Fair Employment & Housing Council
Employment Regulations Regarding Criminal History, the California Family Rights Act, and the New Parent Leave Act

CALIFORNIA CODE OF REGULATIONS
Title 2. Administration
Div. 4.1. Department of Fair Employment & Housing
Chapter 5. Fair Employment & Housing Council
Subchapter 2. Discrimination in Employment
Article 2. Particular Employment Practices; Article 11. California Family Rights Act and New Parent Leave Act

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Article 2. Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

(a) Except in the circumstances addressed in subdivisions (a)(1) - (4) below, employers and other covered entities ("employers" for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's pre-conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subdivisions (c) and (e) – (i) of this regulation):

(1) If the position is one for which a state or local agency is otherwise required by law to conduct a conviction history background check;

(2) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(3) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(4) If the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Security Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(b) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(1) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1,

including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subdivision (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subdivisions (a) through (d), unless the specific position is exempted pursuant to subdivisions (a)(1) – (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subdivisions (a)(1) – (4).

(4) For purposes of section 11017.1 of these regulations only:

(A) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post-conditional offer review of the individual's criminal history.

(B) "Employer" includes a labor contractor and a client employer.

(C) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(D) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.

(E) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(F) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

(c) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history both after a conditional offer has been made and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:
~~Introduction. Employers and other covered entities ("employers" for purposes of this section) in California are explicitly prohibited under other state laws from utilizing certain enumerated criminal records and information (hereinafter "criminal history") in hiring, promotion, training, discipline, lay-off, termination, and other employment decisions as outlined in subsection (b) below. Employers are prohibited under the Act from utilizing other forms of criminal history in employment decisions if doing so would have an adverse impact on individuals on a basis enumerated in the Act that the employer cannot prove is job-related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively.~~

~~(b)Criminal History Information Employers Are Prohibited from Seeking or Considering, Irrespective of Adverse Impact. Except if otherwise specifically permitted by law, employers are prohibited from considering the following types of criminal history, or seeking such history from the employee, applicant or a third party, when making employment decisions such as hiring, promotion, training, discipline, lay-off and termination:~~

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952~~Id.~~);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (~~Id.~~Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (c)(1)-(5), employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first 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. The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subdivision (g) of this section that is used to determine whether the criminal conviction history is job-related and consistent with business necessity. The individualized assessment needs to include, at a minimum, consideration of the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) If, after conducting an individualized assessment, the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); and

(C) An explanation of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice). If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both. The types of evidence that may demonstrate rehabilitation or mitigating circumstances may include, but are not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; whether the individual is bonded under a federal, state, or local bonding program; successful completion, or compliance with the terms and conditions, of probation or parole; and rehabilitation efforts such as education or training. If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no less than five additional business days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

(3) The employer shall consider any information submitted by the applicant before making a final decision regarding whether to rescind the conditional offer of employment. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in a writing that includes the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis enumerated in the Act.

~~(c) Additional Criminal History Limitations, Irrespective of Adverse Impact.~~

~~(1) State or local agency employers are prohibited from asking applicants for employment to disclose information concerning their 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 (Labor Code section 432.9).~~

~~(2) Employers may also be subject to local laws or city ordinances that provide additional limitations. For example, in addition to the criminal history outlined in subsection (b), San Francisco employers are prohibited from considering a conviction or any other determination or adjudication in the juvenile justice system; offenses other than a felony or misdemeanor, such as an infraction (other than driving record infractions if driving is more than a de minimis element of the job position); and convictions that are more than seven years old (unless the position being considered supervises minors, dependent adults, or persons 65 years or older) (Article 49, San Francisco Police Code).~~

~~(3) Employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).~~

(~~d~~f) Consideration of Other Criminal Convictions and the Potential Adverse Impact. In addition to the types of criminal history addressed in subdivision (c) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, c~~C~~onsideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on individuals on a basis protected by the Act, including, but not limited to, gender, race, and national origin. An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis enumerated in the Act. For purposes of such a determination, adverse impact is defined at Sections 11017 and 11010 and the *Uniform Guidelines on Employee Selection and Procedures* (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e). The applicant(s) or employee(s) bears the burden of proving an adverse impact. An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing substantial disparities in the conviction records of one or more categories enumerated in the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(g~~e~~) Establishing "Job-Related and Consistent with Business Necessity."

(1) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis enumerated in the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The criminal conviction consideration policy or practice needs to bear 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. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

(A) The nature and gravity of the offense or conduct;

(B) The time that has passed since the offense or conduct and/or completion of the sentence; and

(C) The nature of the job held or sought.

(2) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate 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~~either:~~.

~~(A) Demonstrate that any "bright line" conviction disqualification or consideration (that is, one that does not consider individualized circumstances) can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify, or otherwise adversely impact the status of the employee or applicant, have a direct and specific negative bearing on the person's ability to perform the duties or responsibilities necessarily related to the employment position.~~ Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subdivision (~~f~~h) below). An individualized assessment must involve notice to the adversely impacted employee (before any adverse action is taken) that they have been screened out because of a criminal conviction; a reasonable opportunity for the individuals 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 individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employee is not job related and consistent with business necessity.~~; or~~

~~(B) Conduct an individualized assessment of the circumstances and qualifications of the applicants or employees excluded by the conviction screen. An individualized assessment must involve notice to the adversely impacted employees or applicants (before any adverse action is taken) that they have been screened out because of a criminal~~

~~conviction; a reasonable opportunity for the individuals 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 individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the employees or applicants is not job-related and consistent with business necessity.~~

(3) ~~Regardless of whether an employer utilizes a bright line policy or conducts individualized assessments, b~~Before an employer may take an adverse action such as ~~declining to hire,~~ discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record cannot be considered in the employment decision.

(h~~f~~) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code section~~s~~ 432.7~~, 432.9~~). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(i~~g~~) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as 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.

~~(h) Disparate Treatment. As in other contexts, the Act prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history if the disparate treatment is substantially motivated by a basis enumerated in the Act.~~

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, ~~and~~ 12940, and 12952, Government Code.

Article 11. California Family Rights Act and New Parent Leave Act

§ 11087. Definitions.

The following definitions apply only to this article. The definitions in the federal regulations that became effective March 8, 2013 interpreting the Family and Medical Leave Act of 1993 (FMLA) (29 U.S.C. § 2601 et seq.) shall also apply to this article, to the extent that they are not inconsistent with the following definitions:

(a) "Certification" means a written communication from the health care provider of the child, parent, spouse, or employee with a serious health condition to the employer of the employee requesting a family care leave to care for the employee's child, parent or spouse, or a medical leave for the employee's own serious health condition.

(1) For family care leave for the employee's child, parent, or spouse, this certification need not identify the serious health condition involved, but shall contain the information identified in Government Code section 12945.2.

(A) the date, if known, on which the serious health condition commenced,

(B) the probable duration of the condition,