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Use of Criminal History In Employment Decisions: Expanded Statewide Regulation Takes Effect July 1

by James Morris

Effective July 1, 2017, an expanded California regulation imposes additional restrictions on employers' use of criminal background information in making employment decisions. (2 C.C.R., sec. 11017, 11017.1.)

For starters, the regulation makes unlawful any employer policy or practice that has an adverse impact on any characteristic protected by the Fair Employment and Housing Act ("FEHA"), *unless* the policy or practice is not only job-related but also consistent with business necessity.

Employers should assume that criminal conviction information can be shown with relative ease to have an "adverse impact" on one or more FEHA-protected characteristics. In practice, California employers can no longer comfortably rely on broad-brush automatic bars to employment on the basis of criminal history – e.g., "a felony conviction is an automatic disqualifier for employment."

How can employers establish that any consideration of criminal background information is both job-related and consistent with business necessity *for the particular job in question*? The regulation offers two approaches. Both will prove easier to recite on paper than to apply in practice:

First, an employer can show (i) that any "bright-line" conviction disqualification (i.e., one that does not look at individualized circumstances) can properly distinguish between those who do, and those who do not, pose an unacceptable level of risk; and (ii) that the disqualifying conviction(s) "have a direct and specific negative bearing" on the individual's ability to perform the particular job's duties or responsibilities. (Notably, a bright-line disqualification for any conviction seven or more years old is *presumed* not to be "sufficiently tailored" to meet this test – unless the disqualification is required by other laws!)

Alternatively, an employer can perform "an individualized assessment of the circumstances and qualifications" of those excluded by the conviction screen.

Either approach – "bright-line" or "individualized assessment" – then leads employers into a procedural thicket: Before taking any "adverse action" – e.g., refusing to hire someone – on the basis of criminal history, an employer now must provide the person with notice and a reasonable opportunity to present evidence that the conviction information is "factually inaccurate."

Additionally, under the "individualized assessment" approach, the employer must also allow the person a reasonable opportunity to explain why the conviction record shouldn't be applied to that person's particular circumstances, *and* the employer must consider whether any such additional information justifies an exception and makes the policy not job-related and consistent with business necessity.

The regulation alludes in passing to "local laws or city ordinances" that impose additional limitations – for example, the many cities with "ban-the-box" requirements for employment applications, and San Francisco's broader-than-state-law exclusions of various types of criminal offenses.

The regulation also explicitly excludes consideration of (or seeking information about) *any* non-felony conviction for marijuana possession that is two or more years old (as opposed to the current confusing list of various specified marijuana misdemeanors). In practice, however, this more explicit rule does not represent much of a change.

In sum, even when employers can permissibly collect and consider criminal conviction information, either during the initial stages of the application process or (e.g., in ban-the-box jurisdictions) after initial qualifications have been met, California employers now must navigate with far more care, and at slower speed, before basing negative employment decisions on criminal conviction history. In particular, employers would be wise to review their hiring practices with regard to the acquisition and use of criminal history information, whether obtained directly from applicants or through background checks that are subject to additional federal and state laws.

Reminder: July 1 Also Ushers In Various Local Minimum Wage Hikes And Leave Laws

On July 1, many local jurisdictions will leap ahead of the 2018 California statewide minimum wage increase with their own minimum wage hikes. Raises vary from city to city, and also by size of employer. Locales implementing increases include Emeryville, Los Angeles (City and County), Malibu, Pasadena, San Francisco, San Jose and Santa Monica. Los Angeles and San Francisco also are implementing paid leave ordinances, and Emeryville's Fair Workweek Ordinance becomes effective, too.

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