

NEWS & PUBLICATIONS

New Los Angeles Regulations Provide Clarity on Ban-the-Box Directives

Act Now Advisory

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The Los Angeles Department of Public Works Bureau of Contract Administration published [Rules and Regulations](#) (“Regulations”) to assist employers in Los Angeles—including city contractors and subcontractors—with implementing the Los Angeles Fair Chance Initiative for Hiring Ordinance (“Fair Chance Ordinance”)[1]. As discussed in our prior [Act Now Advisory](#) and recent [blog post](#), the Fair Chance Ordinance took effect on January 22, 2017.

Among other things, the Fair Chance Ordinance prohibits employers and city contractors and subcontractors that are physically operating within the city of Los Angeles from seeking a job applicant’s criminal history until after a conditional offer of employment is extended. After a conditional offer of employment is made, employers may request information regarding the applicant’s criminal history, but the conditional offer can only be withdrawn pursuant to the “Fair Chance Process.” Employers have until *July 1, 2017*, to comply with the terms of the Fair Chance Ordinance before penalties and fines are enforced.[2]

The Regulations clarify key definitions in the Fair Chance Ordinance (such as the definition of an “employee” and “employer”), set forth notice and posting requirements, and elaborate on procedures that employers must follow before seeking an applicant’s criminal history. Sample notices that employers may use are also available

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(see below).

Definitions Under the Regulations

The Regulations clarify several of the definitions in the Fair Chance Ordinance, most notably:

- › **“Applicant”** is defined as any individual who submits an application for employment, *regardless of that person’s location*.
- › **“Criminal History”** includes information regarding any plea, verdict, or finding of guilt, regardless of *whether or not a sentence was imposed*, from any source and in any format.
- › **“Employee”** means *any person who performs at least two hours of work within the city of Los Angeles*^[3] *on an average week*. Time spent traveling through the city without employment-related stops is not included in the two-hour determination. This definition also includes:
 - full-time, part-time, seasonal, and temporary employees, as well as *independent contractors*;
 - owners, management, and supervisory employees; and
 - *telecommuters* who work from home and live in Los Angeles, *regardless of where the employer is located*.
- › **“Employer”** includes all private employers, such as all city contractors and subcontractors, with employees who physically work within the city of Los Angeles.
- › **“Temporary Help Firm”** is defined as any business that recruits, hires, and assigns its own employees to perform work at, or services for, another entity for a temporary time period, to support that entity’s workforce.

Notice and Posting Requirements for Employers

Employers must comply with the following notice and posting requirements:

- › All job postings for positions located within the city must include a statement that the Employer will seek all qualified Applicants, in compliance with the Fair Chance Ordinance—this includes job postings advertised online and in publications outside of Los Angeles.
- › A conspicuous notice must be posted in every workplace or job site *within the city*, under the Employer’s control, informing Applicants of the provisions of the Fair Chance Ordinance. This notice must be in a location under the Employer’s control that is *visited by Applicants*.
- › A copy of the notice regarding the provisions of the Fair Chance Ordinance must be sent to each labor union or workers with a collective bargaining agreement that covers Employees located within the city.

The City has provided sample notices for private employers and city contractors, in both English and Spanish.

Application and Interview Procedures Under the Fair Chance Ordinance

In order to comply with the Fair Chance Ordinance’s application and interview procedures:

- › Employers cannot seek the disclosure of an Applicant’s Criminal History for any position located within Los Angeles. Thus, national and statewide Employers must:
 - create a separate Fair Chance Ordinance-compliant application for positions within Los Angeles;
 - remove all questions regarding a person’s Criminal History from the general application; or
 - include a disclaimer on the general application, which must be included immediately next to any question regarding Criminal History, stating that individuals applying for positions located in Los Angeles should not answer that question.
- › Employers must remove all statements on any application materials requiring that a criminal background check must be passed to be considered for the position, as it violates the Fair Chance Ordinance.

While Employers are permitted to research an Applicant’s background and experience for verification purposes—including Internet searches—any intentional attempt to discover Criminal History prior to a conditional offer of employment violates the Fair Chance Ordinance. The Employer can investigate the Applicant’s Criminal History only after the Employer makes a conditional offer of employment to an Applicant.

Notably, Temporary Help Firms are permitted to conduct a background check on a prospective Employee after offering that individual a position *within their pool of temporary placement candidates*. These firms are not required to wait until after an Applicant is offered a specific job placement to review an Applicant’s Criminal History.

Engaging in the Fair Chance Process

After reviewing an Applicant’s Criminal History, an Employer may decide to take an “Adverse Action”—i.e., revoke the conditional offer. Under the Fair Chance Ordinance, before taking an Adverse Action, the Employer must prepare a written “Individualized Assessment” of the Applicant. The City prepared a [sample Individualized Assessment form](#) for Employers. This written assessment must include a discussion of *at least* the following factors, set forth in the [2012 EEOC Enforcement Guidance number 915.002](#) regarding the use of arrest and conviction records in employment decisions under Title VII of the Civil Rights Act of 1964:

- › What is the nature and gravity of the offense?
- › How much time has passed since the offense?
- › What is the nature of the job duties and responsibilities?
- › Confirmation that only convictions are being considered, as arrests cannot be considered in employment decisions.

If the Employer determines that the Applicant poses an unreasonable risk based on the results of the Individualized Assessment, the Employer must provide the Applicant with a notice of the proposed Adverse Action, including a copy of the written assessment and all supporting documentation. The City published a [sample notice to rescind employment letter](#) for Employers. Employers must document the date that the Applicant is notified of the proposed Adverse Action, which must be kept as part of the Employer's records described below.

Employers are required to keep the advertised position open for at least *five days* after the Applicant receives notice of the proposed Adverse Action, to permit the Applicant time to provide additional information or documentation regarding his or her Criminal History in response to the Employer's Individualized Assessment. If the Applicant provides any response, the Employer must perform a reassessment of the proposed Adverse Action and repeat the process outlined above. If the Applicant does not respond, the Employer may proceed with the Adverse Action.

Positions Exempt from Fair Chance Ordinance Compliance

While no Employer or industry is exempt from the Fair Choice Ordinance, there are certain exceptions for specific positions or roles.

Exceptions include positions for which:

- › the Employer is required by law to obtain an Applicant's conviction history;
- › the Applicant would be required to possess or use a firearm in the course of his or her employment; and
- › an Employer is legally prohibited from filling with an Applicant who has been convicted of a crime, regardless of whether the conviction has been expunged, sealed, eradicated, or judicially dismissed, following probation.^[4]

Every Employer claiming that an exception applies to a particular position must maintain an "exemption log" specifying (i) what exemption is claimed and (ii) how the position fits into the exception and the statutory basis for that exemption. The Regulations recommend, but do not require, that Employers inform Applicants of the applicable exception at the time of application. As with all other documents evidencing compliance with the Fair Chance Ordinance, this log is subject to the Fair Chance Ordinance recordkeeping requirements, discussed below.

Fair Chance Ordinance Recordkeeping Requirements

Employers must maintain all documents evidencing their compliance with the Fair Chance Ordinance (including all applications submitted, Individualized Assessments, correspondence with Applicants, etc.) for a period of a

least *three years* from the date an application is received.

If the Employer relied on any oral information for its determination of the Adverse Action, that information must be summarized and kept in writing as part of the Applicant's file.

What Employers Should Do Now

- › Eliminate, by one of the methods described above, all questions about Criminal History from employment applications for any position located within Los Angeles, including positions where prospective Employees may telecommute from their homes in Los Angeles more than two hours each week.
- › Include notices of compliance with the Fair Chance Ordinance on all job advertisements, stating that you will consider all qualified Applicants, regardless of their Criminal Histories.
- › Post a notice regarding the provisions of the Fair Chance Ordinance at each workplace or job site in Los Angeles within your control, where a prospective Employee may visit. Also provide a copy of that notice to any labor union or representative of workers with which there is a collective bargaining agreement or other agreement or understanding.
- › Make conditional offers of employment contingent upon completion of the criminal background check process before requesting an Applicant's Criminal History.
- › If the results of the background check cause you to want to withdraw the conditional offer of employment, make sure that it is not information that you are prohibited from considering, then begin the Fair Chance Process, outlined above, before withdrawing the conditional offer of employment.
- › Retain all records related to your compliance with the Fair Chance Ordinance for positions located within Los Angeles, including, but not limited to, all job postings, employment applications, and Fair Chance Process documentation for at least three years.

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ENDNOTES

[1] This law is not intended to supplant other legal requirements for employers under California and federal statutes. For example, if an employer in Los Angeles uses a third-party consumer reporting agency to obtain criminal background history, that employer must still comply with the requirements of the Fair Credit Reporting Act, including providing the requisite notices, while also complying with the Fair Chance Ordinance.

[2] In addition to monetary fines and other penalties applicable to all private employers, employers that are city contractors and subcontractors may also be subject to (i) contract termination on the basis of a material breach, requiring the return of all monies for services not yet rendered; (ii) documentation of the violation in the contractor evaluation, under Los Angeles Administrative Code (“LAAC”) Section 10.39; (iii) documentation of the violation in all subsequent Contractor Responsibility Questionnaires, under LAAC Section 10.40; and/or (iv) the initiation of a civil action against the contractor or subcontractor by the Los Angeles City Attorney.

[3] Neighborhoods such as Century City, Hollywood, San Pedro, and many others (including most of the San Fernando Valley) are all part of the city of Los Angeles and are covered by the scope of the Fair Chance Ordinance. Separate municipalities, such as Santa Monica, Culver City, West Hollywood, Torrance, the city of San Fernando, Burbank, and Pasadena, however, are not covered by the Fair Chance Ordinance. For more information regarding the neighborhoods that make up the city of Los Angeles, please see this map.

[4] Los Angeles Municipal Code Sections 189.02, 189.03, and 189.04(A), and LAAC Sections 10.48.2, 10.48.3, and 10.48.4(A).