

New Criminal Background Regulations Coming July 1

The California Office of Administrative Law (OAL) approved new regulations this week relating to the use of criminal background information in employment decisions.

These regulations will be filed with the Secretary of State's office and take effect on July 1. Employers will have additional burdens under the new regulations.

As previously reported, the California Fair Employment and Housing Council (FEHC) proposed these criminal history regulations last year.

In addition to reiterating existing prohibitions on the use of criminal history information in California, the regulations require employers to demonstrate that any criminal history information sought is job-related and consistent with a business necessity.

Job-Tailored Consideration

Employers can demonstrate that the consideration of criminal history information is appropriately tailored to the job in one of two ways:

- Employers may conduct an individualized assessment of the circumstances and qualifications of applicants/employees excluded by the conviction screen. Before taking an adverse employment action, such as refusal to hire, the employer must give the individual notice of the disqualifying conviction and a reasonable opportunity for the individual to respond and demonstrate that the criminal history exclusion should not apply to his/her particular circumstances. The employer must consider this information and determine whether an exception is warranted.
- An employer may demonstrate that its “bright-line” conviction disqualification policy (one that doesn’t contain an individualized assessment of the facts) properly distinguishes between applicants and employees that do and do not pose an unacceptable level of risk and that the conviction being used has a direct and specific negative bearing on the applicant/employee’s ability to perform the duties or responsibilities necessarily related to the position.

Any bright-line rule that includes conviction-related information that is seven or more years old will be presumed to not be sufficiently tailored to meet a job-

related/consistent with business necessity defense. The burden will be on the employer to rebut this presumption.

Notice Required

Regardless of whether an employer uses a bright-line policy or conducts an individual assessment, if the employer gets the criminal information from a source other than the applicant or employee (such as through a third-party background check), the employer must provide the individual with notice and the ability to challenge the factual accuracy of the information. This notice must be provided before any adverse action can be taken.

Even if the employer can show that a criminal history inquiry is job-related/consistent with business necessity, an individual can still bring a discrimination claim if he/she can show that there is a less discriminatory and more effective alternative means of achieving the business necessity.

The California Chamber of Commerce asked the OAL to reject the regulations on numerous grounds.

In addition to these new regulations, the California Legislature has introduced legislation (AB 1008; McCarty; D-Sacramento) that addresses the use of prior criminal history information in employment decisions.