

California FEHC Further Limits Employers' Use of Criminal History

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California's Fair Employment & Housing Council (FEHC) recently issued new regulations that set forth the criteria employers should use when considering certain criminal records and information (criminal history) in making employment decisions that impact applicants and employees (i.e., hiring, promotion, training, discipline, layoff, termination). The updated California Code of Regulations Section 11017.1 (the regulations) go into effect on July 1, 2017.

Rebuttable Defense to Adverse Impact

In the new regulations, the FEHC largely adopted 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*, setting forth that employers are prohibited from "utilizing other forms of criminal history in employment decisions if doing so would have an adverse impact on individuals" within a protected class.

Job-Related & Business Necessity

The regulations provide that the applicant or employee bears the initial burden of demonstrating that the employer's policy of considering criminal history has an adverse impact on a basis set forth in the regulations (i.e. gender, race, and national origin). Once the applicant or employee has done so, the employer must then show that the policy is justifiable because it is both (1) job-related and (2) consistent with business necessity. Business necessity, as defined in CCR § 11010(b), is a fairly high standard that requires an employer to prove that "there exists an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and the challenged practice effectively fulfills the business purpose it is supposed to serve." To meet this burden, the employer must establish that the policy or practice is "appropriately tailored," considering factors such as: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense, conduct, and/ or completion of the sentence, and (3) the nature of the job held or sought.

To show that considering an applicant or employee's criminal history is appropriately tailored to the job, the employer may establish either that:

1. Any “bright-line” conviction disqualification or consideration can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk, and that the conviction has a direct and negative impact on the individual’s ability to perform the job position; or
2. It conducts an individualized assessment of the circumstances and qualifications at issue, as well as complying with the regulations’ pre-adverse action notice requirements.

Less Discriminatory Alternatives

Even if an employer is able to demonstrate that its policy is job-related and consistent with business necessity, an applicant or employee *may still* prevail on a claim under the regulations by demonstrating that there is a less discriminatory—but equally effective—means of achieving the particular business necessity.

Pre-Adverse Notice & Action Requirements

If an employer obtains an applicant or employee’s criminal history from a source other than the individual (i.e., a credit report), the employer must provide the individual with pre-adverse action notice of his or her disqualifying conviction. The employer must also provide him or her with a reasonable opportunity to present evidence that the information is factually inaccurate before it may take an adverse action based on the information obtained. If the applicant or employee establishes that the record is inaccurate, that record may not be considered in the employment decision.

Criminal History Explicitly Prohibited From Consideration in Employment Decisions

Additionally, the regulations reiterate existing law, which provides that employers are always prohibited from considering the following information when making employment decisions:

- An arrest or detention not resulting in conviction;
- Referral to or participation in a pretrial or post-trial diversion program;
- A conviction that has been judicially dismissed or ordered sealed, expunged, or statutorily eradicated pursuant to law;
- An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was a juvenile; and
- A non-felony marijuana possession conviction that is two or more years old.

Finally, the regulations note the following:

- State or local agency employers may not ask applicants to disclose criminal conviction history until after the employer has decided the applicant meets the minimum employment qualifications;
- Local laws or city ordinances may further restrict employers from asking about criminal history (i.e., San Francisco employers have additional limitations); and
- Employers that run background checks, or obtain other investigative consumer reports, are also subject to the Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act.

Next Steps

California employers should pay close attention to any use of criminal history in employment decisions, and review all screening policies, procedures, and assessments to ensure compliance with the new regulations, the FCRA, and

the patchwork of various local ordinances.

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