



New California Regulations Further Limit Employers' Ability to Use Criminal History in Making Employment Decisions

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Effective July 1, 2017, new regulations from the California Fair Employment and Housing Council will further limit an employer's ability to consider the criminal history of a job applicant or employee when making employment decisions.

The new regulations make the following key changes:

1. **Adverse Impact on Protected Classes.** Prohibits employers from using criminal history information in making employment decisions if using such information results in an adverse impact on individuals within a protected class (e.g., race, sex, or national origin). An applicant or employee bears the initial burden of proving an adverse impact. If this burden is met, the employer then needs to establish that the policy is justifiable because it is job-related and consistent with business necessity.

To meet this standard, the employer must demonstrate that the policy or practice:

- Has a demonstrable relationship to the successful performance of the job;
- Measures the person's fitness for the specific job;
- Is appropriately tailored by considering, at a minimum, the nature and gravity of the offense or conduct, the time that has passed since the offense or conduct occurred, and the nature of the job held or sought; and,
- Requires that, if the employer uses a bright-line conviction disqualification, the disqualifying conviction has a direct and specific negative bearing on the person's ability to perform the duties and responsibilities of the position; or, requires the employer to conduct an individualized assessment with proper notice to the employee and opportunity for the employee to respond.

1. **Notice Prior to Adverse Employment Action.** Prior to taking any adverse employment action (e.g., declining to hire an applicant or firing an employee) based on criminal history information *obtained from a source other than the employee or job applicant*, employers are required to give the applicant or employee notice and a reasonable opportunity to present evidence that the information is factually inaccurate.¹ If the affected applicant or employee is successful in showing the information is inaccurate, the employer cannot consider the criminal history record.
2. **Marijuana Possession Convictions.** Expands the list of types of criminal history employers are prohibited from considering to include any non-felony conviction for possession of marijuana that is two or more years old. (See Cal. Code Regs., tit. 2, § 11017.1, subd. (b) for a list of types of criminal history prohibited from consideration.)

Employers should keep in mind that these new regulations are part of a larger trend in California, as well as nationally, to restrict the use of criminal history records in making employment decisions.² In addition to the types of criminal history employers are prohibited from considering, in 2014, California implemented Labor Code section 432.9, which prohibits public sector employers from seeking criminal history information on employment applications (referred to as ban the box legislation). The Cities of San Francisco and Los Angeles have implemented their own ban the box ordinances applicable to the private sector. In February 2017, legislation seeking to prohibit private employers from inquiring about or considering a job applicant's criminal history prior to a conditional offer of employment was introduced in the California State Assembly.

Finally, employers that conduct background checks must be mindful of the requirements of the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.), California Investigative Consumer Reporting Agencies Act (Civ. Code §§ 1786 et seq.), and the California Consumer Credit Reporting Agencies Act (Civ. Code §§ 1751.1 et seq.).

Employers should consult with counsel and carefully review their existing policies on the use of criminal history information to ensure compliance with existing law and these new regulations.

How Nossaman Can Help

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¹This notice requirement is different from the notices required by the federal Fair Credit Reporting Act (15 U.S.C. §§ 1681 et seq.), and the ordinances in Los Angeles and San Francisco, which each have unique requirements.

²Like California, numerous jurisdictions have implemented statutes and ordinances that require employers to remove the criminal history question from job applications and to wait until after an interview or a conditional offer to ask criminal history questions.