

(Background) Check It Out: Understanding California's New Fair Chance Act Regulations on Criminal Records and Background Checks When Making Employment Decisions

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Starting Oct. 1, 2023, California employers must adhere to [new regulations under the Fair Chance Act \(FCA\)](#) concerning the use of an individual's criminal history in employment decisions. These rules impact California Code of Regulations Title 2, Section 11017.1 and introduce additional steps for employers to follow when considering criminal history in hiring or other employment actions. The regulations add to an already lengthy list of procedures employers must follow in California regarding criminal history as a basis for employment decisions.

What Is Changing?

1. **Expanded "Employer" Definition:** The regulations expand the definition of employer from the current "a labor contractor and a client employer" to also include "any direct or joint employer, any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list."
2. **Expanded scope of Applicant:** The modified regulations add two categories of employees in its definition of applicant: (1) existing employees who have applied for or indicated a specific desire to be considered for a different position with their current employer; and (2) existing employees who are subject to a review and consideration of criminal history because of a change in ownership, management, policy or practice.
3. **Individualized Assessment:** Under the new regulations, employers are required to conduct an individualized assessment of each candidate with a criminal record before making a hiring decision. This assessment involves considering the nature and gravity of the offense, the time that has elapsed since the conviction, and the nature of the job.
4. **"Directly-Related" Standard:** Employers can only consider criminal records that are "directly related" to the job in question. This means that employers cannot reject an applicant

solely based on their criminal record unless the conviction has a clear and specific bearing on the job duties.

5. **Job-Relatedness and Business Necessity:** Employers must demonstrate that their screening policies are job-related and necessary for the business. Vague or overly broad policies that disproportionately impact individuals with criminal records will be considered discriminatory.
6. **Disclosures and Notifications:** Employers must provide written notice to the candidate if their criminal record was a factor in their non-selection. The applicant then has the opportunity to respond, providing additional information about their record.
7. **Fair Chance Process:** A “fair chance process” has been introduced. This involves a step-by-step procedure that employers must follow if they decide to deny employment based on a candidate’s criminal record. This process allows the applicant to respond, challenge inaccuracies, or present evidence of rehabilitation.

What This Means for Employers

Employers must review and, if necessary, revise their hiring practices and policies to ensure compliance with the new Fair Employment and Housing Act regulations. This includes updating application forms, training human resources staff and managers on the new procedures, and implementing the individualized assessment and fair chance process. Failure to adhere to these regulations could lead to costly legal repercussions and potential discrimination claims.

Key Points to Note:

1. Employers cannot inquire about or consider an applicant’s criminal history until they’ve made a conditional job offer. Even if another entity, like an occupational licensing board, is required to conduct a background check, the employer must still adhere to these regulations.
2. Some exceptions apply, such as positions in law enforcement, certain Farm Labor Contractors, and jobs mandated by law to consider criminal history.
3. These rules apply to new applicants, current employees seeking different roles, and employees undergoing criminal history reviews due to changes in ownership, management, policies, or practices.
4. If an applicant voluntarily shares criminal history information before a conditional offer, the employer can’t consider it until after the offer decision.
5. Employers can ask applicants to complete IRS form 8850 (or similar forms) before a conditional offer, but the information should only be used for Work Opportunity Tax Credit purposes.
6. Certain types of criminal convictions, like non-felony marijuana convictions over two years old and others, along with arrests without a conviction, can never be considered.
7. If an employer intends to deny employment based on conviction history, the employer must

conduct an individualized assessment, considering factors like the nature of the offense, time passed since the offense, and the nature of the specific job and how the conviction record relates to the job.

8. If an applicant presents evidence of rehabilitation or mitigating circumstances, the employer must consider it.
9. The employer must provide written notice of their preliminary decision to deny the applicant, including details about the convictions considered, information relied upon, and the right to respond.
10. Applicants have at least five business days to respond, and if they request more time, they must be granted an additional five business days.
11. The employer must inform the applicant of the final decision and provide information on how to challenge it or file a complaint with the California Civil Rights Department.
12. Even if an employer justifies their policy as job-related and necessary, they may still face claims of discrimination if a less discriminatory alternative exists.

Employers should take note of these modifications, ensuring that they are fully informed and prepared for the changes coming into effect Oct. 1, 2023.

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