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California Becomes Latest State to "Ban the Box"

New Law Takes Effect January 1, 2018

Employers Will Be Required To Individually Assess Whether Conviction History Has A Direct And Adverse Relationship With Specific Duties Of The Position

Governor Jerry Brown has signed a statewide law (AB 1008) governing when and what types of conviction history information employers may consider regarding job applicants.

The topic of when and how employers may consider criminal convictions continues to be a hot topic, both nationally and in California. In 2013, California enacted a law precluding state agencies and cities from inquiring about or using information related to criminal conviction history except in specified instances (Labor Code section 432.9). Similarly, in 2014 and 2016 the cities of San Francisco and Los Angeles, respectively, enacted "Fair Chance" Ordinances limiting how and when employers could consider applicants' criminal conviction information, thus joining Compton and Richmond as California municipalities with such restrictions. The Fair Employment and Housing Council recently issued final regulations regarding "Consideration of Criminal History in Employment Decisions" which took July 1, 2017.

Outside of California, over two dozen states and over one hundred cities have also enacted "ban the box" laws designed to remove employment barriers by delaying and/or limiting when an applicant's conviction history may be considered.

Given these trends, it is not surprising that Governor Brown signed this legislation. It's also no surprise that California's new law is broader than most other states in that it not only imposes initial limits upon when and what information may be considered, but it also imposes new notice requirements within fairly tight time frames for employers. In this regard, California's version echoes the federal Fair Credit Reporting Act (FCRA) and California's Investigative Consumer Reporting Agencies Act (ICRA) by requiring employers notify applicants about a tentative adverse decision based upon the conviction history and provide the applicant an opportunity to respond.

Here is an overview of the law's key provisions and some steps employers should consider taking in order to ensure compliance with this new law, which takes effect January 1, 2018.

What is Prohibited and What is Required?

At the outset, because AB 1008 amends the Fair Employment and Housing Act rather than the Labor Code, it applies to all employers with five or more employees.

Like many "Ban the Box" ordinances, AB 1008 creates an initial delay before an employer can even seek information related to conviction history. Specifically, new Government Code section 12952 precludes

employers from including on employment applications any question seeking the disclosure of an applicant's conviction history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made.

Even after a conditional offer is made, AB 1008 limits the type of information that can be obtained or considered during a background search. Specifically, it precludes the consideration, distribution or dissemination of the following specific items during any background checks: (a) arrests not followed by conviction (except where the applicant is seeking employment at specified health facilities or where after an arrest the applicant is out on bail or released on their own recognizance pending trial); (b) referrals to or participation in a pretrial or post-diversion program; or (c) convictions that have been sealed, dismissed, or expunged pursuant to law. It also prohibits employers from interfering with or restraining the exercise of any right provided under this new section.

Before denying a position based upon an applicant's conviction history, the employer would also need to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position. In doing so, employers would need to consider all of the following: (a) the nature and gravity of the offense; (b) the time that has passed since the offense and completion of any sentence; and (c) the nature of the job held or sought. This bill also provides that employers may, but are not required to, commit the results of this individualized assessment to writing. In this respect, AB 1008's requirements are similar to the individual assessment contemplated by the EEOC's 2012 Enforcement Guidance regarding the consideration of arrest and conviction records, even though initially proposed language expressly requiring employers follow the EEOC's guidance were removed by amendment.

For these requirements, the new law provides that "conviction" shall have the same meaning as defined in paragraphs (1) and (3) of subdivision (a) of current Labor Code section 432.7. It further provides that notwithstanding that exception, "conviction history" includes an arrest not resulting in conviction for the specific, limited purposes enumerated in section 432.7 when an employer is a health facility (as defined) or an arrest for which an individual is out on bail or his or her own recognizance pending trial.

New Notice Requirements

While many other states simply limit when and what type of information may be considered, California's law imposes new notice requirements on the state's employers. The notice requirements (summarized below) are similar to those required by San Francisco and Los Angeles' Ban the Box Ordinances and/or mimic some of the written notice requirements of the FCRA and ICRA.

For example, if an employer makes a preliminary decision the applicant's conviction history disqualifies them from employment, the employer must provide written notice of this preliminary decision to the applicant. While the employer may, but is not required to, justify or explain the employer's reason for making this preliminary decision, the notice must contain all of the following: (a) notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer; (b) a copy of the conviction history report, if any; and (c) an explanation of the applicants right to respond to the employer's preliminary decision before it becomes final and the deadline for doing so. The notice in new subsection (c) requires applicants be informed that they may challenge the accuracy of the conviction history

that is the basis for rescinding the offer, or submit evidence of rehabilitation or mitigating circumstances, or both.

The applicant will then have at least five business days to respond before a final employment decision can be made. If within the five business days the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report at issue and is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have five additional business days to respond to the notice.

Employers would need to consider the applicant's response before making a final decision. If an employer makes a final decision to deny an applicant in whole or in part upon prior conviction history, the employer must notify the employee in writing of the following: (a) the final denial or disqualification; (b) any existing procedure the employer has for the applicant to challenge this decision; and (c) the right to file a complaint with the Department of Fair Employment and Housing. As with the original notice regarding a preliminary decision to rescind, the employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification.

Important Exceptions

To reduce the opposition to this proposed new law, AB 1008 specifically exempts certain positions from its prohibitions and requirements. Specifically, it does not apply to: (1) a position with a state or local agency required to conduct a conviction history background check; (2) a position with a criminal justice agency, as defined in Penal Code section 13101; (3) a position as a Farm Labor Contractor (as defined in Labor Code section 1685); and (4) a position where an employer or agent is required by state, federal or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history, including the Securities Exchange Act.

Lastly, this bill specifies that it does not affect the rights and remedies afforded by any other law, "including any local ordinance[s]," which is potentially significant given the different requirements contained within the San Francisco and Los Angeles Fair Chance Ordinances. Therefore, employers within San Francisco, Los Angeles, Richmond and Compton should consider the requirements of both AB 1008 and their local ordinances.

What Does This Mean for Employers?

To comply with these new provisions, employers should consider the following steps:

- Update applications to remove inquiries related to conviction history (although it may remain permissible to advise applicants that the employer may inquire about and consider conviction history information after a conditional offer is extended);
- Train hiring managers and supervisors, as well as any third-party recruiters, to avoid inquiring about an applicant's conviction history until after a conditional offer of employment has been extended;

- Train hiring managers and any third-party investigators on the types of information that may be obtained during a background search for conviction history information;

- Because this law precludes consideration of convictions that have been sealed, dismissed, expunged, or "statutorily eradicated pursuant to law," train hiring managers to be careful relying on unverified information and to consider using only professional background screeners;
- Train those involved in the hiring decision about the factors that must be considered when determining whether prior convictions disqualify an applicant;
- Develop protocols and notices for the so-called Fair Chance Process wherein the employer notifies applicants of potentially disqualifying convictions and provides an opportunity to respond; and
- For employers in municipalities with their own Ban the Box Ordinances (e.g., Los Angeles, San Francisco, Richmond and Compton), check those ordinances for additional requirements or limitations regarding conviction history information.

A complete copy of the text of AB 1008 is available at:
http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB1008

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