

ACT 51

S.B. NO. 2193

A Bill for an Act Relating to Employment Discrimination.

Be It Enacted by the Legislature of the State of Hawaii:

SECTION 1. The legislature finds that meaningful opportunities for gainful and legitimate employment are necessary for people with criminal records to achieve economic stability for themselves and their families. The legislature also finds that legitimate employment is significantly correlated with lower recidivism rates for individuals with past convictions, and ensuring more meaningful employment opportunities for people with criminal records may therefore be key to reducing crime and improving public safety in the long-term.

Unfortunately, a job applicant's criminal record, including their conviction history, can itself serve as a barrier to employment opportunities since employers may have express or unconscious biases against hiring or retaining individuals with a record, even if those records are extremely old, for relatively minor crimes, or unrelated to specific employment opportunities. Recognizing this, the legislature was at the forefront of a national movement to pass "ban the box" legislation, which is intended to address employment hurdles that people with criminal records face. Hawaii's current "ban the box" law generally prohibits the use of arrest and court records as a basis for employment discrimination, subject to exceptions for certain occupations. An employer may inquire about and consider conviction records up to ten years old if those records have a "rational relationship" to the duties and responsibilities of the position in question.

Unfortunately, Hawaii's current "ban the box" law, specifically its ten-year conviction record "lookback" exception, may continue to facilitate employment discrimination against individuals who have a criminal history, but who have long since paid their debt to society and pose little to no risk to an employer or the public. For example, employers may use conviction information they acquire in a ten-year background check explicitly allowed under the law to ostensibly justify discrimination against individuals with a conviction record, regardless of the age of their conviction or relevance to the job at hand. Even employers and human resource professionals with good intentions may be affected by unconscious biases and make adverse decisions against wholly qualified employees and prospective employees who have a ten-year-old record. Compounding this problem, background checks are often inaccurate, and can still show arrest and expunged records in conflict with what is currently allowed to be used under the existing statute. Accordingly, even individuals who have not been convicted of

a crime or have had their records expunged may continue to face employment challenges as a result of the ten-year “lookback” period.

The legislature finds that the ten-year “lookback” period for conviction records should be shortened to reduce unnecessary employment discrimination against individuals with old and relatively minor conviction records, in furtherance of economic self-sufficiency, and to reduce crime and recidivism rates.

The purpose of this Act is to limit the convictions that may be used in employment decisions, from all convictions in the most recent ten years, to felony convictions that occurred in the most recent seven years and misdemeanor convictions that occurred in the most recent five years. This Act is not intended to amend or affect existing exceptions that explicitly allow the use of criminal history-related records for certain occupations, such as department of education employees, and specific circumstances, such as sex offender registration.

SECTION 2. Section 378-2.5, Hawaii Revised Statutes, is amended by amending subsections (c) and (d) to read as follows:

“(c) For purposes of this section, “conviction” means an adjudication by a court of competent jurisdiction that the defendant committed a crime, not including final judgments required to be confidential pursuant to section 571-84; provided that the employer may consider the employee’s conviction record falling within a period that shall not exceed the most recent ~~[ten years,]~~ seven years for felony convictions and the most recent five years for misdemeanor convictions, excluding periods of incarceration. If the employee or prospective employee claims that the period of incarceration was less than what is shown on the employee’s or prospective employee’s conviction record, an employer shall provide the employee or prospective employee with an opportunity to present documentary evidence of a date of release to establish a period of incarceration that is shorter than the sentence imposed for the employee’s or prospective employee’s conviction.

(d) Notwithstanding subsections (b) and (c), the requirement that inquiry into and consideration of a prospective employee’s conviction record may take place only after the individual has received a conditional job offer, and the limitation to the most recent ~~[ten-year period,]~~ seven-year period for felony convictions and the most recent five-year period for misdemeanor convictions, excluding the period of incarceration, shall not apply to employers who are expressly permitted to inquire into an individual’s criminal history for employment purposes pursuant to any federal or state law other than subsection (a), including:

- (1) The State or any of its branches, political subdivisions, or agencies pursuant to sections 78-2.7 and 831-3.1;
- (2) The department of education pursuant to section 302A-601.5;
- (3) The department of health with respect to employees, providers, or subcontractors in positions that place them in direct contact with clients when providing non-witnessed direct mental health services pursuant to section 321-171.5;
- (4) The judiciary pursuant to section 571-34;
- (5) The counties pursuant to section 846-2.7(b)(5), (33), (34), (35), (36), and (38);
- (6) Armed security services pursuant to section 261-17(b);
- (7) Providers of a developmental disabilities domiciliary home pursuant to section 321-15.2;
- (8) Private schools pursuant to sections 302C-1 and 378-3(8);

- (9) Financial institutions in which deposits are insured by a federal agency having jurisdiction over the financial institution pursuant to section 378-3(9);
- (10) Detective agencies and security guard agencies pursuant to sections 463-6(b) and 463-8(b);
- (11) Employers in the business of insurance pursuant to section 431:2-201.3;
- (12) Employers of individuals or supervisors of individuals responsible for screening passengers or property under title 49 United States Code section 44901 or individuals with unescorted access to an aircraft of an air carrier or foreign carrier or in a secured area of an airport in the United States pursuant to title 49 United States Code section 44936(a);
- (13) The department of human services pursuant to sections 346-97 and 352-5.5;
- (14) The public library system pursuant to section 302A-601.5;
- (15) The department of public safety pursuant to section 353C-5;
- (16) The board of directors of a cooperative housing corporation or the manager of a cooperative housing project pursuant to section 421I-12;
- (17) The board of directors of an association under chapter 514B, or the managing agent or resident manager of a condominium pursuant to section 514B-133; and
- (18) The department of health pursuant to section 321-15.2.”

SECTION 3. Statutory material to be repealed is bracketed and stricken. New statutory material is underscored.

SECTION 4. This Act shall take effect upon its approval.

(Approved September 15, 2020.)