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Hiring Alert: Governor Signs New Laws Restricting Use of Criminal Histories And Prohibiting Salary Inquiries

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At the end of the 2017 Legislative Session, California Governor Jerry Brown signed two new laws that will impact employers' hiring processes as of January 1, 2018.[1] To start, AB 1008 repeals the "ban the box" requirement in the California Labor Code, which currently applies only to public employers, and replaces it with an amendment to the California Fair Employment and Housing Act, which will apply to both public and private employers. The new law restricts employers' ability to make pre-hire and other employment decisions based on an applicant's or employee's criminal history, including a "ban the box" element.

AB 1008 largely tracks the regulations issued by the California Fair Employment and Housing Council (FEHC), which took effect July 1, 2017, and limited employer consideration of applicant criminal history.(/Publications/articles/2017-06-le-california-employers-new-criminal-history-regulations) Both the FEHC regulations and the new law require employers to make an individualized assessment of the applicant and to provide notice and an opportunity to respond to a preliminary disqualification decision that is based on criminal history. Unlike the regulations, the new law does not allow for a “bright line” conviction disqualification rule. As a result, the new law also does not require employers to consider whether there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice.

Governor Brown also signed AB 168, which amends the California Labor Code to prohibit employers from asking job applicants for “salary history information.” This new law also requires employers to provide applicants with a pay scale for the relevant position upon request.

AB 1008 (Cal. Gov't Code § 12952)

AB 1008 amends the Fair Employment and Housing Act (FEHA) to make it unlawful for an employer with five or more employees to:

1. include on any application for employment any question that seeks the disclosure of an applicant’s conviction history;
2. inquire into or consider the conviction history of an applicant until that applicant has received a conditional offer of

employment; and

3. to consider, distribute, or disseminate information related to specified prior arrests, participation in diversion programs, and convictions that have been sealed, dismissed, expunged, or statutorily eradicated, while conducting a conviction history background check.

Individualized Assessment Required

Under the new law, employers who intend to deny a position of employment solely, or in part, because of the applicant's conviction history must make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In making this assessment, employers must consider the following factors: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense or conduct and completion of the sentence; and (3) the nature of the job held or sought. Employers may, but are not required, to record the individualized assessment in writing.

Notice and Opportunity to Respond

If an employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from employment, the employer must provide the applicant with written notification of the preliminary decision. The notice may, but need not, justify or explain the preliminary decision. The written notification, however, must include: (a) notice of the disqualifying conviction(s) that are the basis for the preliminary decision to rescind the offer; (b) a copy of the conviction history report, if any; and (c) an explanation of the applicant's right to respond to the preliminary decision before that decision becomes final and the deadline by which to respond.

The employer must allow the applicant five days to respond and inform the applicant that he/she may submit evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both. If, within five business days, the applicant notifies the employer in writing that he or she disputes the accuracy of the conviction history report and is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have five additional business days to respond to the notice. The employer is required to consider information submitted by the applicant before making a final decision.

Final Decision

If the employer makes a final decision to deny the application solely, or in part, because of the applicant's conviction history, the employer must notify the applicant in writing of: (1) the final denial or disqualification; (2) any existing procedure the employer has for the applicant to challenge the decision or request reconsideration; and (3) the right to file a complaint with the Department of Fair Employment and Housing. The notification may, but is not required to, justify or explain the employer's reason for making the decision.

Exceptions

The new law provides certain limited exceptions to its requirements, including exemptions for positions for which government agencies are required by law to check conviction history, positions with criminal justice agencies, Farm Labor Contractors, and positions as to which the law requires employers to check criminal history for employment purposes or restricts employment based on criminal history.

Consequences of Violation

Although there are no specific penalties prescribed for a violation of AB 1008, the law creates another protected class of individuals who are entitled to seek remedies under FEHA.

Compliance With Other Criminal History Laws

The new law specifies that it does not affect other rights and remedies that an applicant may have under any other law, "including any local ordinance." This means that if local ordinances, such as those recently enacted in San Francisco and Los Angeles, provide greater protections to applicants, then employers must adhere to the local ordinance, as well as the new law.

AB 168 (Cal. Labor Code § 432.3)

Also effective January 1, 2018, both public and private employers are prohibited from relying on the salary history information of an applicant as a factor in determining whether to offer employment or what salary to offer. The new law also prohibits employers from seeking salary history information about an applicant, either directly or indirectly. "Salary history information" includes prior compensation and benefits.

An applicant, however, remains free to disclose salary history information to a prospective employer "voluntarily and without prompting." If an applicant does so, then employers are not prohibited from considering or relying on that voluntarily disclosed salary history information in determining the salary for that applicant.

The bill also requires employers to provide applicants with the pay scale for a position, upon reasonable request.

Employers who fail to comply with the requirements of AB 168 could be liable for costly Labor Code Private Attorneys General Act (PAGA) penalties.

Employer Takeaway

Employers should prepare for these new laws taking effect in January by reviewing their hiring practices and policies. Employers should carefully consider any request for and use of criminal history when screening applicants and employees to ensure compliance with the new law, as well as state and federal fair credit reporting laws. Employers also should refrain from asking about applicants' salary history information.

[1] Stay tuned for our upcoming summary of other significant new employment laws approved by Governor Brown.

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