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Special Alert - Employers Need to Be Aware of These Substantial Changes to Background Check Rules in California and Understand that More Changes May Be Forthcoming; also, the California Supreme Court Clarified Day of Rest Rules

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California's Day of Rest Statutes Provide No Rest for Employers

Last month, the California Supreme Court issued its opinion in *Mendoza v. Nordstrom, Inc.*, providing guidance to California employers on scheduling of non-exempt employees.

Former employees filed a class action lawsuit alleging Nordstrom violated California labor laws by failing to provide statutorily guaranteed days of rest. The district court held there was no violation and dismissed the action, and the employees appealed. The Ninth Circuit Court of Appeals requested the California Supreme Court resolve unsettled questions relating to the operation of California's "day of rest" statutes.

At issue are two related provisions of the California Labor Code that ensure day of rest protection for employees. Labor Code section 551 entitles employees to "one day's rest therefrom in seven," and Labor Code section 552 prohibits employers from "caus[ing] employees to work more than six days in seven." The day of rest guarantee does not apply, however, "when the total hours of employment do not exceed 30 hours in any week or six hours in any one day thereof." (Labor Code § 556.)

Calculating the Workweek

First, the California Supreme Court answered a question concerning the calculation of the seven-day period provided in Labor Code sections 551 and 552. The Court held employees are guaranteed a day of rest for each "workweek," rather than one day in every seven on a rolling basis. The Court also explained there is no per se prohibition on periods of more than six consecutive days of work that stretch across more than one workweek. In other words, an employer with a typical Sunday-Saturday workweek could satisfy the day of rest requirement by scheduling a two-day weekend every other week.

Defining the Meaning of "Cause"

Next, the Court clarified what it means for an employer to "cause" an employee to go without a day of rest, which is prohibited by Labor Code section 552. The Court held an employer causes an employee to go without a day of rest when it "induces" the employee to forgo rest to which he or she is entitled. An employer, however, is not liable simply because an employee independently chooses to work a seventh day. An employer's obligation is only to "apprise employees of their entitlement to take a day of rest and thereafter to maintain absolute neutrality as to the exercise of that right."

The Court did not further expound on what would be considered inducement, other than to say both express requirements and implied pressure could be considered inducement. The Court also noted the mere payment of overtime is not an impermissible employer inducement.

Clarifying the "Six Hours in Any One Day" Exemption

Lastly, the Court concluded the exemption in Labor Code section 556 applies only if both conditions are satisfied: (1) the employee works no more than 30 hours in the workweek, and (2) the employee works no more than six hours each and every day of the given week.

For instance, if an employee works four hours every day of the week, the employee is not entitled to a day of rest because the employee will have worked only a total of 28 hours and fewer than six hours each day during the workweek. On the other hand, if an employee works more than six hours one day but only four hours every other day in the week, the exemption would not apply because the employee will have worked more than 30 hours in the workweek and more than six hours in one day.

Other Exceptions to the Seventh-Day Rule

Although not included in the questions certified by the ninth circuit, the California Supreme Court recognized the exception in Labor Code section 554(a), explaining that the day of rest provisions shall not "be construed to prevent an accumulation of days of rest when the nature of employment reasonably requires that the employee work seven or more consecutive days, if in each calendar month the employee receives days of rest equivalent to one day's rest in seven." In other words, if at one time an employee works every day of a given week, the employee must be permitted multiple days of rest in another week to compensate. Unfortunately, however, the Court did not provide guidance on the circumstances under which the "nature of the employment" allows employees to accumulate days of rest to be used at a different time during the given month.

Additionally, section 554(a) provides that collective bargaining agreements may waive the day of rest statutes if done so "expressly." And, the California Labor Commissioner may also exempt employers under Labor Code section 554(b) when, in his or her judgment, an exemption will avoid "hardship."

How to Comply with the Day of Rest Statutes

The California Supreme Court's decision in *Mendoza* provided much needed clarification to California employers. Initially, employers should notify their employees of their statutory entitlement to a day of rest, which can be done through a provision in the employee handbook or a separate memorandum to all employees. Employers also should consider training their managers and supervisors on this topic, especially in industries where seven-day-a-week operations are common (e.g. healthcare).
Because employers cannot unduly influence an employee's decision to work shifts that violate the day of rest statutes, employers should review and/or reconsider the use of any incentive programs that reward employees for working additional shifts.

Finally, it is important California employers remember the increased overtime pay requirements when non-exempt employees work seven days in a workweek. Employees are entitled to time and a half overtime pay for the first eight hours of work on the seventh consecutive day in a workweek, and double time for all hours beyond eight.

Alert continued on next page…

Navigating the Complex Legal Framework of Conducting Employment-Related Background Checks in California

Nearly one in three adults in California have a prior arrest or conviction record. This number is staggering and has fueled debate in recent years about pre-employment background screenings that encompass an individual's criminal history.

Obtaining an applicant or employee's criminal history can be a vital tool in the employment screening process. Benefits of maintaining a background check screening program include improved regulatory compliance and increased safety and security of employees and customers. There are however several public policy concerns that overshadow these benefits, including concerns about identify theft, invasion of privacy, and the potential adverse impact these practices can have on minorities in the workforce who have been historically disadvantaged by the criminal justice system. These public policy concerns have resulted in the implementation of various laws and regulations over the past several decades. For instance, both the federal government and California have enacted laws that protect the rights of applicants and employees to receive certain disclosures when their personal information is going to be used for employment purposes and allow these individuals to choose whether to authorize certain background reports. California also enacted various restrictions on the types of convictions an employer can consider when evaluating an applicant's criminal history.

More recently, the debate has switched from what information an employer can obtain as part of a background check, to when and how employers may consider criminal convictions. This article, while by no means comprehensive, is intended to provide an overview of the current status of the legal landscape in California with respect to procuring and using criminal history in connection with pre-employment screenings.[1]

When Can An Employer Inquire About Criminal History?

Nationwide, 24 states and more than 150 cities and counties have adopted so-called "ban the box" laws which preclude employers from inquiring about an applicant's criminal record or conviction history until *after* a conditional offer of employment has been made. The premise behind these laws is that they enable the employer to consider a candidate's qualifications first-- without the stigma associated with a criminal record.

Although California has a "ban-the-box" law that applies to state agencies and cities, it currently does not have a statewide "ban-the-box" law that applies to all employers.[2] However, there is a bill pending in the California Legislature that would apply to all California employers, both public and private, that has a "ban-the-box"

[1] This article does not cover the legality of conducting background checks on current employees.

[2] In 2013, California enacted AB 218, codified at Labor Code section 432.9, which precludes state agencies and cities from inquiring about criminal history in connection with any application for employment until after a determination has been made about whether the applicant meets the minimum employment qualifications for the position.

component (AB 1008).[3] (See AB 1008 Bill Information.) Specifically, AB 1008 would amend the Fair Employment Housing Act (FEHA) to preclude employers from including on employment applications any question seeking the disclosure of an applicant's criminal history, or to otherwise inquire or consider the conviction history of an applicant, until after a conditional employment offer is made.[4]

In addition, San Francisco and Los Angeles have already enacted their own "fair chance" legislation which precludes public and private employers from inquiring into an applicant's criminal history at the application stage and dictates the process an employer must follow when considering criminal history (see chart summarizing applicable laws below).

How Does An Employer Obtain Consent to Procure a Background Report?

The Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA) protect the rights of applicants and employees when their personal information is going to be used for employment purposes. An employer's obligations under the FCRA and ICRAA are triggered when it uses a third-party consumer reporting agency (such as a background screening firm) to procure and prepare background reports on applicants or current employees. These reports are much broader in scope than just a credit report, and can include a variety of information concerning applicants, such as criminal and civil records, driving records, civil lawsuits, educational history, employment history and reference checks.

Before an employer can procure a background report on an applicant, it must first provide the applicant with a disclosure of its intent to obtain a background report and obtain the applicant's written authorization to do so. The FCRA requires employers to make a "clear and conspicuous" written disclosure to the job applicant about the background check, in a document that consists "solely" of the disclosure (referred to as the "stand-alone disclosure" requirement). The ICRRA is more specific and requires the disclosure to contain the following five identified items: (1) that an investigative consumer report may be obtained; (2) the "permissible purpose" justifying the obtaining of a report, i.e., for "employment purposes;" (3) that the report may include information on the applicant's or employee's character, general reputation, personal characteristics, and mode of living; (4) the name, address, and telephone number of the consumer reporting agency conducting the investigation; and (5) the nature and scope of the investigation requested, with a summary of the applicant's or employee's rights under California Civil Code §1786.22. In addition, the disclosure must give the applicant the option to obtain a copy of any report the employer receives.[5]

Recently, the wording and format of the pre-employment background check disclosure and authorization form have come under scrutiny. Federal judges around the country disagree on how to interpret the FCRA's mandate that an employer provide a "stand-alone disclosure" and have reached varying conclusions on what can and cannot be included in the disclosure form. For example, some courts have held including additional state law notices with the disclosure violates the FCRA, while other courts have held the opposite: that the

[3] AB 1008 would repeal and replace Labor Code section 432.9, the public sector "ban-the-box" law passed in 2013.

[4] AB 1008 would not apply to positions where state, federal, or local laws require criminal background checks for employment purposes or restricts employment based on criminal history.

[5] San Francisco and Los Angeles also have their own disclosure and notice requirements.

inclusion of additional state-required notices reinforces the disclosure required by the FCRA. However, on March 20, 2017, the U.S. Court of Appeals for the Ninth Circuit provided some guidance to employers about what absolutely *cannot* be included in the disclosure. Specifically, the ninth circuit held that the disclosure and authorization form cannot include language releasing the employer from any liability relating to the procurement of a background check report. (See *Syed v. M-I, LLC,* 853 F.3d 492 (9th Cir. 2017).

Unfortunately, the two federal agencies with oversight over the FCRA, the Federal Trade Commission (FTC) and the Consumer Financial Protection Bureau, have not promulgated a model disclosure form that employers can use and there is little useful guidance on the issue. The FTC however recently posted a blog article on the topic recommending that employers "keep it simple" and limit disclosures to a "few sentences" of a "simple, easy-to-understand notification that you will obtain a background screening report, perhaps with a simple explanation of what information will be included in the report." (See FTC Blog Article, April 28, 2017.)

What Information Is Off-Limits When Evaluating Criminal History?

California law currently precludes the consideration or dissemination of the following specific items during any background screening: (a) arrests or detentions that did not result in a conviction; [6] (b) referral to or participation in a pretrial or post-trial diversion program; (c) convictions that have been sealed, dismissed, or expunged pursuant to law; (d) an arrest, detention, processing, diversion, supervision, adjudication or court disposition that occurred while the person was subject to the process and jurisdiction of juvenile court law; and (e) any non-felony conviction for possession of marijuana that is two or more years old. (See Labor Code § 432.7 and § 432.8.)

If passed, AB 1008 would add three additional categories to the off-limits list: (1) misdemeanor convictions or infractions for which no jail sentence can be imposed; (2) misdemeanor convictions for which three years have passed since the date of the conviction; and (3) felony convictions for which seven years have passed since the date of conviction. Employers in San Francisco should already be aware of these prohibited areas of inquiry as they are already prohibited by San Francisco's Fair Chance Ordinance.

How Should An Employer Evaluate Criminal History?

Earlier this year, the Fair Employment and Housing Council (FEHC) finalized regulations on consideration of criminal history in the employment context. (See Final FEHC Regulations re Consideration of Criminal History in Employment Decisions.) These regulations take effect on July 1, 2017 and prohibit an employer from considering criminal history in employment decisions if doing so will result in an adverse impact on individuals within a protected class. The FEHC regulations borrow heavily from the Equal Employment Opportunity Commission's April 2012 "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (EEOC Guidance).

[6] California law permits employers to inquire into "unresolved arrests," i.e. arrests for which the employee or applicant is out on bail or on his or her own recognizance pending trial. In contrast, San Francisco's Fair Chance Ordinance only permits consideration by employers where the "unresolved arrest" is less than seven years old and directly related to the individual's ability to do the job.

Like the EEOC Guidance, the FEHC regulations address instances where an employer's background screening practice is being challenged under a disparate impact theory. If an applicant or employee proves that an employer's practice has an adverse impact on any basis protected by the FEHA, i.e. gender, race, national origin, age, etc., the burden shifts to the employer to show that the practice is "job-related and consistent with business necessity." In order to meet this burden, an employer must demonstrate that its practice is appropriately tailored by, at a minimum, taking into account all of the following considerations: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and/or completion of the sentence, and (3) the nature of the job held or sought.

The FEHC regulations provide the employer the option of either using a "bright-line" conviction disqualification policy (provided the practice does not consider convictions greater than 7 years old) or conducting an individualized assessment. Notably, San Francisco's and Los Angeles's Fair Chance Ordinances require employers to conduct an individualized assessment instead of relying on a "bright-line" rule (referred to in the EEOC Guidance as "targeted exclusions").

While the FEHC's regulations take effect on July 1st, these regulations may be quickly superseded by AB 1008, which would require employers to conduct an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the position using the same three factors articulated in the FEHC regulations and EEOC Guidelines.

What Should An Employer Do If It Decides to Take An Adverse Action Based On Criminal History?

The FEHC regulations also require employers to provide applicants and employees with notice and an opportunity to respond before taking any adverse action based on criminal history. These notice obligations are in addition to the pre-adverse and adverse action notices required by the FCRA and under local ordinances (see chart summarizing applicable laws below).

Before taking any adverse action based on criminal history, the FEHC regulations require employers to provide the applicant with notice of any disqualifying conviction and a "reasonable opportunity to present information that the information is factually inaccurate." If the applicant establishes that the record is factually inaccurate, then the record cannot be considered in the employment decision. Additionally, if the employer conducts individualized assessments, the employer must also give the applicant "a reasonable opportunity" to demonstrate an exception should be made under the circumstances. While the employer is not required to change its decision upon receipt of this additional information, it is required to consider it (and be able to explain why it did not change its decision).

Notably, AB 1008 also has its own set of notice provisions which would, for the most part, supersede the FEHC regulations. If an employer makes a preliminary decision to deny employment, the employer must provide written notice of this intent to the applicant and provide all of the following: (a) the conviction that is the basis for the denial; (b) a copy of the conviction history report, if any; (c) examples of mitigation or rehabilitation evidence the applicant may voluntarily provide; and (d) notice of the applicant's right to respond and the deadline for doing so. The applicant will then have at least ten business days to respond before a final employment decision can be made. This response can consist of a challenge to the conviction itself or

evidence of mitigation/rehabilitation evidence, or both, including: (a) that one year has passed since release from a correctional institution without subsequent conviction; (b) compliance with the terms and conditions of probation or parole; or (c) any other evidence of mitigation/rehabilitation, including letters of reference.

Like the FEHC regulations, AB 1008 requires employers to consider the applicant's response before making a final decision. Notably, while the bill originally would have precluded the employer from disqualifying an applicant who showed evidence of mitigation or rehabilitation, this prohibition was removed by recent amendments. However, if an employer does make 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 to challenge this decision; (c) whether the applicant is eligible for other positions with the employer; (d) the earliest day the applicant may reapply; and (e) the right to file a complaint with the Department of Fair Employment Housing.

Conclusion

AB 1008 has passed the Assembly and is currently in the Senate awaiting review and approval. In the interim, employers should review their practices for compliance with federal law, local ordinances and the FEHC regulations. To assist with this review, below is a chart summarizing the various laws and regulations applicable to California private employers. However, it would be prudent for employers to engage a subject matter expert to review their practices and forms (or the forms used by their vendors) to ensure compliance with the patchwork of federal, state and local laws.

	Ban-the-Box	Assessment	Pre-Adverse Action Notice	Adverse Action Notice
FCRA			Copy of report and Summary of Rights Under the FCRA.	Written notice of action with information about the consumer reporting agency who provided report.
San Francisco Fair Chance Ordinance	Not allowed on application. No inquiry until after live interview or conditional offer of employment.	Individualized assessment based on EEOC criteria.	Copy of report with written explanation. Must give applicant at least 7 days to provide evidence of inaccuracies, rehabilitation or other mitigating factors. Employer must hold position open during process.	If applicant provides information, employer must reconsider decision and then inform applicant of final decision.
Los Angeles Fair Chance Ordinance	Not allowed on application. No inquiry until after conditional offer of employment.	Individualized assessment based on EEOC criteria.	Written assessment explaining basis for decision (applying EEOC factors) and informing applicant of right to provide evidence of inaccuracies, rehabilitation or other mitigating factors.	If applicant provides information, employer must consider it and, if employer still intends to proceed with adverse action, must provide written reassessment.

	Ban-the-Box	Assessment	Pre-Adverse Action Notice	Adverse Action Notice
			Employer must wait five business days after providing written assessment and hold position open.	
FEHC Regulations		Individualized assessment or bright-line rule based on EEOC criteria.	Must give applicant notice of the decision and "reasonable opportunity" to provide evidence of inaccuracies, rehabilitation or other mitigating factors.	If applicant provides information, employer must consider it. If applicant provides evidence that conviction history is inaccurate, employer cannot consider the conviction.
AB 1008	Yes. No inquiry until after conditional offer of employment.	Individualized assessment based on EEOC criteria.	Written notice with: (a) the conviction that is the basis for the denial; (b) a copy of the conviction history report, if any; (c) examples of mitigation or rehabilitation evidence the applicant may voluntarily provide; and (d) notice of the applicant's right to respond and the deadline for doing so. Employee has 10 days to respond before employer can make final decision.	Written notice with: (a) the final denial or disqualification; (b) any existing procedure to challenge this decision; (c) whether the applicant is eligible for other positions with the employer; (d) the earliest day the applicant may reapply; and (e) the right to file a complaint with the DFEH.