

California and Criminal Convictions: Employers May Want to Reexamine Background Check Policies in Light of Proposed Regulations

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In early 2016, the **California Fair Employment and Housing Council (FEHC)** proposed regulations that are intended to define and clarify how using a person's criminal history may violate the **Fair Employment and Housing Act (FEHA)**. If adopted, the regulations would create additional avenues for job applicants and employees to sue employers for violations of FEHA. These regulations, coupled with the growing number of local jurisdictions implementing "ban the box" legislation, are yet another reminder that employers may want to proceed with caution when using an employee's criminal history to make an employment decision.

Proving and Defending Adverse Impact Discrimination Claims

Under FEHA, employers can be liable for discrimination if an employment decision has an adverse impact on an employee and the employment decision was based on a FEHA-protected category, such as race, gender religion, or disability. A person is not protected under FEHA based on their status as an "ex-offender." However, the proposed FEHC regulations specifically state that a person may file a discrimination claim under FEHA if the employer's reliance on a criminal conviction adversely impacts an individual within a protected class.

The proposed regulations define "adverse impact" by adopting the U.S. Equal Employment Opportunity Commission's definition of "disparate impact." Accordingly, employment decisions could be found to have an adverse impact if: (i) an employer uses facially neutral tests or selection procedures that disproportionately exclude persons based on race, color, religion, sex, or national origin; and (ii) the tests or selection procedures were not "job-related and consistent with business necessity."

The proposed regulations would allow an employee or job applicant to prove disparate impact discrimination with state or national criminal conviction statistics. Namely, an employee could establish a presumption of disparate impact by using statistics that show a correlation between disparities in the conviction rates of persons of color and adverse employment decisions (*i.e.*, the

failure to hire an applicant). The presumption established by criminal conviction statistics can be rebutted by showing there is a “persuasive basis” to expect a markedly different result after accounting for circumstances such as (a) the geographic area encompassed by the applicant or employee pool, (b) the particular types of convictions being considered, or (c) the particular job at issue.

If an employee or job applicant could demonstrate that a policy or practice creates an adverse impact, the burden would then shift to the employer to prove that the policy or practice is (1) job-related *and* (2) consistent with business necessity. California law already requires employers to demonstrate that their use of an employee or applicant’s criminal history is “job-related.” However, the proposed regulations require employers go a step further and prove there is a relationship between job performance and an individual’s fitness for the specific position. To that end, the regulations specify that employment practices must consider (a) the nature and gravity of the offense, (b) the amount of time that has passed since the offense and/or completion of the sentence, and (c) the nature of the job held or sought.

Therefore an employer’s policies or practices regarding the weight given to conviction history must be “appropriately tailored” to the job by either: (a) demonstrating that a “bright-line” rule barring individuals with convictions can distinguish between persons who actually pose an unacceptable level of risk and that the convictions relied upon in the employment decision have a direct and specific bearing on the individual’s ability to perform the specific job duties; or (b) conducting an individualized assessment and affording the individual an opportunity to explain why the conviction should not prevent him or her from receiving the employment opportunity.

Employee Notification Requirements

The Fair Credit Reporting Act currently requires employers to provide notice to employees or job applicants when an employment decision is made, in part, on information obtained by an employer through a background check. In addition, the FEHC’s proposed regulations would require that employers notify an employee or applicant of the disqualifying criminal conviction if the information were obtained from any source other than the applicant or employee. The employee or applicant would need to be given a “reasonable opportunity to present evidence that the information is factually inaccurate,” and the criminal record could not be considered if the employee could establish that the information was inaccurate.

This change is notable in light of the increased ease by which employers can obtain information regarding employees’ or applicants’ criminal histories without conducting a formal background check. The abundance of information accessible through internet searches, including social media, tempts many employers into collecting information regarding job applicants and employees. As noted above, in those situations, employers obtaining information from social media will be required to notify the employee or applicant of the criminal conviction they have considered in making their decision, and they will be required to give the individual an opportunity to present evidence the information is inaccurate.

Certain Positions Exempt From the Proposed Regulations

The proposed regulations recognize that some employers are prohibited under federal law, state law, or other regulations from hiring individuals with certain criminal records, and are required to screen an individual’s criminal history before hiring him or her into a certain position or occupation. For example, employers of individuals at health facilities or pharmacies where employees have access to

medication or controlled substances are mandated to screen for certain criminal convictions and are prohibited from hiring individuals with certain offenses on their records. Employers that are required to comply with federal or state laws or other regulations that mandate a criminal history screening process or require an employee or applicant to possess or obtain a required occupational license can rely on the applicable laws as a defense to an adverse impact claim.

Best Practices for Employers

In light of the ever changing landscape regarding the use of individuals' criminal histories in employment decisions, employers may want to consider adopting the following practices:

- Reconsider whether criminal background checks are beneficial to your business.
- Craft a narrowly tailored policy that demonstrates how the policy (i) is job-related, (ii) is consistent with business necessity, and (iii) includes an individualized assessment of employees and applicants.
- Eliminate any “blanket policies” that exclude applicants or employees due to any criminal convictions on their records.
- Conduct training for hiring managers and human resources personnel regarding the collection and usage of employees' and job applicants' criminal conviction histories.

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