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# San Francisco Passes Fair Chance Ordinance Restricting Employers' Ability to Use Criminal History Information

James R. Silvers and Sarah R. Nichols | February 24, 2014

San Francisco has "banned-the-box" on employment applications and has added other restrictions on private employers' ability to obtain and use criminal history information. The City and County of San Francisco Board of Supervisors passed Ordinance number 131192 on February 11, 2014, and the mayor signed it on February 14, 2014. The ordinance will become effective on August 13, 2014. San Francisco joins Buffalo, Newark, Philadelphia, and Seattle as the fifth major municipality to "ban the box" on employment applications for private employers. Four states "ban the box": Hawaii, Massachusetts, Minnesota, and Rhode Island.

**Coverage**

The ordinance applies to employers with 20 or more employees, whether they work in or outside of San Francisco, though its restrictions apply only to employees whose duties are performed in whole or substantial part within San Francisco's city limits.

**General Terms**

The ordinance prohibits employers from inquiring into an applicant's criminal history in an employment application or during the first live interview (regardless of whether it is conducted via telephone, videoconferencing, other forms of technology, or in person). Employers may make criminal history inquiries after the first live interview or a conditional offer of employment.

Even when an employer can inquire about an employee's criminal history, there are some categories of information that an employer cannot inquire about or consider. Those categories are as follows:

1. arrests not leading to convictions (though employers may obtain and consider current pending arrests);
2. participation in or completion of a diversion or a deferral of judgment program;
3. convictions that have been judicially dismissed, expunged, or voided;
4. juvenile convictions;
5. convictions that are more than seven years old—the date of conviction being the date of sentencing; or
6. information pertaining to an offense other than a felony or misdemeanor, such as an infraction.

Section 4903 of the ordinance defines "inquire" as requesting or running a background check—suggesting that that employers may not secure any of the above types of information in a background check report. This may mean that employers should instruct their consumer reporting agencies (CRAs) not to report on any of the above information. The restriction on providing conviction information older than seven years has been the law in California for some time, so CRAs likely already are complying with that particular restriction.

**New Posting, Notice and Disclosure Requirements**

All job postings for employees that are reasonably likely to reach persons seeking employment in San Francisco must state that the employer will consider qualified applicants with criminal histories in a manner consistent with the requirements of the

ordinance. Employers may not advertise that any person with an arrest or conviction will not be considered for employment or may not apply for employment.

Employers must post a notice informing applicants and employees of their rights under the ordinance in a conspicuous place at every workplace, job site, or other location under the employer's control that is frequently visited by their applicants and employees. This notice must be posted in any language spoken by at least 5 percent of the employees at that specific location. Employers must also send a copy of this notice to each union with which the employer has a collective bargaining agreement. Additionally, prior to any criminal history inquiry (including running a background check), an employer must provide a copy of this notice to an applicant or employee. Therefore, from a practical standpoint the notice should be provided to an applicant or employee every time that the applicant or employee completes a background check consent/disclosure and authorization form.

The San Francisco Office of Labor Standards Enforcement (OLSE) has been tasked with publishing the notice and making it available in English, Spanish, Chinese, and all languages spoken by more than 5 percent of the San Francisco workforce, for use by employers.

Thus, employers with employees working in whole or in substantial part in San Francisco should ensure that their disclosure and authorization/consent form includes the new San Francisco notice in addition to the disclosure requirements imposed on employers by (a) the federal Fair Credit Reporting Act (FCRA) and (b) state mini-FCRAs.

**Pre-Adverse Action Letter Requirement**

Prior to taking any adverse action, an employer must (a) provide the applicant or employee with a copy of the background check report, if any, (b) notify the applicant or employee of the prospective adverse action, and (c) identify the specific items forming the basis for the prospective adverse action. Importantly, requirement (c) goes beyond the Fair Credit Reporting Act requirements for a pre-adverse action letter.

**Three Factors to Consider in An Initial Review of a Criminal Background**

An employer considering an employment decision based on an applicant's or employee's criminal history, must consider factors similar to those imposed on employers by the Guidance on the Consideration of Arrest and Conviction Records ("EEOC Guidance"), which was issued by the U.S. Equal Employment Opportunity Commission (EEOC) in April 2012. To make an employment decision based on criminal history, employers must consider the following three factors: (a) "Directly-Related Convictions," (b) the time that has elapsed since the conviction or pending arrest, and (c) any evidence of inaccuracy or "Evidence of Rehabilitation or Other Mitigating Factors." The EEOC Guidance describes consideration of three factors as part of a "targeted screen." The San Francisco ordinance confusingly refers to this consideration as an "individualized assessment," which is a later step (coming between the pre-adverse action letter and the adverse action letter) under the sequence of steps described in the EEOC Guidance.

The ordinance defines the phrases, "Directly-Related Conviction" and "Evidence of Rehabilitation or Other Mitigating Factors" as follows.

- "Directly-Related Conviction" includes any criminal history information that has a direct and specific negative bearing on an individual's ability to perform the duties or responsibilities necessarily related to the employment position. In determining whether the criminal history information is directly related to the employment position, the employer should consider whether the employment position at issue offers the opportunity for the same or a similar offense to occur and whether circumstances leading to the conduct for which the individual was convicted (or that is the subject of a pending arrest) will recur in the employment position.

- “Evidence Of Rehabilitation or Other Mitigating Factors” may include but is not limited to an individual’s satisfactory compliance with all terms and conditions of parole and/or probation, employer recommendations, educational training since the conviction, completion of or active participation in rehabilitative treatment, letters of recommendation, and the age of the individual at the time of the conviction. Examples of mitigating factors that are offered voluntarily by the individual may include but are not limited to explanations of the precedent coercive conditions (i.e., conditions leading to the criminal history), intimate physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.

Importantly, the OLSE does not have authority to second-guess the employer’s decision in relation to whether or not a conviction history is directly related to the position. The ordinance specifically states that the OLSE shall not find a violation in that situation. Instead, the OLSE’s focus will largely be on whether or not the “individualized assessment” (using the three factors above) occurred at all.

**Delay of Adverse Action if the Applicant/Employee Engages in the Individualized Assessment**

After issuing a pre-adverse action letter, employers must give applicants and employees seven days to submit evidence of inaccuracy or “Evidence of Rehabilitation or Other Mitigating Factors.” If the applicant or employee provides such information, the employer must delay sending an adverse action letter for a “reasonable period” to conduct an individualized assessment under the EEOC model (“reasonable period” is not defined in the ordinance).

**Adverse Action**

Upon taking an adverse action based on criminal history information, an employer must notify the applicant or employee of the final adverse action. This notice is required regardless of whether the criminal history information was obtained via a consumer reporting agency or some other method.

**Retaliation Prohibited**

The ordinance makes it unlawful for employers to interfere with, restrain or deny the exercise of, or the attempt to exercise any right protected under the ordinance. Employers are prohibited from retaliating against applicants or employees who file a complaint, cooperate with the OLSE, oppose any unlawful act or inform others of violations or their rights under the ordinance. Individuals who mistakenly allege violations in good faith are also explicitly protected.

The ordinance also creates a presumption of retaliation if the adverse action is taken against a person within 90 days of the exercise of a right under the ordinance.

**Employer Recordkeeping Requirements**

Employers should retain records of employment, application forms, and other pertinent data required by the ordinance for a period of three years, and must allow the OLSE access to such records. Employers must provide information to the OLSE, or the OLSE’s designee, on an annual basis as may be required to verify the employer’s compliance with the ordinance.

**Enforcement and Penalties**

While there is no private cause of action under the new ordinance, the OLSE and the city have the authority to enforce the ordinance. As noted above, the OLSE does not have authority to second-guess the employer’s decision in relation to whether or not a conviction history is directly related to the position. Instead, its primary function will be to determine whether employers are adhering to the ordinance’s procedural, posting, and documentation requirements, as well as its retaliation provisions. The OLSE

will focus on whether the employer failed to conduct the individualized assessment required by the ordinance. As a result, the employer should carefully document the individualized assessment.

(1) Administrative Enforcement

The OLSE may order any appropriate temporary or interim relief to mitigate the violation, pending completion of a full investigation or hearing. For a first violation, or for any violation during the first 12 months following the operative date of the ordinance, the OLSE must issue warnings and correction notices and offer the employer technical assistance on how to comply with the ordinance. For a second violation, the OLSE may impose an administrative penalty of no more than $50 for each employee or applicant as to whom the violation occurred or continued, to be paid to the city of San Francisco. Thereafter, for subsequent violations, the penalty may increase to no more than $100 for each employee or applicant whose rights were violated.

(2) Civil Enforcement

The city may bring a civil action in court against employers and, upon prevailing, is entitled to legal or equitable relief including, but not limited to: reinstatement; back pay; the payment of benefits or pay unlawfully withheld; the payment of an additional sum as liquidated damages in the amount of $50 to each employee, applicant, or other person whose rights under the ordinance were violated for each day the violation continued or was permitted to continue; appropriate injunctive relief; and reasonable attorneys' fees and costs.

**Recommended Steps**

The law will become effective on August 13, 2014. Covered employers should begin their preparations to comply with the new ordinance. While employers may be relieved that the OLSE will not be second-guessing their decision in relation to whether a criminal history is directly related to the position, the ordinance places a number of new requirements on employers and opens hiring managers up to a dialogue with applicants and employees that may be unfamiliar territory for many. Furthermore, it is likely that this ordinance will become a source of claims of wrongful termination in violation of public policy.

Covered employers will need to review policies, job posting templates, employee application forms, notices of adverse decisions, and disclosure and authorization forms. Employees who will be making the individualized assessments should be educated and trained on the ordinance's requirements including the anti-retaliation provisions. Covered employers should set up a protocol for handling individualized assessments, ensure that job postings contain the required language, post the necessary notice when it becomes available, and ensure that they retain the relevant records as required by the ordinance.

Background check requirements, including these San Francisco requirements, are summarized in the firm's *O-D Comply: Background Checks* subscription materials, which are updated and provided to *O-D Comply* subscribers as the law changes.

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