are free. OLS gathers evidence by conducting interviews, obtaining witness statements, and reviewing written information. Throughout the investigation, OLS can help the parties reach a settlement agreement for early resolution.

b. Who can represent a party in an investigation?
The investigation is designed to be accessible and easy to navigate, so employees and employers involved in an investigation should not feel that they have to be represented. However, parties are free to engage attorneys to represent them. Parties also are free to invite other individuals (e.g. union representative, family member) to support or advocate for them during the process.

c. Can a party be represented by a union?

Yes. Employees can invite union representatives to support them during the investigation process. Employees must provide written notice of union representation for OLS to share updates with the union representative on the investigative process

d. Will OLS open an investigation based on a third party complaint (e.g. union representative, family member)?

OLS will open an investigation based on a third party complaint only when the complaint has been confirmed by an employee who was directly affected by the alleged violation/s. If no employee will confirm the allegations made by the third party, OLS will not initiate an investigation. However, OLS will keep the information provided by the third party to help inform future directed investigations into FCE violations.

e. How long does an investigation take?

The length of an investigation will vary depending on the severity of the allegations and the complexity of the situation. All enforcement actions include evidence gathering and result in a written resolution (e.g. settlement agreement, Director's Order).

For allegations such as failure to comply with workplace poster requirements, OLS strives to complete the matter within 60 days.

For other allegations (e.g. categorical exclusions in job advertisements, failure to consider an applicant's explanation, correction, or verifiable information regarding rehabilitation, retaliation) OLS strives to complete the matter within 180 days.

In most cases, OLS requires payment of amounts owed to workers within 30 days of a final settlement agreement or Director's Order.

f. What information is an employer asked to provide?

The information requested depends on the specifics of the alleged violation. Types of information may include:

- Demonstrated compliance with the workplace poster requirement;
- Job posting;
- Job application;
- Job description;
- Documentation of hiring process;
- Personnel records;
- Other relevant documents.

g. What happens if an employer does not respond to a request for information?

OLS has the authority to issue subpoenas that require employers, witnesses and other parties to provide written and verbal testimony. Depending on the circumstances, OLS also may issue a default finding of violation.

3. **Resolutions**

   a. **Are settlements available?**

   Yes. If evidence shows noncompliance, OLS will seek a settlement agreement that provides a full remedy for all workers (i.e., back wages plus interest), an agreement to comply in the future, and monitored compliance. This type of settlement agreement will also constitute a first violation of the ordinance.

   b. **What findings are provided at the end of an investigation?**

   Unless there is a settlement agreement, OLS will provide a written determination at the conclusion of an investigation.

   - **No Violation:** The Director issues a **"Determination of No Violation"** with notice of an employee or other aggrieved party's right to appeal the decision.
   - **Violation:** The Director issues a **"Director's Order"** that states the amounts due for each violation, including, for violations that occur after January 16, 2016, payment of to 3x unpaid wages plus interest, up to $5,000 to an employee (or other aggrieved party) for retaliation, reinstatement or 3x front pay in lieu of reinstatement for retaliation, civil penalties, and fines. The Director's Order may permit waiver or reduction of civil penalties and fines due to the Agency if the employer quickly pays the full remedy due to employees. The Director's Order also can require corrective action, such as monitored compliance for a reasonable time period and employer training. The Director's Order further includes notice of the right to appeal the decision within 15 days.

   c. **How is an investigation closed by settlement?**

   Settlement agreements are a binding contract signed by the OLS Director and the employer(s), which list agreed-upon terms for closing an investigation. OLS encourages settlement agreements as an efficient way to resolve complaints, obtain payment for workers and/or change employer practices to achieve compliance. Depending on the circumstances, a settlement can include all remedies, penalties and fines, that are available for Director's Orders (e.g. for violations that occur after January 16, 2016, up to 3x wages owed, up to $500 civil penalty per aggrieved party for first violation, mitigation of civil penalties and fines for quick payment to workers), employer training, a description of the steps necessary to achieve compliance, and a requirement for OLS compliance reviews for a reasonable time period.

5. **(UPDATE) Appeals**

   a. **What appeal rights do parties have if they disagree with the outcome of the investigation?**

   - **Employers:** An employer can appeal the Director's Order by requesting a contested hearing in writing within 15 days of service. If an employer fails to appeal the Director's order within 15 days of service, the Director's order is final and enforceable. When the last day of the appeal period so computed is a Saturday, Sunday, or federal or City holiday, the period runs until 5 p.m. on the next business day. In a contested hearing, the Office of Labor Standards has the burden of proof by a preponderance of the evidence before the Hearing Examiner.

   - **(UPDATE) Employees:** Employees may appeal a Director's "Determination of No Violation" subject to administrative rules. While OLS is developing these rules, employees can request reconsideration within 30 days of the determination.

6. **(UPDATE) Employee Remedies**

   a. **What happens if OLS finds that an employer is in violation of the ordinance?**
   If evidence shows noncompliance, OLS will seek a settlement agreement that provides a full remedy for all workers, civil penalties and fines when appropriate, an agreement to future compliance, monitored compliance for a reasonable time period and employer training. This type of settlement agreement also will constitute a first violation of the ordinance. If the employer does not agree to settlement, then the Director will issue a Director's Order.

   b. **Does the Director have discretion in determining employee remedies and civil penalties and fines?**
   Yes. While the OLS Director will *always* secure a full remedy for workers, the Director does have discretion to determine additional amounts owed to employees for first violations, the payment due to employees for retaliation and the amount due for civil penalties and fines up to a statutory cap. The Director's discretion is guided by the total amount of unpaid wages, damages, penalties, fines, and interest due; the nature and persistence of the violations; the extent of the employer's culpability; the nature of the violations; the size, revenue, and human resources capacity of the employer; the circumstances of each situation; the amount of penalties in similar situations; and other factors established by administrative rules.

   c. **What remedies are available to the aggrieved party (e.g. job applicant or employee)?**

Violation	**Remedy to Job Applicant or Employee**
First Violation	Mandatory up to $500 per aggrieved party (e.g. job applicant or employee).
Second Violation	Mandatory up to $1,000 per aggrieved party (e.g. job applicant or employee).
Third Violation	Mandatory up to $5,000 per aggrieved party (e.g. job applicant or employee).
Retaliation	Payment of up to $5000 to job applicant or employee, and reinstatement or front pay of up to 3x wages owed plus interest. *If OLS finds evidence of retaliation (e.g. termination, demotion, assignment of a less desirable shift) after an employee or job applicant has asserted rights under one of the labor standards ordinances, the employee or job applicant is entitled to a payment of up to $5,000 and reinstatement or up to three times front pay. The term, "front pay" is pay the employee would have earned if the employee had not been terminated, demoted, assigned a less desirable shift, etc.*

Interest Rate	12% per annum calculated monthly. *This is the maximum rate permitted under RCW 19.52.020. Interest will start accruing from the date payment of the wages were due.*

d. How are remedies paid to the aggrieved party (e.g. job applicant or employee)?

Remedies will either be paid directly to employees by employers, or OLS will collect the amount from the employer and distribute it to workers.

e. What is the City's collection procedure for unpaid orders?

If an employer fails to comply with a final settlement agreement, Director's Order, or Hearing Examiner Order within 30 days, OLS will refer the unpaid order to the City Attorney's Office for collection proceedings, which can include referral to a collections agency, filing liens and garnishing wages. OLS also will contact the City's department of Finance and Administrative Services (FAS) to initiate revocation of the employer's business license. FAS has the authority to revoke a business license until the order is paid.

f. Can the City revoke an employer's business license for unpaid orders?

Yes. If an employer fails to comply with a final settlement agreement, Director's Order, or Hearing Examiner Order within 30 days, OLS will contact the City's department of Finance and Administrative Services (FAS) to initiate revocation of the employer's business license. FAS has the authority to revoke a business license until the order is paid.

g. Can the City debar City contractors for unpaid orders and repeated violations?

Yes. If an employer fails to comply with a final settlement agreement, Director's Order or Hearing Examiner order within 30 days, the employer is not permitted to bid on any City contract until s/he has paid the full amount due. Additionally, if an employer is subject to a final order two times or more within five years, the employer is not allowed to bid on any City contract for two years. These restrictions are separate from debarment provisions for public works projects in RCW 20.70.

h. Is there successor liability for FCE violations?

Yes. If an employer sells or transfers a business, any person who becomes a successor to that business becomes liable for the full amount of a final unpaid order if the successor had actual knowledge of the order or had prompt, reasonable and effective means of accessing the amount of the order.

7. Employer Civil Penalties

a. Will OLS impose civil penalties and fines for new requirements resulting from the 2015 Wage Theft Prevention and Labor Standards Harmonization Ordinance?

Until September 30, 2016, OLS refrained from imposing civil penalties and fines for an employer's failure to comply with certain requirements resulting from the 2015 Wage Theft Prevention and Labor Standards Harmonization Ordinance and certain notice requirements of the original Wage Theft Ordinance.

OLS will remedy the problem (by settlement agreement or Director's Order, if necessary), but will not record the incident as a "violation" that incurs civil penalties and fines. OLS recognizes that employers are still in the process of learning about these requirements and our goal is to help employers achieve compliance. This "soft launch" of certain requirements includes:

- Displaying an OLS-created "Workplace Poster" with notice of rights in English and the primary language(s) of employees at the workplace.

For more information about these requirements, please see this guide, Changes to Seattle's Labor Standards Laws.

8. **Can civil penalties and fines owed to the City of Seattle be waived or reduced if an employer quickly pays workers?**
   Yes. The OLS Director has the discretion to waive or reduce civil penalties (i.e. penalties owed to the City) for prompt payment to workers after service of the final order.
   - **Payment to workers within 10 days:** Penalties and fines waived 100%.
   - **Payment to workers within 15 days:** Penalties and fines reduced by 50%.
   - **Payment to workers after 15 days:** Penalties and fines must be paid 100%.

9. **What civil penalties can the OLS Director impose?**

10. **What civil fines can the OLS Director impose?**

Violation	**Civil Penalty**
(Willful) Workplace Poster Violation	Mandatory civil penalty of $750 for the first violation and $1,000 for subsequent violations
(Willful) Interference	Mandatory civil penalty of $1000 to $5000
Violation	**Fine**
Failure to provide employees with written notice of rights (i.e. workplace poster).	$500
Failure to comply with prohibitions against retaliation.	$1,000 per aggrieved party
Failure to provide notice of investigation to employees.	$500
Failure to provide notice of failure to comply with final order to the public.	$500

11. **What does the City do with the money collected from civil penalties and fines?**
    The money collected from civil penalties and fines is deposited in the City's general fund which pays for a variety of City project and staffing needs.

If an employer has additional questions, OLS Business Liaisons Darius Foster and Kerem Levitas provide technical assistance on FCE requirements and can be reached at 206-684-4500 or at laborstandards@seattle.gov.