

## California Joins Ban-the-Box Bandwagon

On October 14, California Governor Jerry Brown signed into law new workplace restrictions on employers' use of criminal records in employment decisions. Starting in 2018, California employers will generally be barred from seeking disclosure of job applicants' criminal conviction history or from considering such information prior to a conditional job offer. Employers should review their employment applications, applicant screening protocols and hiring practices to ensure compliance.

### Background

Hawaii first banned conviction questions from job applications in 1998. Since then, a growing number of states and cities have adopted so-called "ban-the-box" or "fair chance" laws that limit prospective employers' ability to consider applicants' criminal history for employment purposes. These laws generally require public and/or private employers to delete the check-off box on their job applications that asks whether prospective hires have a criminal record, and bar inquiries into applicants' criminal history records during the initial stages of the hiring process.

California initially banned the box for public employers in 2014, but expanded the restrictions to certain government contractors the following year. Since 2015, it has required bidders on state contracts involving onsite construction-related services to certify that they will not ask an applicant to disclose conviction history on or at the time of an initial employment application unless required under federal or state law. (See our [October 8, 2014 FYI In-Depth](#).) With certain limited exceptions for law enforcement and health care facilities, existing state [law](#) generally prohibits both public and private employers from inquiring into an applicant's juvenile convictions or using them as a factor in determining any condition of employment.

Earlier this year, Los Angeles' "Fair Chance Initiative for Hiring (Ban the Box)" went into effect, limiting the use of criminal history information by employers that are located or doing business in the city. Unlike San Francisco's 2014 ban-the-box law that restricts questions about criminal history on job applications and generally prohibits criminal history inquiries until after the *initial* job interview, the Los Angeles ordinance bars employers from inquiring about criminal histories *prior to a conditional offer of employment*. (See our [January 24, 2017 For Your Information](#).)



Nine states, the District of Columbia and 15 major cities – including Los Angeles and San Francisco – now have fair chance hiring laws that cover both public- and private-sector employers, and more than 20% of the U.S. population lives where state or local laws restrict private employers' ability to inquire into applicants' criminal records.

## New Statewide Restrictions

On October 14, California became the latest state to ban the box when Governor Jerry Brown signed [AB 1008](#) into law. The bill amends the state's Fair Employment and Housing Act (FEHA) to prohibit employers that have five or more employees from seeking or relying on criminal history information for employment purposes until after a conditional offer of employment has been made. The new statewide restrictions on employers' use of criminal records will go into effect on January 1, 2018.

Largely modeled after Los Angeles' ban-the-box ordinance, the state law adds a new Section 12952 to FEHA that generally bars employers from:

- Asking about conviction history on an employment application
- Inquiring into or considering applicants' conviction history prior to a conditional offer of employment
- Considering or sharing information while conducting a conviction history background check about: certain arrests not followed by a conviction; referral to or participation in a pretrial or post-trial diversion program; and convictions that have been sealed, dismissed, expunged, or statutorily eradicated

Like other ban-the-box laws currently in effect, California's new law narrowly excludes from coverage certain employers and positions. It will not apply to jobs in law enforcement or with criminal justice agencies, state or local agencies required to conduct background checks, farm labor contractors, and employers required by state, federal, or local law to check criminal history.

**Comment.** Because the state law did not exempt local fair chance ordinances – such as San Francisco's and Los Angeles' – that may impose additional or greater restrictions on applicant screening and other hiring practices, it is important for California employers to understand and monitor relevant local laws in the jurisdictions in which they operate.

## Rejecting Applicants

Like the Los Angeles, New York, and San Francisco ordinances, the new California law requires employers to follow a "fair chance" process before rejecting an applicant based on conviction history. Before conducting a criminal background check, employers should ensure they are complying with any consent and notification requirements of federal and state Fair Credit Reporting Acts. Employers that use a consumer reporting agency for that purpose should run the fair chance process concurrently with the pre-adverse and adverse action requirements of those laws.

Under California's new law, employers that intend to deny employment on the basis of an applicant's criminal history must:

- Make an individualized assessment of whether that history has a direct and adverse relationship with specific job duties justifying the rejection
- Notify the applicant in writing of a preliminary decision to reject, identify the prior conviction used in whole or in part as the basis for denying employment, provide the applicant with a copy of any conviction history report, and give the applicant an opportunity to respond before finalizing the decision
- Allow the applicant at least five business days to respond and consider any information provided before making a final employment decision
- Notify the applicant of any final decision, among other disclosures

**Comment.** Because California’s new law largely follows the best practices set out in the EEOC’s 2012 [guidance](#) on the use of arrest and conviction records in employment decisions, many employers may already conduct individualized assessments when evaluating job candidates. However, California employers should review their practices to ensure that they will be in compliance with applicable federal, state and local laws when they request or utilize criminal background checks during the hiring process.

Employees will be able to file claims with the California Department of Fair Employment and Housing for violation of the state’s ban-the-box law. Available remedies for violation may include compensatory damages, punitive damages, and attorney’s fees in addition to all other rights and remedies that an applicant may have under any other laws, including local ordinances.

## In Closing

California employers should review their employment applications, applicant screening protocols and hiring practices to ensure compliance with new restrictions on the use of criminal records that go into effect next year.

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