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California Employers Are Subject to New Requirements When Using Criminal History Information

BY JENNIFER MORA ON FEBRUARY 21, 2017

In April 2012, the Equal Employment Opportunity Commission (EEOC) issued its long-awaited "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (2012 Guidance). The 2012 Guidance does not prohibit employers from using criminal records, but outlines best practices that the EEOC advises employers to follow, including a recommendation that employers, among other things: (1) remove from employment applications the question that asks job applicants to self-disclose their criminal record; (2) not make an employment decision based solely on the fact of an arrest record; and (3) conduct an "individualized assessment" before rejecting an applicant or terminating an employee because of a conviction.

Since the EEOC issued its guidance, most legislation at the state and local level impacting employer use of criminal records has focused almost exclusively on "banning the box." Specifically, numerous jurisdictions have implemented statutes and ordinances that require employers to remove the criminal history question from job applications and to wait until a later time, such as after an interview or a conditional offer (depending on the jurisdiction), to present the criminal question to job applicants.[1]

More recently, however, the California Fair Employment & Housing Council (FEHC) issued proposed regulations in 2016 that identified numerous ways in which employers can face liability when using a candidate's (which means both a job applicant and an employee) criminal history in hiring and other employment decisions. On January 10, 2017, the FEHC approved those proposed regulations. The regulations have been filed with the Office of Administrative Law and likely will be effective as of July 1, 2017.

In many ways, the FEHC regulations borrow heavily from the EEOC's 2012 Guidance. Specifically, the regulations do not prohibit a California employer from considering criminal information. Moreover, even though one's status as an "ex-offender" is not considered a protected characteristic under California law or Title VII, the regulations allow a candidate to bring a discrimination claim if the employer's use of conviction records results in an "adverse impact" (referred to by the EEOC as "disparate impact") on those in protected classes, such as race, national origin and gender.

The regulations are summarized below. Although this Insight does not address related considerations, such as the interplay between the regulations and the Fair Credit Reporting Act (FCRA), employers should continue to be mindful of their obligations under these laws when using criminal background reports provided by third-party consumer reporting agencies.[2] In addition, nationwide employers should continue to be mindful of so-called "ban the box" laws and the fair employment laws in some states that extend various protections to ex-offenders as "ex-offenders," rather than as members of an otherwise protected class.

Prohibition on Considering Certain Criminal Records

California currently prohibits employers from considering or seeking information about certain types of criminal records, including:

- an arrest or a detention that did not result in a conviction;
- certain marijuana infractions and misdemeanor convictions that are older than two years;
- referral to or participation in any pre-trial or post-trial diversion program;
- an arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of a juvenile court; and
- convictions that have been sealed, judicially dismissed, expunged or statutorily eradicated by law.

The regulations now expand this list to include ***any*** non-felony conviction for possession of marijuana that is older than two years.

Standards for Proving Adverse Impact Discrimination

The FEHC regulations prohibit an employer from considering criminal history in employment decisions if doing so will result in an adverse impact on individuals within a protected class. This theory of discrimination may result from the administration of a facially-neutral policy or procedure; specifically, criminal record screening policies that disproportionately affect members of protected classes.

The candidate bears the threshold burden of proving disparate impact

According to the regulations, a candidate bears the threshold burden of proving that an employer's criminal background screening policy has an adverse impact on a protected class. Adverse impact can be proven by using conviction statistics or by offering other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more protected characteristics are presumptively sufficient to establish an adverse impact. However, an employer may rebut this presumption by offering evidence showing that there is reason to expect a different result after accounting for any particularized circumstances, such as (1) the geographic area covering the applicant or employee pool, (2) the particular types of convictions being considered, or (3) the specific job at issue.

The burden shifts to the employer to show its policy is job-related and consistent with business necessity

Similar to the defense of a disparate impact theory of liability under Title VII, the FEHC regulations state that if a candidate can establish an adverse impact, the burden will shift to the employer to prove that its conviction policy is job-related and consistent with business necessity. In this regard, the employer must show that its policy bears a "demonstrable relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific position(s), not merely to evaluate the person in the abstract."

To make this showing, an employer must establish that the policy or practice is appropriately tailored to the position at issue, taking into account certain factors, derived from *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975) (the centerpiece of the EEOC's position for the past 25 years): (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offense or conduct and/or completion of the sentence, and (3) the nature of the job held or sought. On this point, depending on whether the employer has a "bright-line" conviction disqualification rule or conducts an individualized assessment of the conviction, the regulations set out in detail the ways in which an employer will be able to prove that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job at issue.

The FEHC defines a **"bright-line"** disqualification or consideration to mean that the employer does not consider the candidate's "individualized circumstances" in making an employment decision based on criminal history. According to the regulations, for an employer to show that such a policy is appropriately tailored to the job at issue, it must show that the policy can properly distinguish between candidates that do and do not pose an unacceptable level of risk and that the conviction being used to disqualify, or otherwise adversely impact the status of a candidate, has a direct and specific negative bearing on the candidate's ability to perform the duties or responsibilities necessarily related to the position. Any "bright-line" rule that includes conviction information that is more than seven years old is subject to a rebuttable presumption that the rule is not sufficiently tailored to meet the job-related and consistent with business necessity defense (unless subject to an exemption discussed below).

On the other hand according to the FEHC, an **individualized assessment** means that the employer has considered the candidate's circumstances and qualifications before making an employment decision based on criminal history. To show this practice is appropriately tailored to the job at issue, such an assessment must involve the following:

- notice to the candidate (before any adverse action is taken) that they have been screened out because of a conviction;
- a reasonable opportunity for the candidate to demonstrate that the exclusion should not be applied due to their particular circumstances; and
- consideration by the employer as to whether the additional information provided by the candidate or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied is not job-related and consistent with business necessary.

The candidate has one final chance to prevail

If an employer can meet its burden of proving that its policy or practice of considering conviction history is job-related and consistent with business necessity, the candidate still may be able to prevail if he or she can demonstrate there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice. The regulations give as examples 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.

Notice Requirements

Regardless of whether the employer has a "bright-line" policy or conducts an individualized assessment, before an employer may take adverse action (*e.g.*, decline to hire, discharge, or decline to promote) against a candidate based on conviction history, the regulations require an employer to give the candidate notice of the disqualifying conviction and provide him or her with a reasonable opportunity to present evidence that the conviction information is factually inaccurate. If the candidate can demonstrate the record is factually inaccurate, the employer will not be permitted to consider the record.

This notice is only required when the criminal information is obtained by a source other than the candidate (*e.g.*, a third-party background check, the employer's independent search of court records or the internet). This is different from the FCRA, which requires certain notices ***only*** if the employer takes adverse action against a candidate based, even in part, on information contained in a third-party background check report (the FCRA does not require such notices when adverse action is taken based on criminal information derived from a source other than a third-party background report). This new California notice requirement is also different from those in some "ban the box" laws, such as city ordinances in Los Angeles and San Francisco, where notice may be required if adverse action is taken against a candidate based on criminal record information derived from ***any source***, including a self-disclosure by the candidate.

Exemptions for Certain Regulated Employers

The FEHC regulations recognize that some employers are subject to federal or state laws or regulations that (1) prohibit individuals with certain criminal records from holding certain positions or (2) mandate a screening process employers are required or permitted to utilize before employing individuals in such positions. The regulations note also that some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses. In these situations, compliance with these laws or regulations will constitute a rebuttable defense to an adverse impact claim under California law.

Intentional Discrimination

The regulations address the subject of intentional or "disparate treatment" discrimination. Specifically, the FEHC reiterates the long-standing rule that it is unlawful for an employer to treat applicants or employees differently when considering conviction history if such treatment is substantially motivated by a protected characteristic.

Next Steps for Employers

Employers with operations in California that use or are thinking about using criminal records to screen applicants or employees should consider the following:

- Employers that want to assess potential disparate/adverse impact risks should consider conducting a privileged review of their criminal record-based screening policies and procedures to help identify areas of opportunity in terms of fortifying the policies and procedures as defensible under California law and Title VII. This review may need to include statistical adverse impact analyses of practices that exclude larger groups of applicants or employees.
- Employers should continue to be mindful of, and comply with, the various laws that impact the use of criminal records in addition to the California Fair Employment and Housing Act and Title VII, including state fair employment laws, so-called "ban the box" laws, and federal and state fair credit reporting laws, such as the FCRA.

[1] *See* Jennifer Mora, Rod Fliegel and Christina Cila, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law* (https://www.littler.com/publication-press/publication/city-los-angeles-mayor-sign-long-awaited-%E2%80%9Cban-box%E2%80%9D-law), Littler Insight (Dec. 9, 2016); Jennifer Mora, Philip Gordon and Matthew Curtin, *Connecticut Becomes the Third Jurisdiction in 2016 to "Ban the Box"* (http://www.littler.com/publication-press/publication/connecticut-becomes-third-jurisdiction-2016-ban-box), Littler Insight (June 3, 2016); Jennifer Mora, *Vermont Joins the Ranks of Cities and States that "Ban the Box* (http://www.littler.com/publication-press/publication/vermont-joins-ranks-cities-and-states-

ban-box)", Littler Insight (May 10, 2016); Philip Gordon and Jennifer Mora, *Austin Becomes the First City in Texas to "Ban the Box"* (http://www.littler.com/publication-press/publication/austin-becomes-first-city-texas-%E2%80%9Cban-box%E2%80%9D), Littler Insight (Mar. 25, 2016).

[2] See Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements (https://www.littler.com/publication-press/publication/federal-courts-increase-scrutiny-employer-compliance-fcras-adverse)*, Littler Insight (Jan. 4, 2016); Rod Fliegel, Jennifer Mora, and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers (https://www.littler.com/swelling-tide-fair-credit-reporting-act-fcra-class-actions-practical-risk-mitigating-measures)*, Littler Report (Aug. 1, 2014).