

## **POTENTIAL LIABILITY FOR CALIFORNIA EMPLOYERS CONSIDERING CRIMINAL HISTORY BACKGROUND CHECKS**

Effective July 1, 2017, the California Fair Employment and Housing Act (“FEHA”) is amended to update regulations regarding employers’ consideration of criminal history in employment decisions. The regulations state that employers are “explicitly prohibited under other state laws from utilizing certain enumerated criminal records and information in hiring, promotion, training, discipline, layoff, termination, and other employment decisions that would have an adverse impact on individuals on the basis enumerated in the Act.”

Except as specifically permitted by law, employers are prohibited from considering the following types of criminal history, or seeking such history from the employee, applicant or third-party:

1. An arrest or detention that did not result in conviction.
2. Referral to or participation in a pretrial or post-trial divergent program.
3. A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (example: sealed juvenile offense records).
4. A non-felony conviction for possession of marijuana that is two or more years old.

The FEHA also lists additional criminal history limitations, regardless of whether it results in an adverse impact against the employee or prospective employee. Please note the following limitations:

1. State or local agency employers are prohibited from asking applicants for employment to disclose information concerning conviction history, including on an employment application, until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for the position.
2. Employers may also be subject to local laws or city ordinances that provide additional limitations. For example, the city of San Francisco prohibits employers from considering a

conviction or any other determination or adjudication in the juvenile justice system, and convictions that are more than seven years old unless the position being considered supervises minors, or dependent adults, or persons 65 years or older.

The applicant or employee bears the burden of proving an adverse impact. Such burden can be met by showing through the use of conviction statistics or by offering any other evidence that establishes an adverse impact.

However, an employer may be able to rebut this presumption by showing that the policy or practice of considering criminal convictions is justifiable because it is job-related and consistent with business necessity.

This is not an exhaustive list. Regardless of the foregoing, employers should be very cautious when considering using criminal history information in making employment decisions.

If you have questions about this, or any other employment matter, please contact our office.

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