

California Joins the Ban-the-Box Bandwagon

Article By:

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California's new Ban the Box regulation became effective last week. Effective July 1, 2017, questions concerning an applicant or employee's criminal convictions will now be subject to the new regulation. That regulation raises the bar employers must clear in order to pose criminal conviction-related questions to applicants and employees. And it raises it significantly. We discuss the new regulation below.

Generally the New Regulation Bans Questions That Adversely Impact a Candidate or Employee Based on a Protected Category

While California already prohibited inquiries into prior arrests or detentions that did not result in a criminal conviction (or if the conviction was sealed, expunged or eradicated), the new regulation, which is applicable to employers with 5 or more California employees, prohibits employers from inquiring about *past convictions* if:

1. that inquiry has an "adverse impact" on individuals on a basis protected by California's anti-discrimination law (e.g., gender, race, and national origin), and
2. the employer cannot prove the inquiry is job-related and consistent with business necessity, or alternatively, if the employer can show business necessity, the employee or applicant can demonstrate a less discriminatory alternative means of achieving the specific business necessity as effectively.

While individuals have the burden of proving adverse impact, as a practical matter, the burden can be fairly easily met by using statistics or other evidence that shows substantial disparities on protected categories. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. An employer may rebut this presumption by showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

Employers Have a Narrow Path to Show That the Information Was Needed

Despite Adverse Impact

Once an individual demonstrates that the criminal conviction inquiry will have an adverse impact, the burden shifts to the employer to demonstrate that criminal conviction information is job-related and consistent with business necessity. To show business necessity, an employer must establish that the policy or practice is appropriately tailored to the position at issue, taking into account at least the following factors:

- (A) The nature and gravity of the offense or conduct that was the basis for the conviction;
- (B) The time that has passed since the offense or conduct and/or completion of the sentence; and
- (C) The nature of the job held or sought by the applicant or employee.

There are two ways to specifically demonstrate appropriate tailoring:

1. If the employer demonstrates that a “bright-line” criminal conviction disqualification policy properly distinguishes between individuals who do and do not pose an unacceptable level of risk in the workplace and the convictions being used to disqualify, or otherwise adversely impact the status of the employee or applicant, have a direct and specific negative bearing on the person’s ability to perform the duties or responsibilities necessarily related to the employment position. Older convictions (seven years or more) will almost never satisfy this rule.
2. If the employer conducts an individualized assessment of the applicant or employee (i.e., a review of the conviction and the applicant’s personal circumstances). For this approach, the employer must satisfy certain notice requirements before screening out the employee or applicant.

Under either circumstance, and similar to the regulations under the Fair Credit Reporting Act and many state and local regulatory equivalents, the employer must give the applicant or employee notice and reasonable opportunity to show that the conviction information is factually inaccurate, and under this regulation, the employer cannot consider the conviction if it is based on a factually inaccurate record.

While the regulations suggest that bright-line tests should be used sparingly, employers who must comply with federal or state licensing laws or regulations that mandate particular criminal history screening processes or that require employees or applicants to possess specific occupational licenses (which themselves may bar the issuance of a license based upon certain convictions) may rely on those laws to rebut any adverse impact claim.

In addition, employers in certain industries may rebut adverse impact claims where it is clear the criminal conviction is distinctly relevant. For example, employers hiring for assisted living and child care positions, transportation-related positions, financial services, banking and accounting, and safety sensitive positions (security-related, some technology positions) may have a defensible and rational basis to prohibit the employment of individuals with related criminal convictions (such as elder or child abuse and financial crime convictions).

But convictions that arguably merely pose a “generalized fear” – such as narcotics convictions,

drunk driving or assault – should not be used as bright-line disqualifiers, unless the employer is prepared to risk a discrimination claim.

Even if the employer clears the job-relatedness and business necessity hurdles, the applicant or employee still has the opportunity to prevail by showing that there is a less discriminatory alternative means of achieving the specific business necessity.

Intersection with Other Federal, State and Local Laws

Employers may also be subject to local laws or city ordinances that provide additional limitations beyond those set forth in the state regulations. See Exhibit A: San Francisco. Further, employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 *et seq.*) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 *et seq.*).

So What's An Employer To Do Now?

- Employers should carefully reconsider whether using a bright-line test is in their best interest. Employers should consider doing so only if the industry or position clearly calls for disqualification (such as, indicated above, positions in which an individual is working, unsupervised, with the legally disadvantaged, or are given access to health, banking or other sensitive information).
- Employers should also take care to conduct an “individualized assessment” of each conviction that appears to rule out an applicant. Toward this end, this adds yet another reason (in addition to the Fair Labor Standards Act and Americans with Disabilities Act) for employers to revisit job descriptions and classifications.
 - Does the job involve handling money or managing significant financial responsibilities?
 - Does the job involve a high level of trust (access to data, access to personally identifiable information – social security numbers, health information)?
 - Does the job involve unsupervised contact with individuals who are disadvantaged in some way?
 - Do federal or state regulations govern suitability? (i.e., some convictions disqualify).

Individualizing the assessment of each job will further and necessarily individualize the assessment of each conviction and the person's ability to do the job. This may be one instance where a new regulation in one area might even have a general overall salutary impact on others.

- Employers should review their job applications to ensure that existing language does not implicate non-compliance with the new regulations. If there is a “check box” that asks about criminal convictions, consider whether to remove it entirely, and instead request the information – if at all – further along in the employment application process.
- Employers in San Francisco and other jurisdictions with even more stringent requirements

should ensure that their practices also comply with the local law or ordinance.

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