New regulations issued by the California Fair Employment and Housing Council, effective July 1, 2017, limit California employers’ use of criminal history when making employment decisions. The regulations prohibit employers from utilizing criminal history in employment decisions if doing so would have an adverse impact on a protected class (such as race or gender), unless the employer can demonstrate that its policy or practice is job-related and consistent with business necessity. Even if an employer can make this demonstration, however, the employee or applicant can challenge the policy or practice by showing that there is a less discriminatory alternative means of achieving the specific business need as effectively.


**Employers Are Prohibited From Considering The Following Criminal History**

Under California law, employers may not ever consider or seek the following types of criminal history records and information:

1. arrests or detentions that did not result in conviction;
2. referrals to, or participation in, a pre-trial or post-trial diversion program;
3. convictions that have been judicially dismissed or ordered sealed, expunged or statutorily eradicated;
4. arrests, detentions, processings, diversions, supervisions, adjudications, or court dispositions governed by a juvenile court; and
5. non-felony convictions for possession of marijuana that are two or more years old.

**Employers May Consider Other Forms Of Criminal History Provided That Doing So Does Not Create An Adverse Impact On A Protected Class**

Under the new regulations, employers may consider other criminal conviction history if doing so does not create an adverse
impact on individuals within a protected class, unless the employer demonstrates that its policy or practice is job-related and consistent with business necessity. To make this showing, employers must demonstrate that the policy or practice measures a person's fitness for specific positions, rather than evaluating the person in the abstract. Employers must consider the following: (1) the nature and gravity of the offense; (2) the time that has passed since the offense or completion of the sentence; and (3) the nature of the job.

Additionally, the regulations require that employers conduct an *individualized assessment* of the circumstances and qualifications of the applicants or employees excluded by the conviction screen. An individualized assessment must involve: (1) notice to the adversely impacted employees or applicants (before any adverse action is taken) that they have been screened out because of a criminal conviction; (2) a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and (3) consideration by the employer as to whether the additional information warrants an exception to the exclusion.

Alternatively, if an employer applies a "bright-line" conviction disqualification rule, rather than considering individualized circumstances, then the employer must be able to show that its rule properly distinguishes between applicants or employees that do and do not pose an unacceptable level of risk. The employer also must be able to show that 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 of the employment position. Policies that permit consideration of conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to be job-related and consistent with business necessity – unless the employer is required by state or federal law to prohibit individuals with certain criminal records from holding particular positions or occupations.

Given that employers still may face adverse impact claims, even if the policy or practice is job-related and consistent with business practice, employers should consider whether there is a less discriminatory policy or practice that serves the employer’s goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

**Employees Are Entitled To Notice Prior To Any Adverse Action**

Before an employer may take adverse action based on criminal history, the employer must give the impacted individual: (1) notice of the disqualifying conviction, and (2) a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.

**Proposed Legislation**

A proposed bill, AB 1008, seeks to revise the “ban the box” requirement, which currently applies to public employers, and would make it unlawful under FEHA for an employer to: (1) include on an employment application any question that seeks the disclosure of an applicant’s criminal history; (2) inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer; and (3) when conducting a conviction history background check, consider, distribute, or disseminate specified information related to prior criminal convictions. The bill also would require employers to perform an individualized assessment of whether the applicant’s conviction history has a “direct and adverse relationship” to the specific duties of the job. Then, the employer would be required to notify the applicant of the reasons for the decision and provide the applicant 10 days to challenge the accuracy of that information.
or provide evidence of rehabilitation or mitigation. The employer would be required to consider such evidence before making a final employment decision, in writing.

**Employer Takeaways**

California employers should review their policies and practices concerning their use of criminal history when screening applicants and employees to ensure compliance with the new regulations, as well as state and federal fair credit reporting laws and local laws or city ordinances that provide additional limitations.

For more information, please contact:

**Lisa M. Pooley**, Partner
415-995-5051
lpooley@hansonbridgett.com

**Emily Leahy**, Counsel
415-995-5155
ELeahy@hansonbridgett.com