

California Employers Face New Criminal History Rules

Earlier this year, California’s Fair Employment and Housing Council approved new regulations on the use of criminal history in employment decision-making, and Los Angeles joined a growing list of cities that have “banned the box.” Both state and city regulations that limit employers’ consideration of criminal history in hiring and other employment decisions became enforceable on July 1. Employers should review their applicant screening, hiring and other employment practices to ensure compliance.

Background

For some time, California laws have prohibited employers from using certain criminal background information in hiring, promotion, training, discipline, termination and other employment decisions. For example, state law bars asking applicants to provide information about detentions or arrests that did not result in a conviction (unless the applicant is awaiting trial), referrals to or participation in diversion programs, juvenile records, or convictions that have been judicially dismissed or sealed. It also restricts employers from obtaining and using current employees’ criminal records in employment decision-making. Local ordinances in cities like San Francisco and Los Angeles further limit employers’ ability to use criminal records for employment purposes.

On December 9, 2016, Los Angeles enacted the “Fair Chance Initiative for Hiring (Ban the Box)” ([Fair Chance Ordinance](#)), limiting the use of criminal history information by employers that are located or doing business in the city and have 10 or more employees. With certain narrow exceptions, the ordinance prohibits employers from conducting criminal background checks or inquiries concerning a job applicant prior to a conditional job offer – effectively eliminating such inquiries on a job application and during the interview process. While allowing post-offer checks and inquiries, the law imposes additional requirements on an employer that seeks to base a hiring decision on criminal history information it receives. Although the ordinance took effect on January 22, it gave employers (including city contractors and subcontractors) a six-month grace period to come into compliance. (See our [January 24, 2017 For Your Information](#).)



FEHC Criminal Background Regulations

On March 27, the state's Office of Administrative Law approved the California Fair Employment and Housing Council's (FEHC) new criminal background [regulations](#) that limit employers' ability to consider criminal convictions when making employment decisions. The FEHC regulations, which largely adopt the EEOC's 2012 [Enforcement Guidance](#) on the use of arrest and conviction records for employment purposes, take effect July 1.

California's new rules expand the types of criminal history employers may consider, prohibiting consideration of any non-felony convictions for marijuana possession that are more than two years old. They also impose new notice requirements on employers that would disqualify prospective hires because of a criminal record.

When the source of the criminal history is a third party (such as a consumer report or internally generated search) rather than the applicant or employee, employers must provide the applicant notice of the disqualifying conviction along with a reasonable opportunity to present contrary evidence before taking adverse action. If the applicant shows the information is factually inaccurate, the employer cannot consider the conviction in its decision-making. While the federal Fair Credit Reporting Act requires notice when the employer takes adverse action based on information from a third-party background check, local ban-the-box ordinances in cities like Los Angeles and San Francisco may require notice when adverse action is taken based on criminal history information from any source, including the applicant.

Similar to the EEOC guidance, the FEHC regulations preclude employers from considering criminal history if that would result in an adverse impact or disproportionately exclude individuals within a protected class such as race or national origin, harmonizing federal and state law on this issue. If an applicant can establish such an impact through statistics or other evidence, the employer must show that the policy is both "job related and consistent with business necessity" and sufficiently tailored to the circumstances; the amount of time elapsed since the offense or completion of the sentence; and the nature and responsibilities of the job. Even when such a showing is made, an applicant or employee would still be able to bring a claim by demonstrating there is a less discriminatory alternative available.

Employers that rely on broad policies that automatically disqualify applicants with certain types of prior convictions will face an increased burden to justify the disqualification. Under the new regulations, bright-line disqualification policies that use conviction-related information that is seven or more years old are presumed to be insufficiently tailored to pass muster.

EEOC Enforcement Guidance

Unlike recent ban-the-box laws, EEOC guidance does not prohibit the use of criminal records for employment purposes. However, it does confirm that using criminal history in making hiring and other employment decisions may violate Title VII's prohibition against employment discrimination.

In determining whether a particular criminal offense should disqualify an individual from employment, employers must consider:

- The nature and gravity of the offense or conduct
- How much time has passed since the offense or sentence occurred
- The nature of the job

Los Angeles Fair Chance Regulations

On January 22, the city issued [rules and regulations](#) to implement the so-called “fair chance” or “ban-the-box” ordinance. The regulations clarify key definitions (including “employee” and “employer”), notice and posting requirements, and the procedures employers must follow before seeking an applicant’s criminal history.

Definitions

The regulations provide the following definitions:

- *Applicant* is any individual who submits an application for employment, regardless of that person’s location.
- *Criminal History* includes information regarding any plea, verdict, or finding of guilt, regardless of whether a sentence was imposed, from any source and in any format.
- *Employee* means any person who performs at least two hours of work within the city of Los Angeles on an average week (not including time spent traveling through the city without employment-related stops). The term includes: full-time, part-time, seasonal, and temporary employees; independent contractors; owners, management, and supervisory employees; and telecommuters who work from home and live in Los Angeles, regardless of where the employer is located.
- *Employer* includes all private employers, city contractors and subcontractors, with employees who physically work within the city limits.
- *Temporary Help Firm* means any business that recruits, hires and assigns its own employees to perform work at, or services for, another entity for a temporary time period, to support that entity’s workforce.

Notice and Posting Requirements

The regulations require covered employers to:

- Include in internal and external job postings for positions in the city (including postings online and in publications outside Los Angeles) a statement that it will seek all qualified applicants in compliance with the ordinance.
- Conspicuously post in a location visited by applicants a notice of the ordinance at every workplace and job site within the city under the employer’s control.
- Send a copy of the notice to each labor union or workers with a collective bargaining agreement that covers employees located within the city.

Fair Chance Process

Under the fair chance regulations, employers that conduct a criminal background check after a conditional offer has been made that discloses unfavorable applicant information must:

- Perform a written assessment that ties “specific aspects” of the criminal history with risks inherent in the job sought. The employer must consider factors such as the nature and gravity of the offense, time elapsed, and nature and responsibilities of the particular job.
- Engage in the “Fair Chance Process” before taking an adverse employment action.

- Provide the applicant: (1) written notice of the action; (2) a copy of the written assessment that includes at least the factors set forth in the 2012 EEOC Enforcement Guidance; and (3) any other information or documentation supporting the adverse action.
- Give applicants five business days to provide additional or mitigating information.
- If the applicant timely provides such information, the employer must reassess his or her candidacy using the same process, inform the applicant of its decision to withdraw or cancel the conditional job offer, and provide a copy of that assessment.

In Closing

The new limitations on the use of criminal records for employment purposes by Los Angeles and California increase the risks for employers in this area. Employers should review their applicant screening, hiring and other employment practices to ensure compliance.

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