

## Resources

### California Employers Beware: Big Changes in the Employee Hiring Process Take Effect January 1, 2018

November 13, 2017

On January 1, 2018, California Assembly Bill 1008, known as the “Ban the Box” law [1], will take effect regulating employers decisions to deny employment to an applicant based on his/her conviction history.

Fair Employment and Housing Act (“FEHA”) regulations previously went into effect in July 2017 requiring employers to demonstrate that criminal history information they use in employment decisions was job-related. These new regulations will go much further, not only limiting California employers’ rights to use an applicant’s criminal background history in making employment decisions, but will significantly alter the hiring process for many employers.

#### Prohibition Against Pre-Offer Inquiries Regarding Applicants’ Conviction History

The new law will make it unlawful under the FEHA for an **employer with five or more employees** to inquire about or consider an applicant’s conviction history until the applicant has received a conditional offer of employment. An employer will be prohibited from:

- Including on any employment application a question that seeks disclosure of an applicant’s conviction history;
- Inquiring into or considering the conviction history of the applicant, until after the employer has made a conditional offer of employment; and
- Considering, distributing, or disseminating information relating to arrests that do not result in a conviction, diversion programs, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law.

#### Process for Making Adverse Employment Decisions

The law also regulates employers in their decisions to deny employment to an applicant based on his/her conviction history.

##### The Individualized Assessment

If an employer intends to deny a position based entirely or partially on the conviction history, it must complete an individualized assessment which analyzes the relationship between the conviction and specific duties of the position.

The conviction history must bear directly and adversely on specific duties of the position to justify the denial. As part of the Assessment, the employer must consider all of the following:

- Nature and gravity of the offense or conduct;
- The time that has passed since the offense or conduct and completion of the sentence; and
- The nature of the job.

##### Notice of Preliminary Decision

If after conducting an individualized assessment, the employer believes the conviction history disqualifies the applicant from the position, a **written notice of the preliminary decision must be provided to the applicant**, along with a copy of the conviction report, if any, and notice of the right to respond before the employer’s decision becomes final. Although not required, an employer may provide an explanation of its reasoning.

##### The Final Decision

Before making a final decision, an employer must provide the employee **at least five days** to respond to the preliminary decision.

The employer is required to consider information submitted by the applicant during this time period in reaching its final determination.

Thereafter, if an employer makes a final decision to deny an applicant a position for any reason related to the applicant's conviction, the employer **must provide written notice to the applicant**. The notice must include the following information:

- Final denial or disqualification;
- Any procedures or processes instituted by the employer to challenge the decision or request for consideration; and
- The right to file a complaint with the Department of Fair Employment and Housing.

### Exceptions

The new law does not apply to the following positions:

- (1) a position for which a state or local agency is otherwise required by law to conduct a conviction history background check;
- (2) a position with a criminal justice agency as defined by the California Penal Code;
- (3) a farm labor contractor as defined by the California Labor Code; and
- (4) a position where an employer is required by state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history.

### Penalties for Violations

Applicants can sue employers for discrimination in violation of the FEHA. State law provides for a variety of remedies for victims of employment discrimination, including:

- Back pay (past lost earnings)
- Front pay (future lost earnings)
- Hiring / Reinstatement
- Promotion
- Out-of-pocket expenses
- Policy changes
- Training
- Reasonable accommodation(s)
- Damages for emotional distress
- Punitive damages
- Attorney's fees and costs

### What to do Now?

- Review and update your hiring/on-boarding process with counsel, including policies, procedures, and documents related to the screening process, to comply with the new requirements;
- Delete on any application for employment any question that seeks the disclosure of an applicant's conviction history;

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- Refrain from inquiring about or considering the conviction history of an applicant before the applicant receives a conditional offer of employment; and
- Modify offer letters to condition employment on the results of criminal background checks.

For more information, please contact Laura P. Worsinger, (213-457-1744 or [lworsinger@dykema.com](mailto:lworsinger@dykema.com)), Madeleine K. Lee (213-457-1756 or [mlee@dykema.com](mailto:mlee@dykema.com)), or your Dykema relationship attorney.

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[1] "Ban the Box" means delete the question on job applications inquiring about criminal convictions. The cities of Los Angeles and San Francisco have previously enacted Ban the Box laws.

## Attorneys

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## Practice Areas

Labor & Employment

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