

## **New FEHA Regulations Alter How, When Employers Can Consider Applicant's Criminal Histories**

Article By:

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The California Civil Rights Council (CRD) (formerly the DFEH) has issued **new regulations** that modify the Fair Employment and Housing Act (FEHA), the law that governs how and when California employers can consider a job applicant's criminal history when making employment decisions. The new regulations took effect on October 1, 2023, and provide more coverage, prohibitions and requirements for potential employers to consider.

### **IN DEPTH**

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### **THE LAW**

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Under the FEHA, employers are prohibited from inquiring into a job applicant's criminal history prior to extending a conditional offer of employment, including through job applications, background checks and internet searches.

The FEHA also requires that if an employer is considering taking an adverse action with respect to a job applicant or employee, the employer must first conduct an individualized assessment of the job applicant's criminal history—including determining whether the applicant's criminal history has a “direct and adverse” effect on their ability to perform the functions of the position.

While the thrust of the law remains the same, the new regulations expand the scope of who is covered by the FEHA, the kinds of inquiries the law prohibits, the kinds of evidence employers must accept and consider regarding an applicant's justification for the past offense in question and the process for rescission of a conditional offer of employment.

## **EXPANDED COVERAGE**

First, the new FEHA regulations expand the definitions of “employer” and “applicant.” Previously, an “employer” was defined as “a labor contractor or client employer.” The updated regulations clarify that the definition of employer additionally encompasses any direct or joint employers, agents of the employer, staffing agencies, entities that evaluate the applicant's criminal history on behalf of an employer, and entities that select or provide workers to an employer from a pool or availability list.

Similarly, the updated regulations clarify that an “applicant” may

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include, in addition to an individual who has been conditionally offered employment, existing employees who have applied to a different position with their current employer, those who have indicated a specific desire to be considered for a different position with their current employer, and even an existing employee who is subjected to a review and consideration of their criminal history because of a change in ownership, management, policy or practice.

Employers should note that job applicants are still considered “individuals who have been conditionally offered employment” even if they have commenced employment during the post-conditional offer review and criminal background check process. In other words, employers cannot transition an applicant to an employee before beginning the background check process to avoid the FEHA.

## **EXPANDED PROHIBITIONS**

The new regulations make clear that employers are prohibited from including statements in job advertisements, postings, applications or other materials indicating that they will not consider applicants with criminal histories, including statements such as “no felons” or “must have clean record.”

In addition, employers are prohibited from conducting pre-hire internet searches on job applicants, and they cannot consider criminal history *even if* voluntarily provided by the job applicant during the application or interview process.

Moreover, employers are now barred, *at any stage of the hiring process*, from the following:

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- Refusing additional evidence voluntarily provided by an applicant contextualizing the offense in question (or another party at the applicant's request);
  - Requiring an applicant to submit additional evidence, or a specific type of documentary evidence, regarding the offense in question; and
  - Requiring an applicant to disclose their status as a survivor of domestic abuse or comparable statuses, medical records, or the existence of a disability or diagnosis.

## **EXPANDED ADVERSE EMPLOYMENT ACTION REQUIREMENTS**

Currently, employers are required to conduct an individualized assessment of an applicant's criminal offense and its bearing on the individual's candidacy before rescinding a conditional offer of employment if the decision is based in whole or in part on the applicant's criminal history. However, the updated regulations explain that employers must additionally conduct a reassessment after the job applicant has had an opportunity to respond to the pre-adverse action notice and before making a final decision. The result is a four-step process: (1) the initial individualized assessment, (2) the pre-adverse action notice and applicant response, (3) reassessment and (4) the final decision. We discuss each step below.

### **1 – Initial Individualized Assessment**

The new regulations expand the scope of the employer's individualized assessment. The regulations require the assessment to be reasoned and evidence-based, take place *prior* to sending the pre-adverse action letter and consider the following factors:

- The nature and gravity of the offense or conduct;

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- The time that has passed since the offense or conduct;
  - The nature of the job held or sought; and
  - Evidence of rehabilitation or mitigating circumstances.

## 2 – The Pre-Adverse Action Notice and Applicant Response

If an employer wishes to rescind a conditional offer of employment after conducting an individualized assessment, the employer must notify the applicant in writing. The notice requirements largely remain the same: Employers must identify the conviction(s) they based their decision on, provide a copy of all the reports they utilized (including internet search results), inform the applicant that they have a right to respond before the decision is finalized and explain the kinds of evidence the applicant may provide evidence as part of their response. However, the new regulations do make a few notable changes to the notice requirement:

- The regulations require the employer to provide the job applicant with notice of their right to respond to a pre-adverse action notice *and* with a response deadline that is at least five (5) business days from the date the applicant receives the notice.
- If an applicant timely notifies the employer in writing that additional time is needed to respond, the employer must give the applicant at least five **additional** business days to respond to the notice before making a final decision. The regulations contain ambiguity regarding what is a “timely” notification.
- If the pre-adverse action notice is sent to the applicant through email, the notice is deemed received two business days after it is sent, meaning that the five-day response deadline begins to run after the second day post-transmittal.

## 3 – Reassessment

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If the applicant provides evidence related to mitigating circumstances or their rehabilitative efforts since the conviction at issue, the employer must consider the information—a process the new regulations call “reassessment.” The employer must consider factors such as the applicant’s conduct during incarceration, employment history since the conviction or release from incarceration, community service and engagement, and other rehabilitative efforts.

## **4 – Final Decision**

There are no new requirements for employers to consider when making their final decision to rescind a conditional offer of employment.

## **EMPLOYER LIABILITY IMPOSED BY FEHA**

Job applicants may allege violations of the FEHA by arguing that there is a less discriminatory policy or practice that serves the employer’s goals as effectively as its current background check policy or practice without significantly increasing the cost or burden on the employer. These allegations can be lodged through a complaint filed with the CRD or a civil lawsuit for discrimination. A variety of remedies are available for possible violations of the FEHA, such as reinstatement of back pay and benefits, compensatory damages for emotional distress and out-of-pocket losses, injunctive relief and punitive damages. Courts also regularly award attorneys’ fees if job applicants prevail.

## **PRACTICAL CONSIDERATIONS AND NEXT STEPS**

Employers with background check programs can start implementing the following key action items in response to the updated FEHA

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regulations:

- Review and update job postings and applications to ensure that they do not include statements suggesting that job applicants are barred from the process because of their criminal history, including “no convicted felons,” “criminal background check required” and language referring to “ex-offenders.”
- Review background check policies as necessary to ensure compliance with the FEHA’s new requirements, including expanded time periods in communications with job applicants consistent with the four-step process above if considering an adverse action.
- Ensure detailed and organized documentation of all discussions with job applicants who may be subject to an adverse action in preparation for future challenges to the employer’s hiring process under the new regulations.
- Consider providing additional or updated trainings to human resources professionals who handle the application and new-hire process, especially to emphasize that internet searches (including social media) of job applicants are strictly prohibited prior to extending a conditional offer of employment. All inquiries should be saved until after a conditional offer of employment has been extended.

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