



Client Alerts

California Compliant: New Changes for Considering Conviction History in Making Employment Decisions

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California “banned the box” more than five years ago; since January 1, 2018, employers have been unable to ask applicants about their criminal convictions before making a conditional job offer. The state’s Fair Chance Act (FCA, codified at Government Code Section 12952) prohibits most employers from including a question about criminal convictions on an application for employment, or asking individuals about criminal history during an interview or other screening process. The Act includes limited exceptions, including for employers that are required by state, federal, or local law to restrict employment based on criminal history. According to California’s Civil Rights Department (CRD), the Act can “reduce barriers to employment for individuals with conviction histories because gainful employment is essential to these individuals supporting themselves and their families and to improving their community ties and mental health – all of which reduce recidivism.”

Nothing in the FCA prevents a covered employer from obtaining an applicant’s conviction history **after** making that person a conditional offer of employment. Once a conditional offer has been made, the employer can run a background check or ask the applicant directly about a history of convictions. But employers that learn of a criminal conviction after making a conditional job offer must follow specific steps if they are considering withdrawing an offer based upon the applicant’s conviction history.

And now, things just became even more complicated. Amended regulations implementing the FCA modify the process for reconsidering a conditional offer, effective October 1, 2023. The revised regulations also explicitly prohibit employers from obtaining information about an applicant’s criminal history by conducting internet searches. Further, they prohibit employers from including in job postings, applications, or advertisements statements suggesting that applicants having a criminal history are ineligible for employment.

California employers will want to review all pre-hiring documents to ensure that they comply with the FCA, including the new regulations, and make any necessary adjustments to the process by which they take conviction history into account in making employment decisions (whether at hiring or thereafter).

Impermissible Use of Arrests or Convictions in Making Employment Decisions

With limited exceptions, Labor Code Section 432.7 prohibits all employers (“whether a public agency or private individual or corporation”) from inquiring about **arrests that did not result in a conviction**, whether in connection with hiring or another condition of employment (e.g., a promotion or transfer). The FCA, which applies to employers having five or more employees, includes the same prohibition. Both statutes carve out limited exceptions, including for “an arrest for which the employee or applicant is out on bail or on their own recognizance pending trial.”

Both Section 432.7 and the FCA also prohibit employers from taking into account **convictions that were set aside** (i.e., because they were sealed or dismissed), or the applicant’s participation in a “pretrial or posttrial diversion program.” (The Penal Code permits a court to offer certain criminal defendants “diversion,” such as the opportunity to complete training, treatment, or similar conditions, in exchange for a dismissal of charges without serving jail time.)

Scope of the FCA – Who is Being Considered for Employment?

The amended regulations implementing the FCA make clear that the Act’s restrictions are not limited to **prospective** employees. For purposes of the regulations, an “applicant” for employment includes all of the following:

- someone who has started work, subject to successful completion of a background check or other review for criminal history;
- existing employees who have applied, or requested to be considered for, a different position with the same employer; and
- existing employees who are subject to review for criminal history because of a change in ownership, management, policy, or practice.

An “employer” includes direct employers, joint employers, labor contractor/client employers, staffing agencies, and “any entity that evaluates the applicant’s conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly.”

Permissible Consideration of Convictions After Making a Conditional Offer

The FCA requires employers not to take a person’s convictions into account when deciding whether to extend them a conditional offer of employment. The amended regulations confirm that this is true even if an applicant voluntarily discloses their criminal history before a conditional offer has been made. Generally speaking, criminal convictions that were not set aside, expunged, or sealed can be considered, if at all, after making a conditional offer, and only if the employer follows specific steps.

The “Individualized Assessment”

The Act requires employers to “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.” This individualized assessment requires employers to consider each of the following factors: 1) “the nature and gravity of the offense or conduct”; 2) the passage of time since the offense or conduct occurred; and 3) the “nature of the job.” The revised regulations break each of these three factors into **subfactors** (see 2 Cal. Code Regs § 11017.1(c)(1)(B) for each list). The regulations now state that the individualized assessment must be “a reasoned, evidence-based determination.” Employers may find it challenging to document that each of the factors and subfactors were weighed; note that the CRD offers sample forms on its website: <https://civildrights.ca.gov/fair-chance-act/fca-forms/>

Notice of a “Preliminary Determination” of a Disqualifying Conviction

If, as a result of the individualized assessment, an employer makes a preliminary determination that the person’s conviction history is disqualifying, the employer must so notify the individual in writing. The employer has the option, but not the obligation, to explain its reasoning. The required notice must, however, identify the convictions that the employer believes to be disqualifying, and inform the individual of the right to respond to the preliminary determination before the employer’s decision becomes final. The notice must state that the individual has the right to submit evidence “challenging the accuracy of the conviction history” or “of rehabilitation or mitigating circumstances.” If the employer obtained a copy of a conviction history report, that must be given to the individual with the notice.

The person receiving a notice of an adverse preliminary determination has no obligation to respond, either with documentary evidence or other information. But an employer must consider whatever is submitted. The notice of an adverse preliminary determination must state that the individual has at least five business days after receipt of the notice to provide any response (an employer can offer more time if it chooses). The regulations include detailed provisions for calculating the date a notice was “received,” depending on the manner of its transmission. Further, employers must extend the time for a response if the recipient of the notice disputes the accuracy of the conviction history.

The Employer’s “Reassessment” After an Individual’s Response

An employer that receives any response to a notice of an adverse preliminary determination must conduct a “reassessment.” At this stage, the employer can consider all of the factors and subfactors that were weighed as part of the individualized assessment, together with additional factors set forth in the amended regulations. These additional factors include, for example, the individual’s “employment history since the conviction or completion of sentence,” their “community service and engagement,” and other “rehabilitative efforts.”



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The Final Decision

If an employer ultimately decides to withdraw the conditional offer after the required process has been exhausted, it must notify the individual of its decision, again in writing. The CRD offers a sample notice of final decision on its website, but its use isn't mandatory. Whether or not it uses the CRD's form, the employer must communicate to the individual: the final decision (an explanation of the decision is not required); any procedure the employer has to request reconsideration; and the individual's right to file a complaint with the CRD about the decision.

Remedies

Rights and remedies under the FCA are cumulative to all other rights and remedies. The FCA is enforced by the CRD. A person challenging an employer's final decision to withdraw a conditional offer can request an immediate right to sue letter from the CRD.

Local Rules May Apply

California employers should also consider whether local rules contain more restrictive protections for applicants or employees. Many employers in the City of Los Angeles, for example, must comply with the city's Fair Chance Initiative for Hiring Ordinance, which among other things requires employers to add specific language to job postings.

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