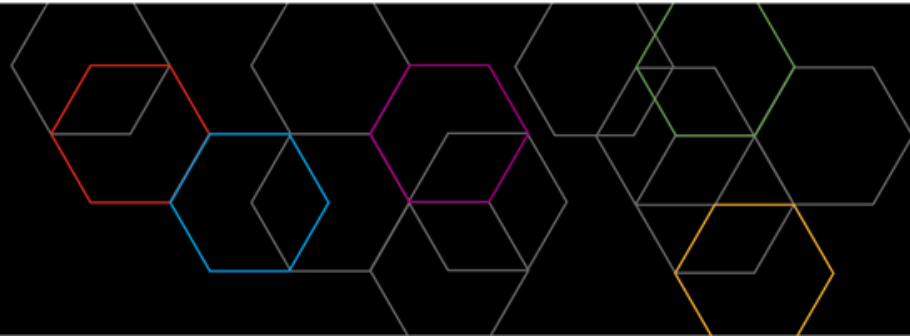


Recruiting & Hiring: Navigating California's New Salary and Criminal History Regulations



Today's eLunch Presenters



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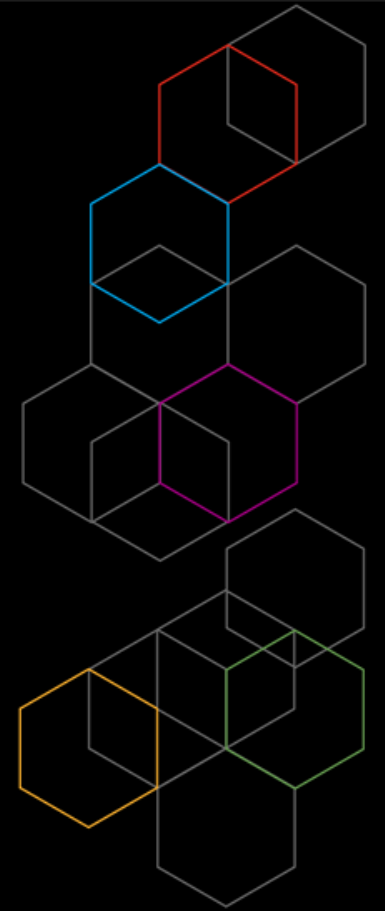


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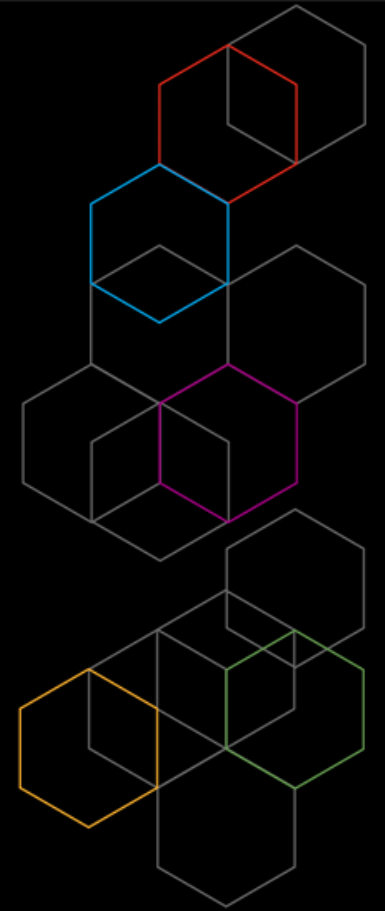
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Agenda



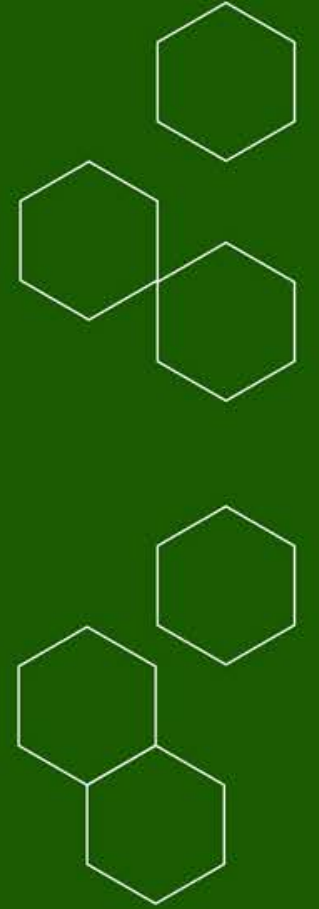
- A.B. 168: California's Ban on Salary History Inquiries.
- A National Trend: San Francisco and Other Laws.
- California's Ban-the-Box Law.
- Overall tips.



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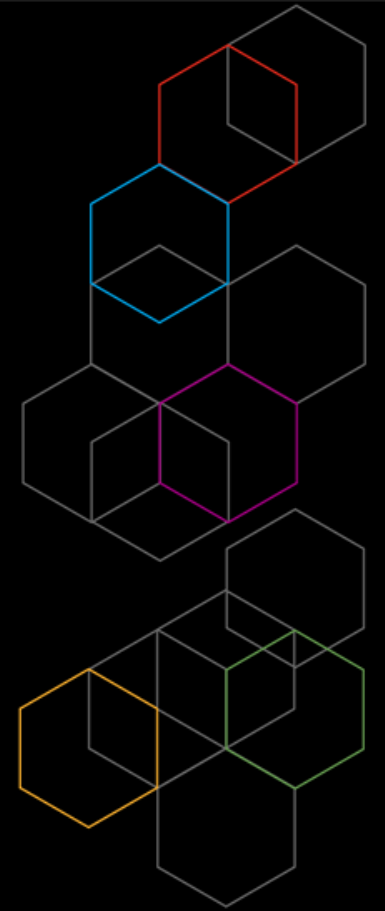
A.B. 168: California's Ban on Salary History Inquiries



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A.B. 168 Summary

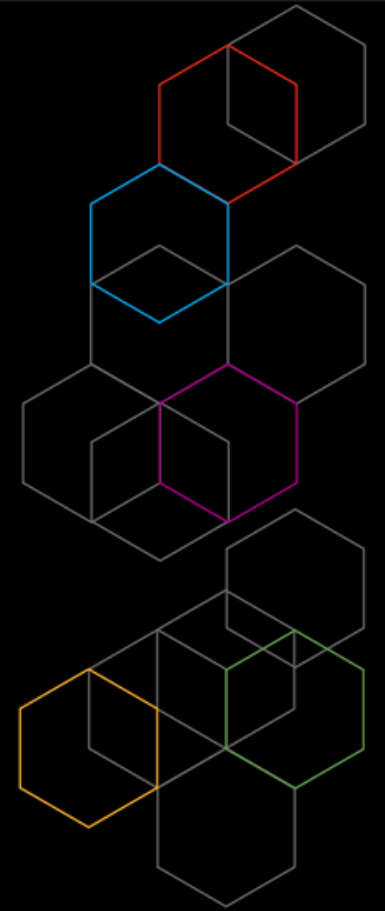
- Key Prohibition:
 - Employers cannot inquire into an applicant's salary history and cannot rely upon that history to set compensation unless it's voluntarily given.
- A national trend: San Francisco, Delaware, Oregon, Massachusetts, Puerto Rico, New York City, and Philadelphia.
- Effective Jan. 1, 2018.



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Coverage

- All employers, including private, public, and employer agents and intermediaries.
- “Applicant” means an applicant for employment.
- “Salary history” not defined in the statute but it generally includes compensation and benefits.

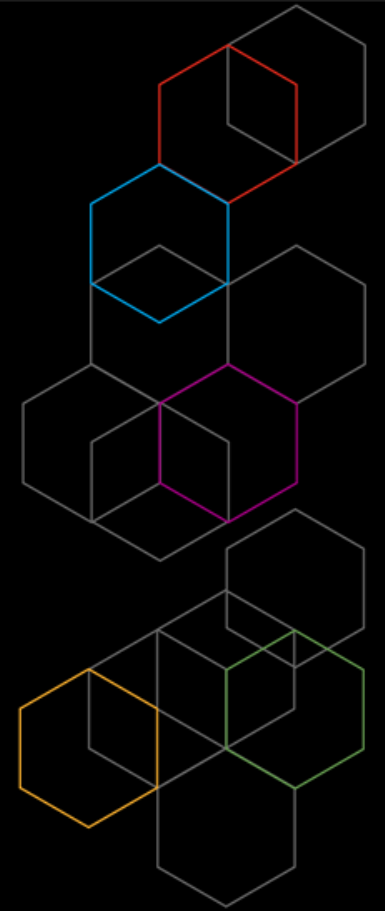


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Prohibitions

- Employers may not:
 - Seek out an applicant's salary history information in any way (e.g., through an agent).
 - Agent: recruiter, headhunter, etc.
 - Rely on salary history as a factor in determining salary or when making a hiring decision.

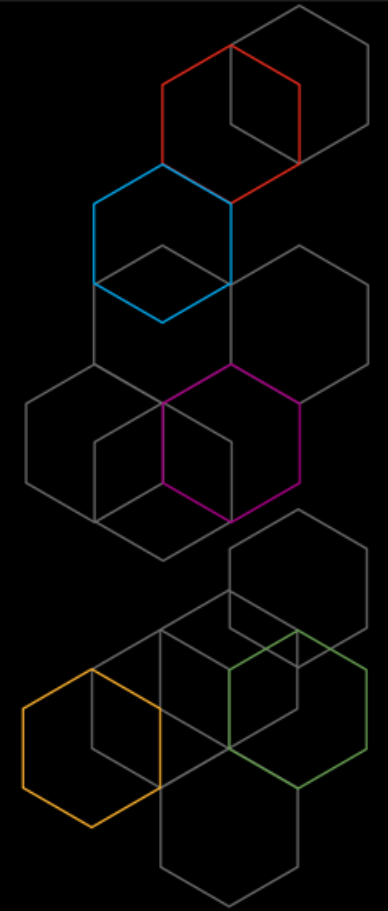


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Permissible Uses

- May consider salary history to determine salary, only if given “voluntarily” and “without prompting.”
 - “Voluntary and without prompting” is undefined.
- Unlike New York City and San Francisco, no express exception for asking about salary expectations.
 - But likely permissible in California.

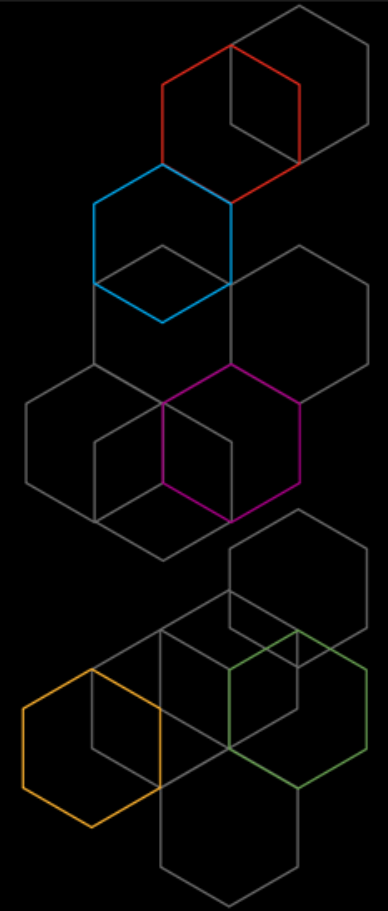


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“Voluntary and without Prompting”

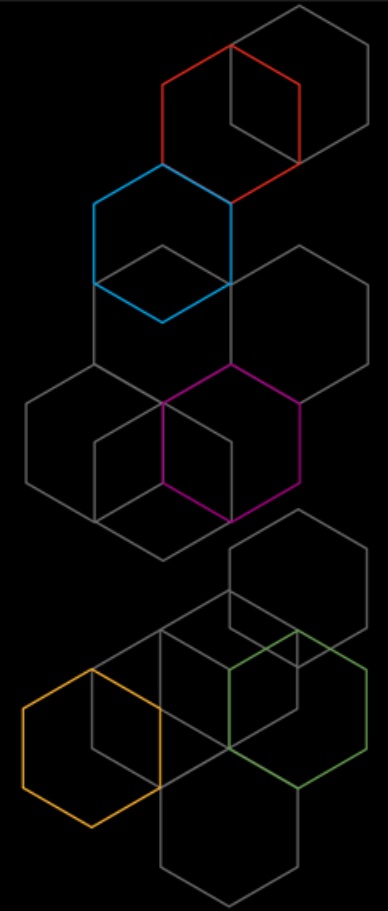
- NYC provides *some* guidance.
- The New York City Commission on Human Rights:
 - “Without prompting” if the average applicant would not think that the employer encouraged the disclosure based on the overall context and the employer’s conduct.



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Pay Scale Disclosure

- Employers must, upon reasonable request, provide applicants with the pay scale for the position.
 - No definition of “reasonable request.”
- Pay Scale:
 - No definition of “pay scale.” It likely refers to the entire pay range for a particular pay grade.



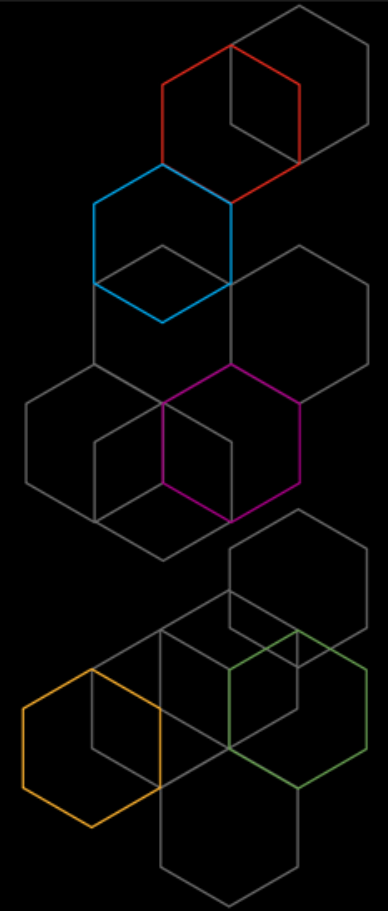
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Penalties



- No specific penalties in the statute.
- Penalties under the California Private Attorneys' General Act presumably are available.
 - \$100 for each aggrieved employee per pay period for the first violation, and \$200 for each aggrieved employee per pay period for each subsequent violation.
 - **Compare:** NYC law – \$125,000 for engaging in an unlawful discriminatory practice or \$250,000 if willful, wanton, or malicious.
- No criminal penalties.

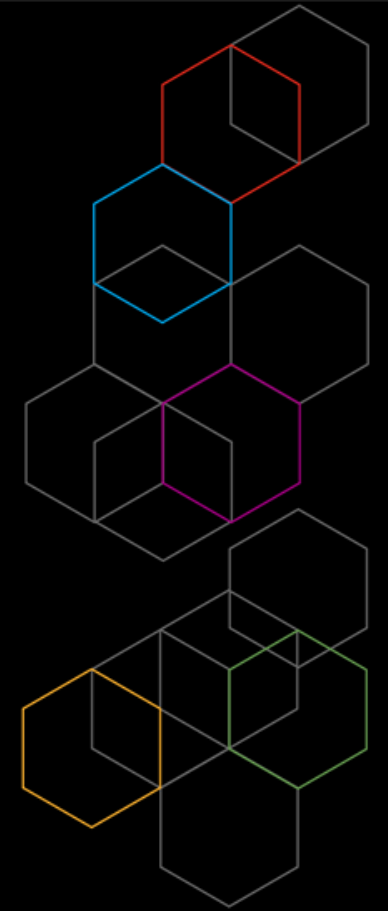


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Threat of “Nuisance” Lawsuits

- No lawsuits yet under California law.
- No lawsuits yet under Delaware or New York City laws.
- Still a threat that applicants will file “nuisance” lawsuits to collect payment for bogus violations.



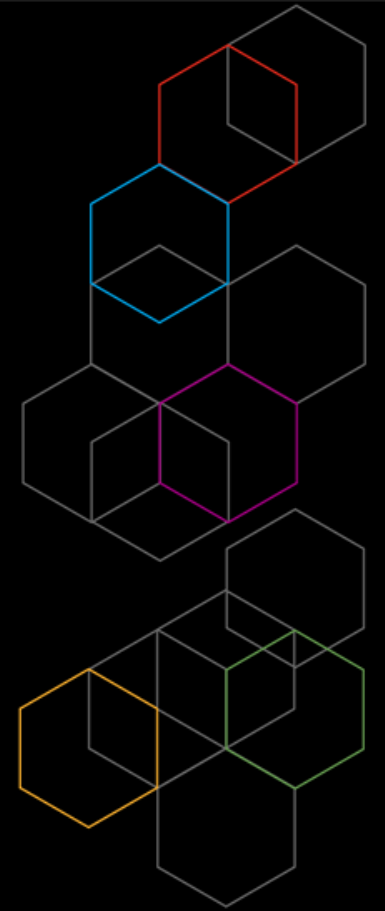
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Keeping Up with the Market Salary



- Now more difficult for employers to determine market salary and pay scale.
- Tips:
 - Ask current employees or persons who are no longer “applicants.”
 - Use anonymous surveys
 - Rely on Bureau of Labor Statistics data or California State Occupational Employment Statistics and Wages Survey data.
 - Obtain general market data from other organizations or private firms.

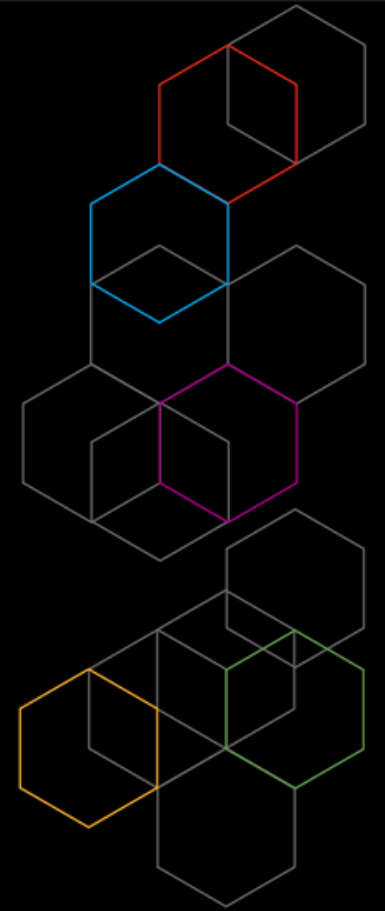


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Examples of Permissible Conduct

- “What compensation package do I need to put together for you to join our company?”
- “What salary are you expecting for this position?”
- Explaining the company’s compensation and benefits package, and letting the applicant volunteer comparisons.
- When speaking to an applicant’s reference: “John has told me his current salary is \$80,000 a year. Can you confirm that?”
- Interviewer asks Jennifer about her duties at her current job. In response, Jennifer tells the interviewer about her benefits and salary. Employer uses information to determine Jennifer’s compensation package.

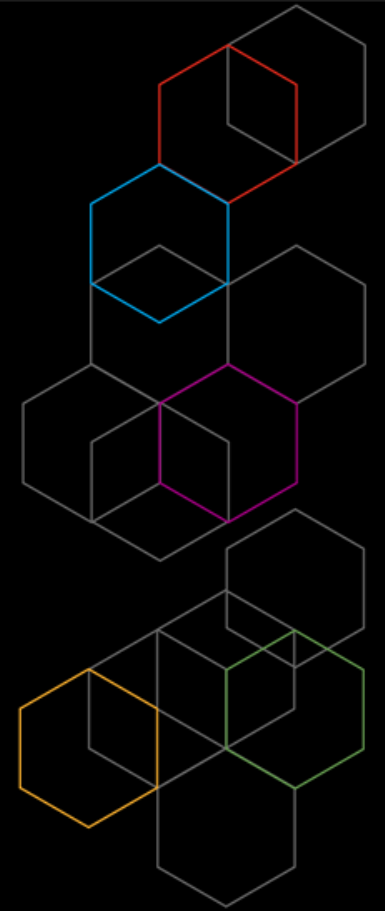


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Impermissible Conduct

- “I’m not allowed to ask you what you’re making, but you can volunteer that information to me.”
- “We can match your current salary if you tell me what it is.”
- Searching for an applicant’s salary history information online.
- Calling the applicant’s previous employer and asking about benefits and compensation.
- “I heard that your current employer pays employees in your position \$60,000 a year, is that true? You don’t have to tell me exactly, but is that a right estimate?”
- Giving the applicant a “voluntary disclosure form” that states that the applicant can reveal salary history by using the form, but is not required to do so.

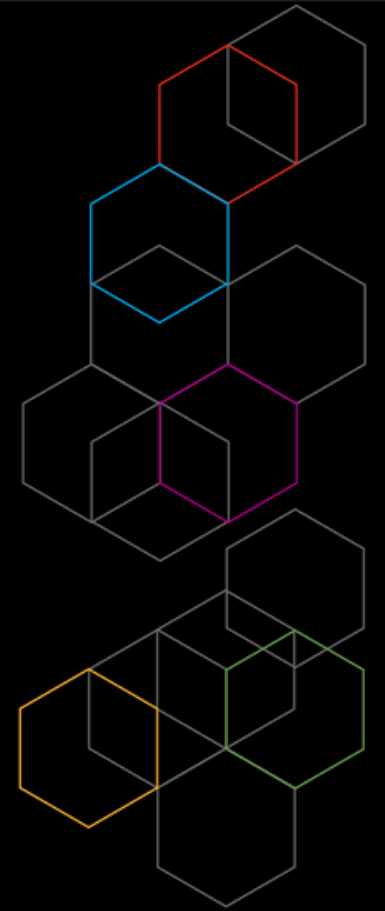


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Impermissible Conduct, Cont.

- When speaking to an applicant's reference: "What is the applicant's current salary?"
- A recruiting firm provides the employer with the salary history of an applicant (or hints at it).
- A recruiter asks the applicant what his or her salary history is or tells the applicant they could reveal their salary if they volunteer to.
- Nationwide online applications that have a question regarding current salary and those applications are used for California applicants.

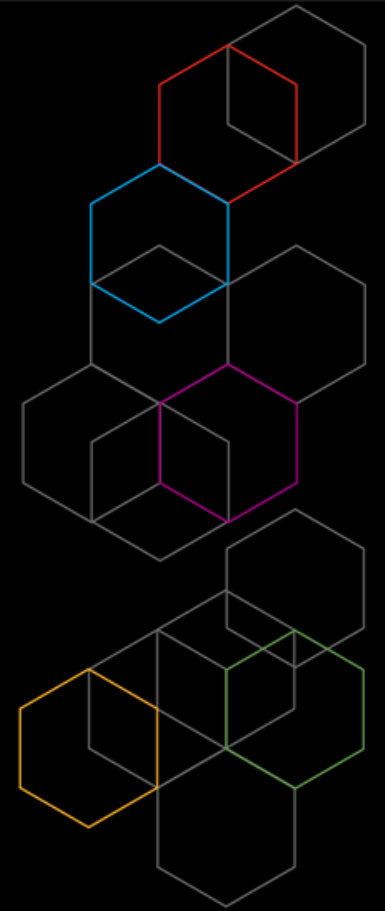


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Conduct that may or may not be permissible

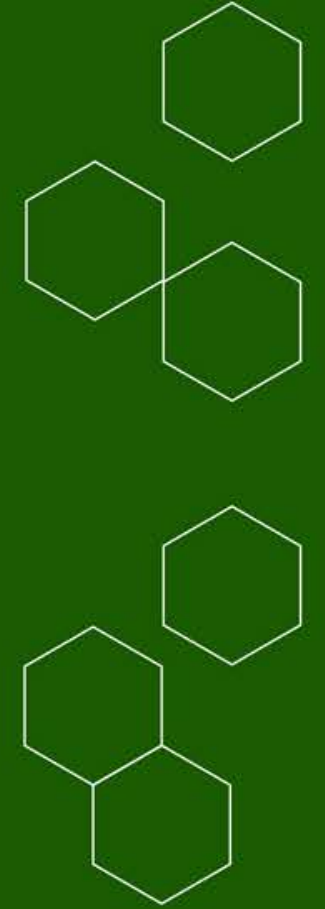
- Interviewing an applicant in California for a position in Texas, and asking about the applicant's salary history.
- **Compare:** Interviewing an applicant in *Texas* for a position in *California*, and asks about the applicant's salary history.



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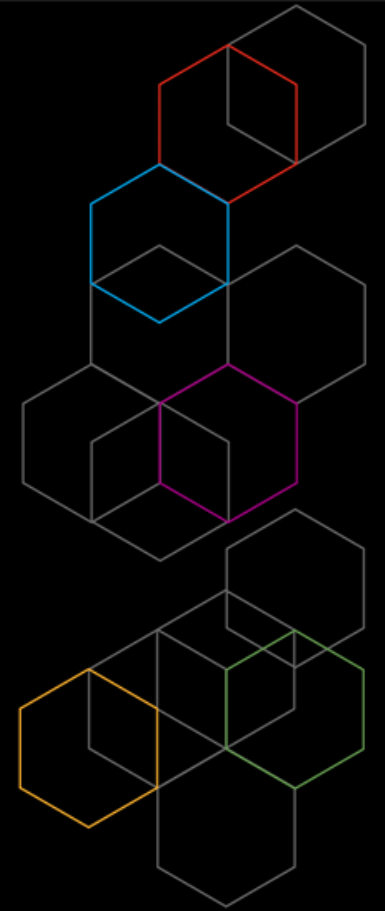
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A National Trend: San Francisco's Parity in Pay Ordinance and Other Laws



Summary of San Francisco's Parity in Pay Ordinance

- Bans inquiry into an applicant's salary history or considering that information when making hiring or salary decisions.
- Effective July 1, 2018.

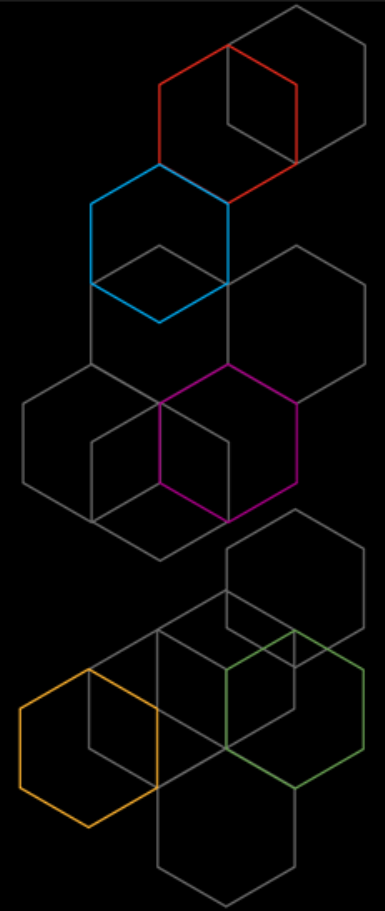


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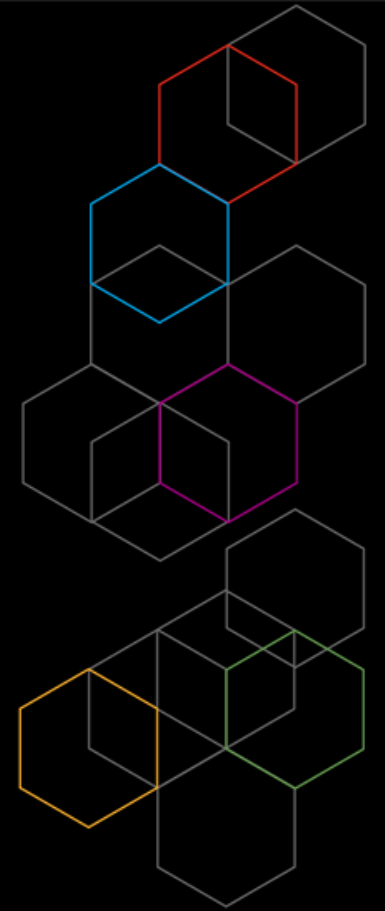
SFC Ordinance: Key Differences with California

- Applicants: Defined as someone applying for employment to be performed in SFC and whose application, at least in part, will be solicited, received, processed or considered in SFC. The individual need not interview in the city.
- Salary expectation questions allowed.
- No retaliation.
- Employer cannot disclose *current* or *former* employees' salary history to prospective employers except under certain circumstances.



SFC Ordinance: Enforcement and Penalties

- Applicant has 180 days to report violation to the SFC Office of Labor Standards Enforcement (OLSE).
- Beginning July 2019, the OLSE may begin imposing administrative penalties of no more than \$100 for any violation except the first violation.
- Subsequent violations within 12 months can be \$200 – \$500.

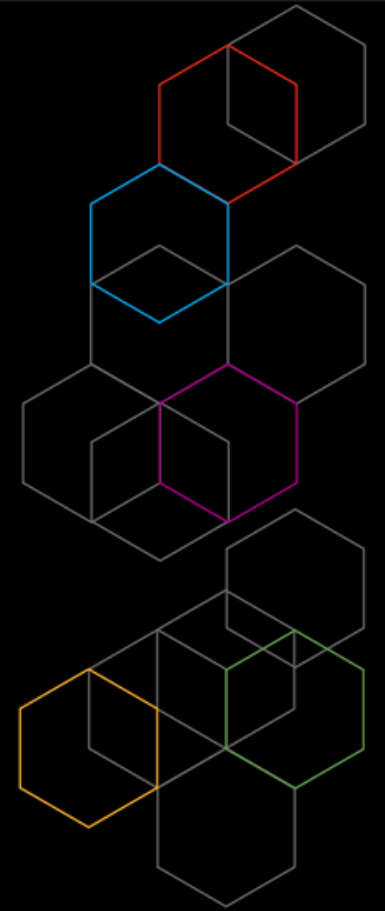


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Other Similar State Laws

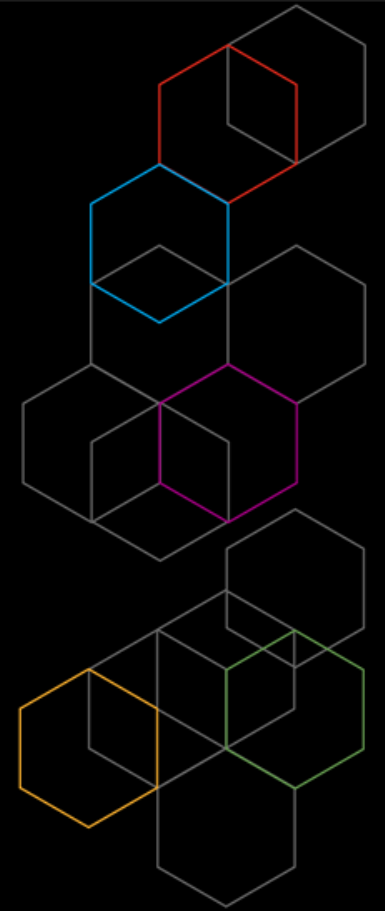
- Other jurisdictions have salary history laws including, New York City, Delaware, Oregon, and Massachusetts.
- Highlights:
 - Allows salary expectation discussions (NYC; Delaware; Massachusetts).
 - Employer not liable for a non-employee agent's actions if the employer informs the agent of the law's requirements (Delaware).
 - Employer can seek an applicant's salary history from public sources (Massachusetts).
 - Allows for punitive damages for screening applicants based on salary history in violation of the law (Oregon).



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Salary History Ban: Overall Tips

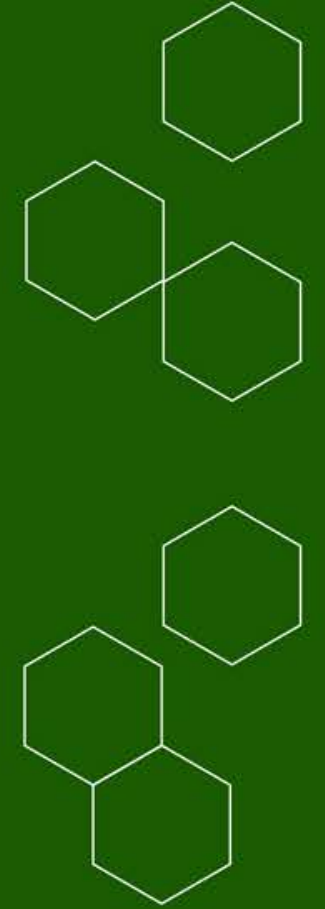
- Audit recruitment and hiring processes.
- Educate and train recruiters, managers, and supervisors on how to comply throughout the recruiting and offer process.
- Develop a pay scale for each position.
- Nationwide employers should consider developing uniform procedures that comply with all requirements.
- To help prevent “nuisance” lawsuits, consider putting more than one person in the interview room and documenting the interview.



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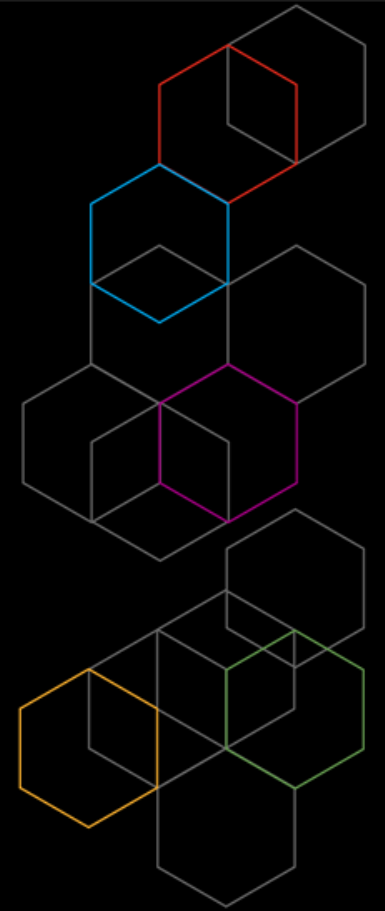
California's Ban-the-Box Law



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Summary

- Restricts ability to use conviction history information in hiring decisions.
- Effective January 1, 2018.
- 30 states, including California, and over 150 cities and counties have adopted ban-the-box laws or policies.
 - California cities (private-employer laws): Los Angeles and San Francisco.
- In 2012, the EEOC issued guidelines also restricting an employer's ability to use criminal history.

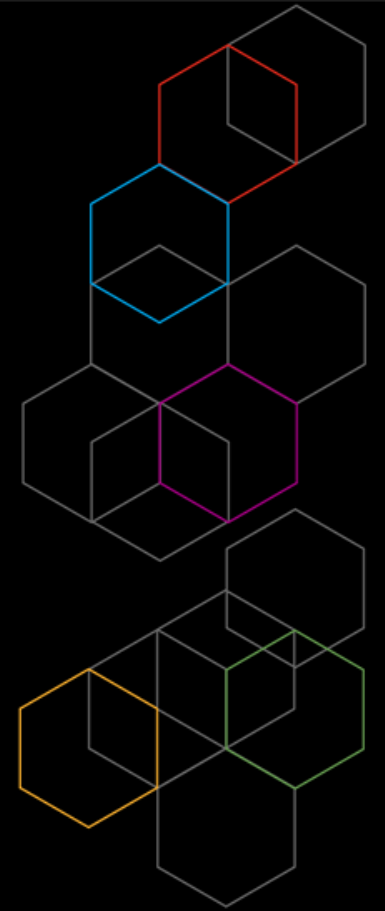


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Coverage

- Employers with 5 or more employees.
- Does not apply when background check required by law.
- Conviction history includes “[a]n arrest for which an individual is out on bail or his or her own recognizance pending trial.”
- A “conviction” includes a “plea, verdict, or finding of guilt, regardless of whether sentence is imposed by the court.”
- “Conviction” does not include any a juvenile court adjudication or any other action taken regarding a person who is under juvenile court law.

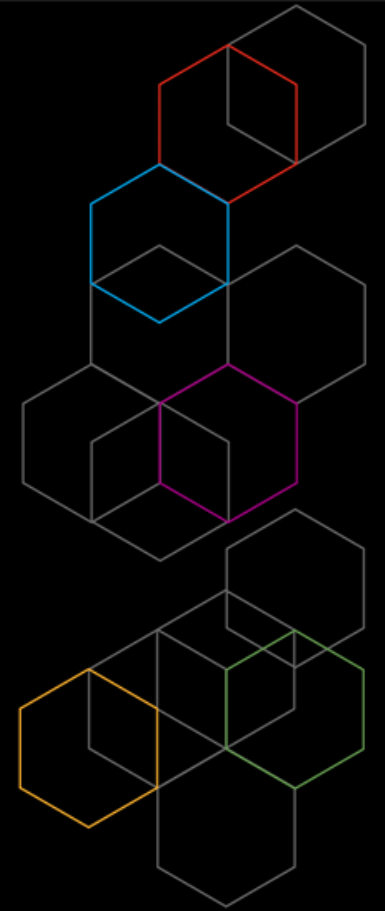


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Prohibitions Prior to Conditional Offer

- Before a conditional offer, the employer cannot:
 - Include in an application any question seeking conviction history disclosure.
 - Inquire into or consider applicant's conviction history.

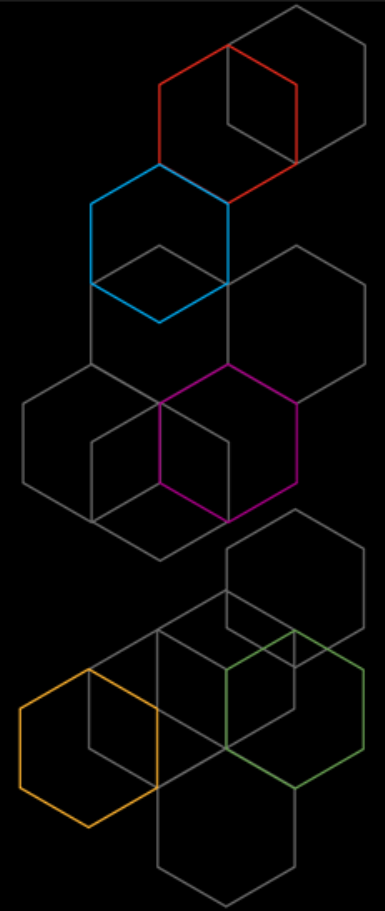


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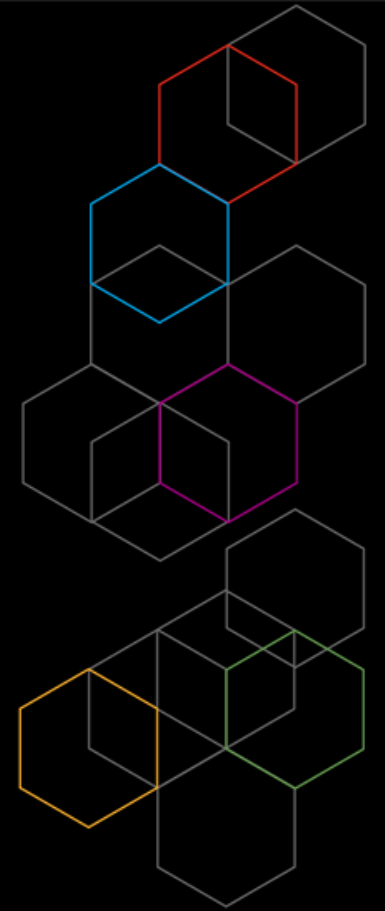
Other Prohibitions

- An employer cannot consider, distribute, or disseminate information about any of the following while conducting an applicant's criminal background check:
 - (A) Arrest not followed by conviction, subject to the exceptions in Labor Code § 432.7(a)(1) and (f).
 - (B) Referral to or participation in a pretrial or post trial diversion program.
 - (C) Convictions that have been sealed, dismissed, expunged, or statutorily eradicated.
- No interference with any individual's rights under the law.



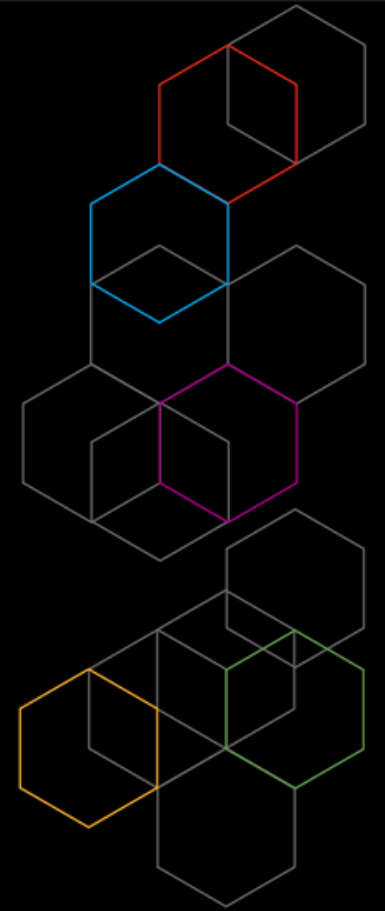
Individualized Assessment

- If an employer intends to reject an applicant because of conviction history, it must make an individualized assessment of whether the conviction history has a direct and adverse relationship with the job's duties that justify denying the applicant the position.
- The employer must consider:
 - (i) The nature and gravity of the offense or conduct;
 - (ii) The time that has passed since the offense or conduct and completion of the sentence; and
 - (iii) The nature of the job held or sought.



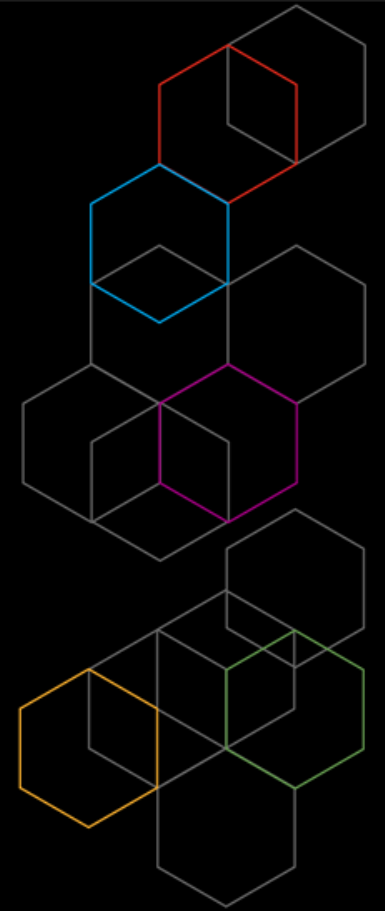
Individualized Assessment: Guidance from the Courts and EEOC

- No California court has yet to interpret this portion of the law.
- The law fails to provide guidance.
- 2012 EEOC Guidance, Title VII case law, and law under other ban-the-box law provide guidance.
- Three-factor test (*Green* factors) used to determine whether a criminal conviction exclusion policy meets the business necessity test under the disparate impact doctrine.
- Green factors are the same as those listed in the new California law.



Individualized Assessment: Factor 1 – The Nature and Gravity of Offense

- Nature of the offense:
 - EEOC Guidance states that this may be assessed according to the harm caused by the crime (e.g., property loss, loss of life, etc.).
 - Guidance also says to look to the legal elements of the crime.
- Gravity of the offense:
 - Guidance says to look to the distinction between misdemeanors and felonies.

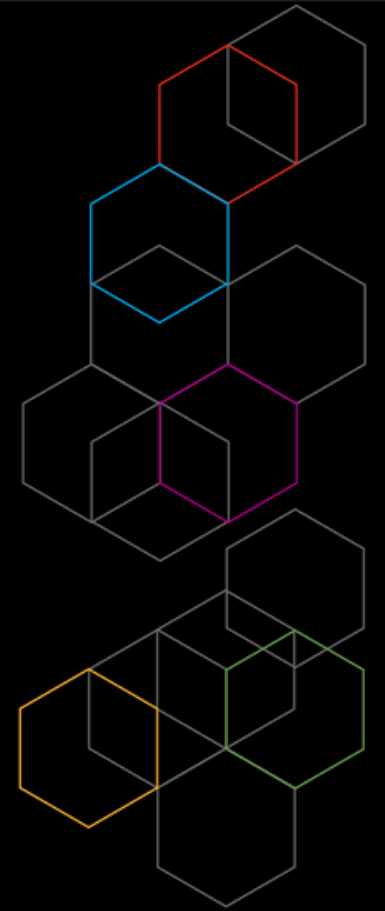


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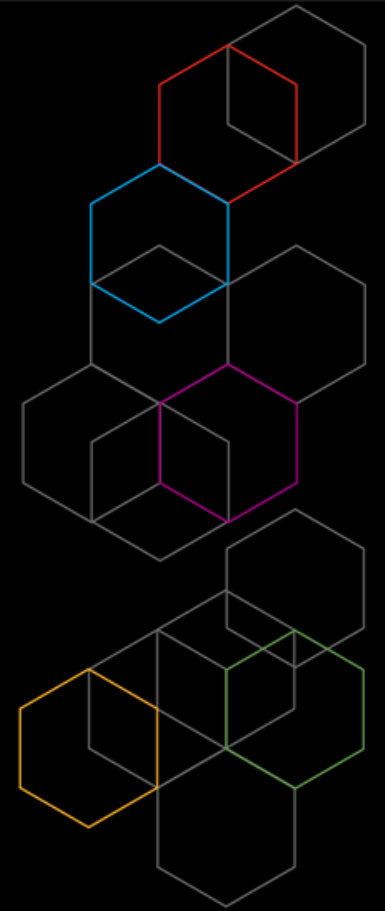
Individualized Assessment: Factor 2 – Time Passed Since the Offense, Conduct, and/or Completion of Sentence

- EEOC Guidance advises that an employer should research studies demonstrating “how much the risk of recidivism declines over a specified time.”
- The Guidance also notes that there is no bright line, and this factor “depend[s] on the particular facts and circumstances of each case.”



Individualized Assessment: Factor 3 – Nature of the Job

- The Guidance says to look to:
 - Job title;
 - Duties;
 - Essential functions of the job;
 - Where the job is performed; and
 - Circumstances under which it is performed.
 - Examine the level of supervision, oversight, and interaction with co-workers or vulnerable individuals.

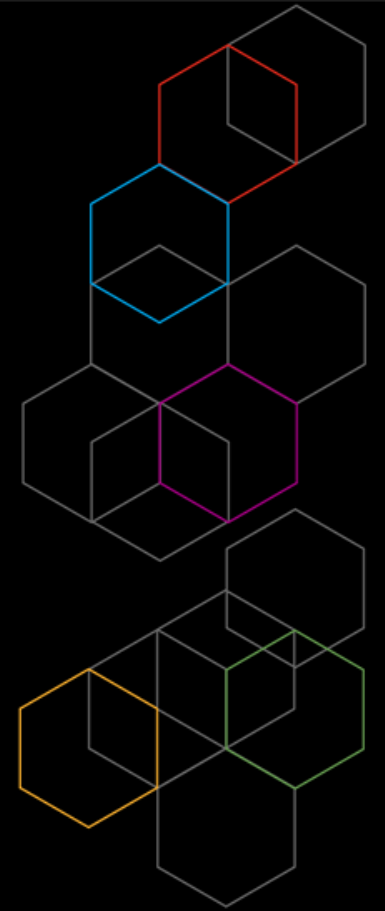


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Notice Requirement – Preliminary Decision

- The employer must notify the applicant in writing.
- The notice must contain:
 - The identity of the disqualifying convictions. Employer need not provide an explanation.
 - **Compare:** Los Angeles – employer must provide supporting documentation/information and copy of *written* individualized assessment.
 - Conviction history report, if any.
 - Explanation of the applicant's right to respond with a deadline for the response (at least five business days), and that response may include evidence challenging the record's accuracy, showing mitigating circumstances, and/or evidence of rehabilitation.

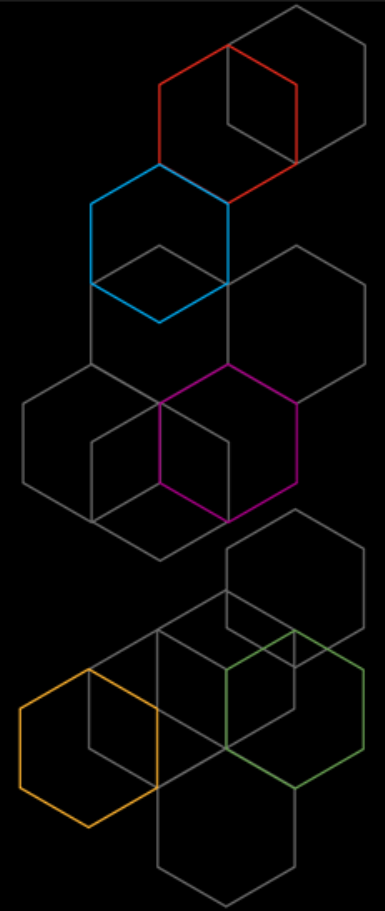


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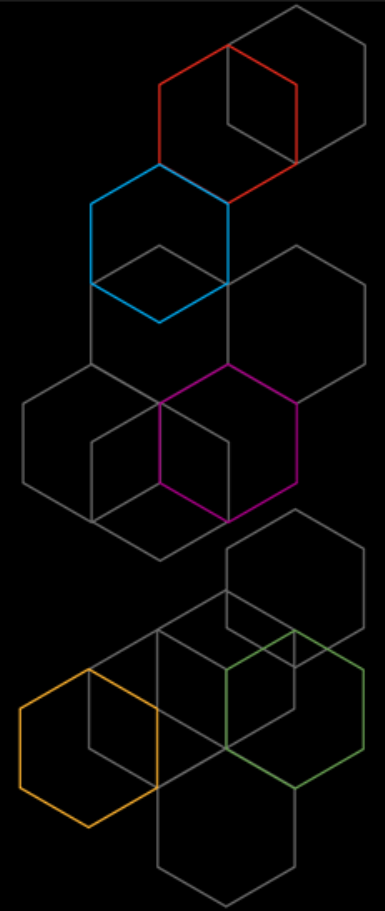
Notice Requirement – Preliminary Decision

- If the applicant notifies the employer in writing that the applicant is disputing the conviction and is obtaining additional evidence, the employer must give the applicant an additional five business days to respond.
- **Compare:** No similar requirement in the Los Angeles ban-the-box ordinance.



Notice Requirement – Reassessment and Final Decision

- After receiving the applicant's response, the employer must consider the response.
- If the employer makes a final decision to deny employment, the employer must notify the applicant in writing of the following:
 - The final denial or disqualification;
 - **Compare:** Los Angeles – must provide applicant with *written* reassessment.
 - Any procedure the employer has to challenge the decision; and
 - That the applicant has the right to file a complaint with the Department of Fair Employment and Housing.

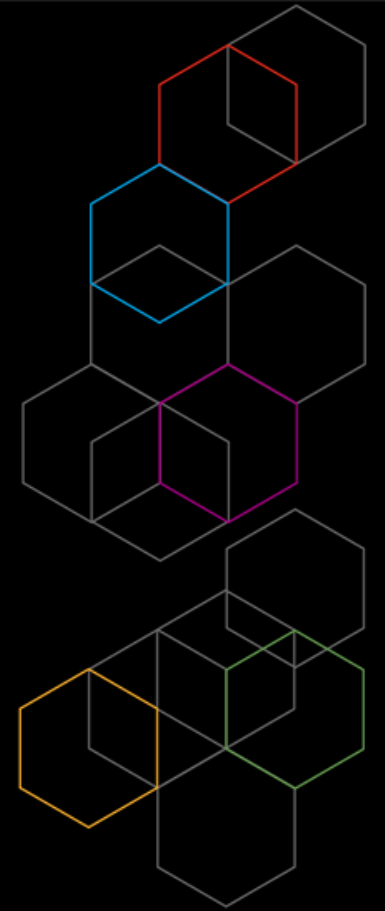


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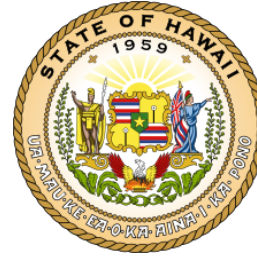
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Case Examples From Other Jurisdictions

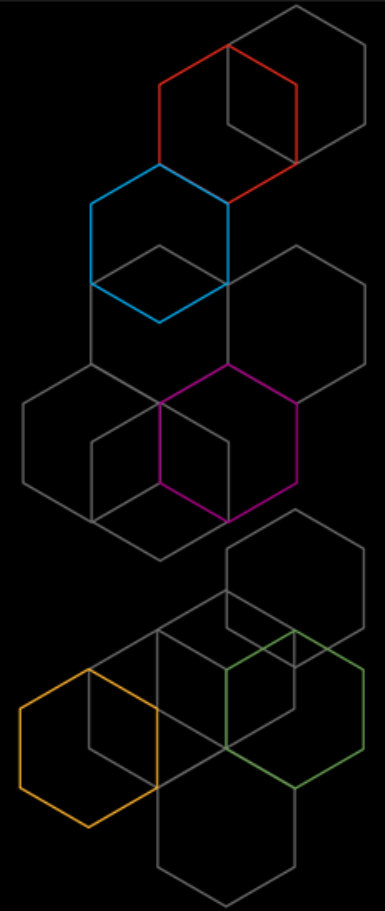
- **Green v. Missouri Pac. R. Co.** (8th Cir. 1975)
 - Railroad's policy of refusing consideration for employment to any person convicted of a crime other than a minor traffic offense not justified by "business necessity" and therefore violated Title VII.
- ***EL v. SEPTA*** (3rd Cir. 2007)
 - Transit authority's ban on anyone with a past felony or misdemeanor conviction of moral turpitude or violence against any person from being employed in paratransit positions was justified by business necessity.
 - A 40 year-old homicide conviction prevented plaintiff from being hired into position.
 - Positions involved interaction with disabled individuals.
 - Expert testimony: murder conviction made plaintiff more likely to be violent.



Compare: Hawaii Ban-the-Box Law



- Employers banned from refusing to employ an individual because of criminal record unless the record bears a rational relationship to the position's duties and responsibilities.
 - Look back period of 10 years, excluding periods of incarceration.
- *Shimose v. Hawaii Health Systems Corp.* (2015)
 - No rational relationship between four-year-old conviction for possession with intent to distribute crystal meth and radiological technician position.
- *Williamson v. Lowe's Hiw, Inc.* (D. Haw. Feb. 4, 2015)
 - Rational relationship between felony assault and harassment convictions within 10 years from application and receiver/stocker position.

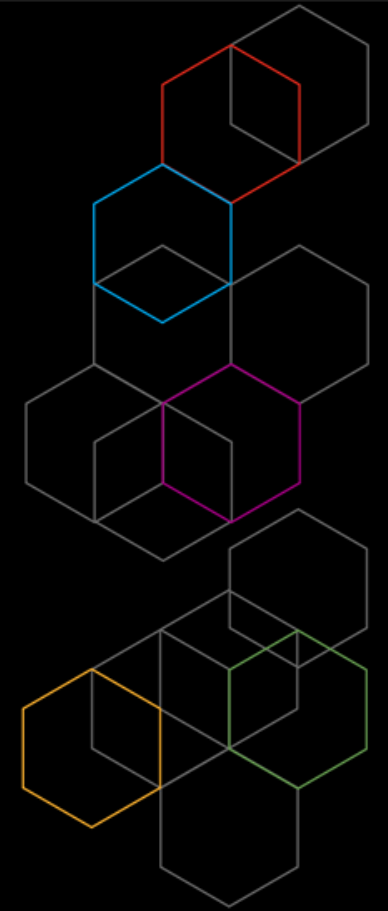


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Hypothetical 1



- Twenty years ago, John was convicted of misdemeanor assault. After which, he graduated from college with an advertising degree and worked in the advertising industry without any more run-ins with the law.
- Now applying to work at a high-end advertising agency as an account director.
- After giving John a conditional offer, employer makes a preliminary decision to reject his application, citing his assault conviction.



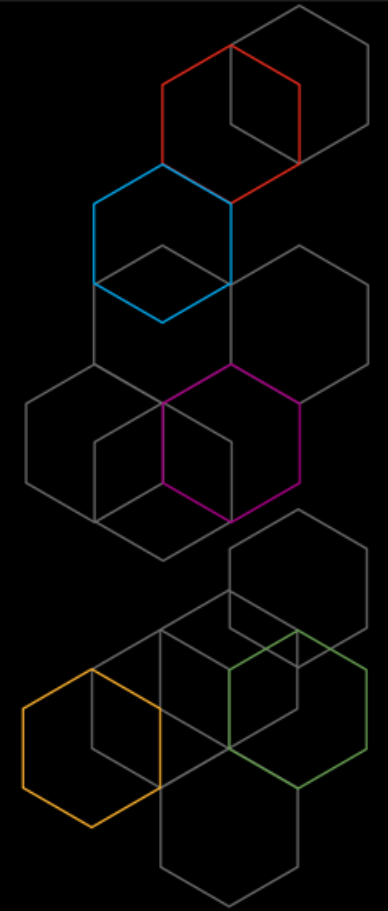
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Hypothetical 1 – Analysis



- Nature and Gravity of the Offense
 - Minor bodily injury or limited threat of violence.
 - Misdemeanor rather than felony.
- Time Passed
 - 20 years.
 - During that time: graduated from college and has worked successfully.
 - No other convictions or arrests.
- Nature of Job
 - Not in contact with vulnerable people.
 - Not security-sensitive.
 - Some interaction with co-workers.



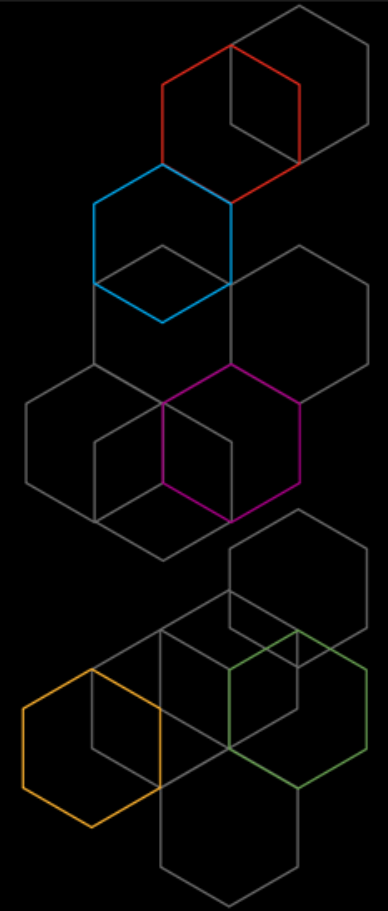
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Hypothetical 2



- While working as a cashier at a department store, Jake repeatedly allowed his friend to pass through his checkout line without paying and took money out of his register.
- Property and funds worth \$5,000.
- Jake convicted of felony embezzlement.
- Three years after being released from prison, he is now applying to become a bank teller.
- The bank makes a preliminary decision to reject his application after giving him a conditional offer because of his embezzlement conviction.



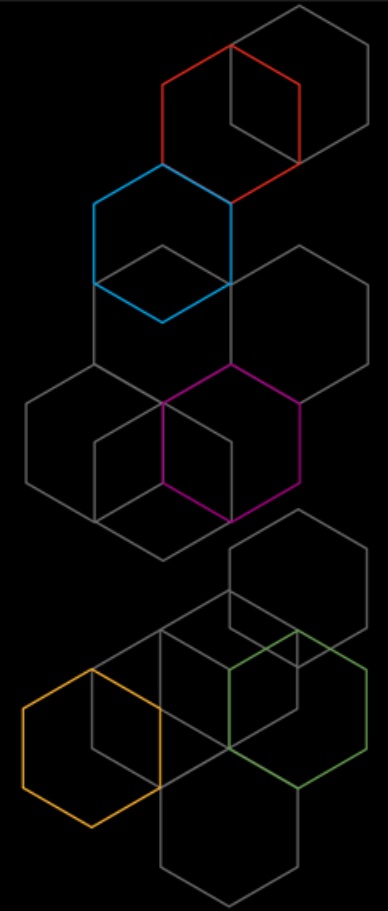
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Hypothetical 2 – Analysis



- Nature and Gravity of the Offense
 - Jake cost his previous employer \$5,000.
 - Felony rather than misdemeanor.
 - Criminal intent required for completion of crime.
- Time Passed
 - 3 years.
 - No relevant mitigating circumstances.
- Nature of Job
 - Constant interaction with other people's money on a daily basis.
 - Position of trust and confidence related to money.

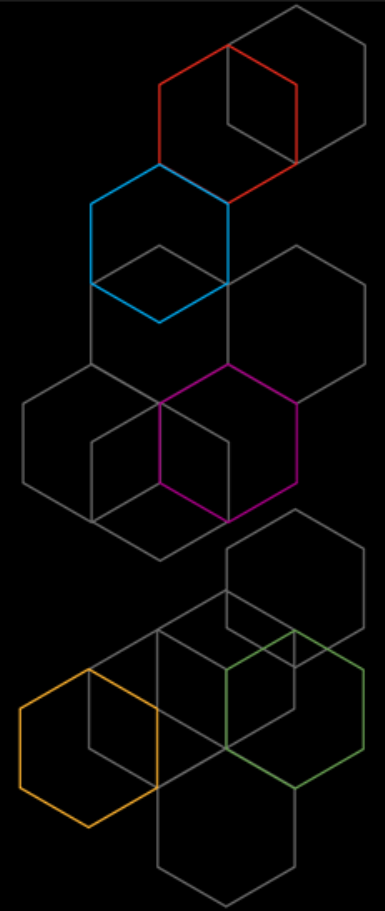


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Tips

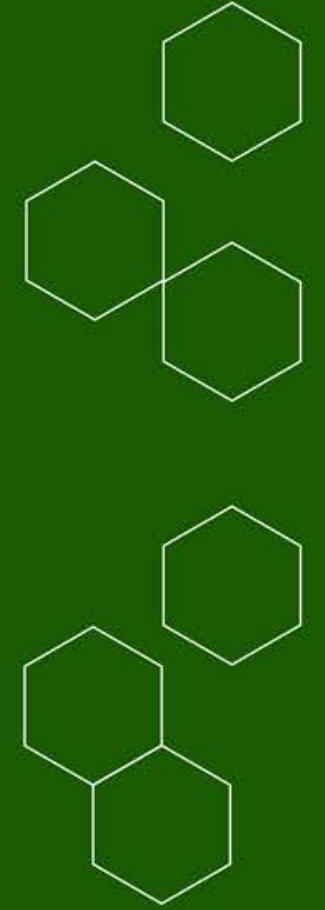
- California employers should audit and review:
 - Recruitment and hiring processes
 - Job postings
 - Applications
 - Policies and procedures
 - Training for managers and human resources
 - Ensure rational and analysis are consistent for all applicants
 - Keep records of past applicant conviction history assessments



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Questions?



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Thank You.



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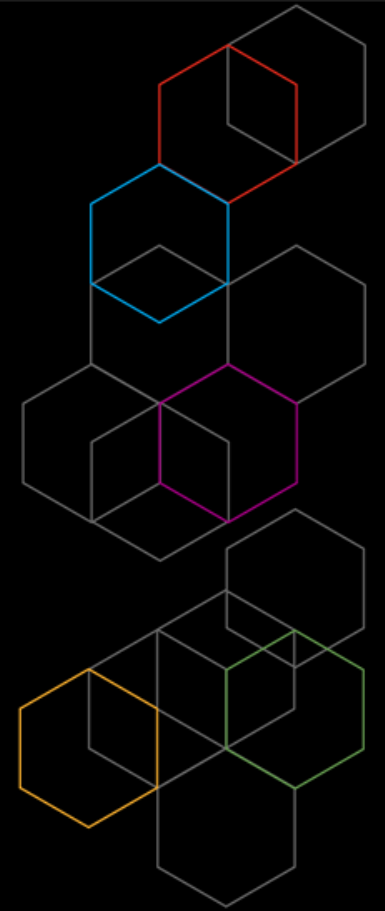


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