

# Congress Wants To Ban Felons While California Doesn't Want To Ask

Article By:

Keith Paul Bishop

---

This week, the Securities and Exchange Commission's "bad actor" rule amendments take effect. These rule amendments implement Section 926 of the Dodd-Frank Wall Street Reform and Consumer Protection Act which is entitled "Disqualifying felons and other 'bad actors' from Regulation D offerings". Although the SEC's rule amendments include long list of acts that aren't felonies, it's clear that Congress put felons at the top of the "bad actor" list. My own prediction is that there will be howls of consternation as issuers and practitioners come to grips with the challenges of compliance. See [All The World's A Stage, But The SEC Isn't Allowing All Actors To Play Upon It](#). Nonetheless, the desire to separate felons from securities offerings is understandable.

## Different Folk Have Different Views

The California legislature is far more forgiving of felons. Last week, it passed a bill, AB 218 (Dickinson), that will forbid a state or local agency from asking an applicant for employment to divulge information concerning his or her conviction history. The agency is permitted to ask after it has determined the applicant meets the minimum employment qualifications, as stated in any notice issued for the position. The ban does not apply to a position for which a state or local agency is otherwise required by law to conduct a conviction history background check, to any position within a criminal justice agency, as that term is defined in Section 13101 of the Penal Code, or to any individual working on a temporary or permanent basis for a criminal justice agency on a contract basis or on loan from another governmental entity. Existing law (Labor Code 432.7) already prohibits a public or private employer from inquiring into or requiring disclosure by an employment applicant of an arrest or detention that did not result in conviction.

One wonders whether this is a case of opening the barn door after the horse has fled. Last month, *The Bakersfield Californian*, [reported](#) "A woman who embezzled \$320,000 from a California state agency was later hired by the state's High-Speed Rail Authority — and she said nobody asked about her background."

## Are The Bad Actor Rules Discriminatory?

According to the legislative analysis, the purpose of the bill is to prevent discrimination. As noted in this blog, a California Court of Appeal has held that exclusion of a potential investor based on a

criminal conviction does not violate California's Unruh Civil Rights Act. *Semler v. General Electric Capital Corp.*, 196 Cal.App.4th 1380 (2011); see [A Question That You May Want To Add To Your Investor Suitability Questionnaire](#). However, U.S. Equal Employment Opportunity Commission has issued [enforcement guidance](#) stating "An employer's use of an individual's criminal history in making employment decisions may, in some instances, violate the prohibition against employment discrimination under Title VII of the Civil Rights Act of 1964, as amended." According to this guidance, an employer best practice is to "eliminate policies or practices that exclude people from employment based on any criminal record." But of course, the SEC's "bad actor" ban will have that very effect. Indeed, the entire point is to eliminate felons from the pool of covered persons.

© 2010-2025 Allen Matkins Leck Gamble Mallory & Natsis LLP

---

National Law Review, Volume III, Number 259

Source URL: <https://natlawreview.com/article/congress-wants-to-ban-felons-while-california-doesn-t-want-to-ask>