



Legal Alert

LA Doesn't Just Ban The Box, It Gives It The Boot

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Los Angeles just joined the ranks of other cities like San Francisco and New York City by enacting its own ban-the-box ordinance, prohibiting private employers from inquiring about criminal convictions during the application process. But not to be outdone by other cities, the Los Angeles Fair Chance Initiative for Hiring, Ordinance No. 184652, will be among the most restrictive in the country for private employers, taking it a few steps beyond the restrictions faced by other employers across the country. If you employ any workers in Los Angeles, you will want to get up to speed on this new law as soon as possible, as the effective date of the ordinance is just a few weeks away.

Los Angeles Takes Firm Stance Against Considering Criminal Convictions

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During Hiring

The LA Fair Chance Ordinance applies to those employers located or doing business in the City of Los Angeles with 10 or more employees. It places a heavy burden on those seeking to screen out applicants with criminal convictions during the hiring process. First, you must eliminate all questions on employment applications that seek information on an applicant's criminal history. Second, you may not seek information regarding an applicant's criminal history until after you have made a conditional offer of employment.

Once a conditional offer of employment has been made, you are permitted to inquire about an applicant's conviction history. However, you may not withdraw the offer or otherwise refuse to employ the applicant based on any such criminal history until you complete a written assessment. This document must "effectively link" the applicant's criminal history with risks inherent in the applicant's prospective job duties.

Under the new law, this written assessment must include – at a minimum – factors identified by the Equal Employment Opportunity Commission (EEOC) and other factors that may be identified by the Department of Public Works, the agency responsible for the administration of the LA Fair Chance Ordinance.

EEOC'S Guidance Serves As A "Minimum" For Los Angeles Employers

In April 2012, the EEOC issued its Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964. According to the EEOC, employers can show that

the exclusion of applicants due to criminal convictions is “job related and consistent with business necessity” by conducting an analysis of factors including: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, or completion of the sentence; and (3) the nature of the job held or sought.

Applicants Must Also Be Allowed To Complete The “Fair Chance Process”

In accordance with the EEOC Guidance, you must also allow the applicant to complete the “Fair Chance Process” prior to taking any adverse action due to the conviction history. The Fair Chance Process requires you to give the applicant written notification of the proposed adverse action, a copy of the written assessment described above, and any other information or documentation supporting the proposed adverse action. You must then wait at least five business days after you give such notice to the applicant before taking the adverse action or filling the position.

During that time, you must afford applicants the opportunity to provide you with documentation regarding the accuracy of the criminal history report or information that should be considered in your assessment. Upon receipt of any information or documentation from the applicant, you must consider the information or documentation and complete a written reassessment of the proposed adverse action. If you still decide to move forward with the proposed adverse action, you must provide the applicant with notification of that decision as well as a copy of the written reassessment.

Notice And Recordkeeping Requirements

You are now required to specifically state in all job postings, solicitations, or

advertisements for employment that you will consider qualified applicants with criminal histories for employment pursuant to the LA Fair Chance Ordinance. You must also post a notice regarding the LA Fair Chance Ordinance at every location in Los Angeles visited by applicants, and send the notice to labor unions or similar organizations with which you have collective bargaining or other similar agreements applicable to employees who work in Los Angeles.

Finally, you must retain records related to all of your employment applications, written assessments, and reassessments for a period of three years.

Enforcement And Penalties

If an applicant or employee believes they are wronged under this new law, they are required to file their complaints with the Department of Public Works within one year of the alleged violation. They may also choose to bring a civil action against the employer within one year of the completion of the administrative process. Moreover, just as with most other employment regulations, the ordinance includes a strong prohibition against retaliation, which can also lead to complaints or lawsuits.

You will have a short grace period through July 1, 2017 to ensure your practices are in compliance. Up until then, you will only be subject to written warnings for violations for of the LA Fair Chance Ordinance. After July 1, 2017, however, most violations of the LA Fair Chance Ordinance will expose you to penalties and fines of up to \$500 for the first violation, up to \$1,000 for the second violation, and up to \$2,000 for subsequent violations. Penalties and

finances for posting and record retention requirements will be up to \$500 for each violation.

Exceptions To The Rule

Besides certain public employers, four other categories of employers are exempt from these onerous obligations: (1) where you are required by law to obtain applicants' conviction information; (2) where the position would require the employee to possess or use a firearm; (3) where a criminal conviction would prohibit an applicant from holding the position by law; and (4) where you are prohibited by law from hiring an applicant with a criminal conviction.

What Employers Should Do Now

The new law has an effective date of January 22, 2017, so covered employers will quickly need to ensure their hiring policies, processes, documentation, and recordkeeping practices are compliant with the LA Fair Chance Ordinance.

If you are covered, you will need to:

- > eliminate all questions related to criminal convictions on employment applications and during the interview process;
- > update job postings and other employment-related advertisements to incorporate the LA Fair Chance Ordinance;
- > post and distribute the required notices; and
- > determine whether and to what extent you retain criminal conviction

background checks as part of your hiring process, including analyzing whether you will be able to justify taking any adverse action against an applicant based on conviction information in written assessments and reassessments as required by the LA Fair Chance Ordinance.

If you have any questions about this ordinance or how it may affect your business, please contact your Fisher Phillips attorney or one of the attorneys in our Los Angeles office at 213.330.4500.

This Legal Alert provides information about a specific city ordinance. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.