

California FEHC Regulations Limit Use of Criminal History for Employment Decisions

02.27.17

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The Fair Employment and Housing Council has finalized new regulations that will further limit employers' ability to consider criminal history when making employment decisions. The new regulations are scheduled to take effect on July 1, 2017. Before the effective date, California employers should review how they collect and use criminal histories in making employment decisions, whether as to job applicants or current employees, and make appropriate adjustments to their policies and practices.

Existing California law prohibits employers from asking job applicants to provide information concerning:

- Convictions for most marijuana possession offenses more than two years old;
- Detentions or arrests not resulting in conviction (except those for which the applicant is released but awaiting trial);
- Convictions that have been judicially dismissed or ordered sealed;
- Information concerning a referral to or participation in a work/education program as part of probation.

Existing California law also limits an employer's ability to obtain and use criminal records when making decisions concerning current employees. And, local "Ban the Box" ordinances, such as the City of San Francisco's "Fair Chance Ordinance" and the Los Angeles "Fair Chance Initiative for Hiring," further restrict employers' ability to inquire about and use criminal background information when making employment decisions. (See advisory on the Los Angeles Fair Chance Initiative) The new regulations represent the FEHC's first substantive foray into this issue and largely mirror the EEOC's Enforcement Guidance, adopted in 2012, regarding the use of criminal records for employment purposes.

While the Enforcement Guidance touches briefly on the issue of disparate treatment, its major focus is on the possible adverse impact that the use of the criminal records for employment purposes may have on protected groups. The Guidance does not prohibit the use of criminal records for employment purposes but does indicate that broad policies that result in the disproportionate exclusion of

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protected groups, such as African Americans, could violate Title VII, and the EEOC has mounted legal challenges to such policies. The stakes in such litigation can be high, as evidenced by a \$3.13 million dollar settlement that the EEOC entered into with a large national employer in 2012. In that case, the EEOC alleged that the company's policy of disqualifying all applicants with any criminal history had an adverse impact on African Americans.

Highlights of the Final FEHC Regulations

Similar to the EEOC Enforcement Guidance, the final FEHC regulations address the potential adverse impact that the use of criminal records for employment purposes could have on protected groups.

The final regulations place the initial burden on the applicant or employee to show that the employer's consideration of criminal history has an adverse impact upon a protected group; this showing can be made using conviction statistics or "other evidence." If an adverse impact is shown, the burden shifts to the employer to justify its policy by demonstrating that the policy is "job-related and consistent with business necessity," as well as appropriately tailored to the specific circumstances. This showing must take into account at least the following factors:

- a) The nature and gravity of the offense or conduct;
- b) The amount of time since the offense or conduct and/or completion of the sentence; and
- c) The nature of the job held or sought.

The regulations require the employer to show that the policy or practice in question bears a demonstrable relationship to an applicant's successful performance of the specific job in question. Where the disqualification of individuals with certain criminal convictions from holding particular positions is required by applicable law—for example, in the case of peace officers and health care workers with access to controlled substances—that exclusion would be job-related and consistent with business necessity under the new regulations.

In those circumstances where a bright-line policy automatically disqualifies all applicants with certain types of past convictions, the employer faces a heightened burden to show that the across-the-board disqualification has "a direct and specific negative bearing on" an individual's fitness for the specific position. Bright-line disqualification policies that include the use of conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored.

Even if an employer can show that its decision to disqualify individuals based upon certain criminal convictions is job-related and

consistent with business necessity, an employee or applicant can *still* make a FEHA claim if he or she can demonstrate that there is a less discriminatory alternative, such as a more narrow list of disqualifying convictions, that serves the employer's legitimate goals as effectively as the challenged policy or practice.

The final regulations allow applicants and employees a reasonable opportunity to present evidence that criminal background information is factually inaccurate before the employer takes adverse action against the individual. If the individual can show that the record is factually inaccurate, that record cannot be used for employment-related decisions.

The new regulations increase the risks associated with the use of criminal records for employment purposes and provide the Department of Fair Employment and Housing with an additional basis for challenging employer practices in this area. Employers are encouraged to consult with counsel to ensure that employment applications, job descriptions, and related hiring practices and policies are consistent with local, California and federal law.

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