

## Auditing Criminal Background Check Use In Calif.

By John Zaimes and Roxanne Wilson

*Law360, New York (September 6, 2017, 1:07 PM EDT)* -- California employers must comply with new regulations on employer consideration of applicants' and employees' criminal background.[1] The regulations, which were effective as of July 1, 2017, borrow heavily from guidance by the U.S. Equal Employment Opportunity Commission in its April 2012 "Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964." [2] Both the regulations and the guidance reflect efforts to reduce employment application rejections due to a criminal record, which are believed to have a detrimental effect on not only the individuals involved but also society as a whole in the form of unemployment and recidivism.[3]



John Zaimes

### Key Aspects of the New Regulations

The new regulations:

#### Limit the Types of Criminal Convictions Employers May Consider

Employers are now prohibited from considering any nonfelony convictions for marijuana possession if the conviction is more than two years old. (Before the regulations were enacted, California law already prohibited asking applicants to provide information concerning convictions for marijuana-related offenses that are more than two years old; any detentions or arrests not resulting in conviction (except for those pending); any convictions that have been judicially dismissed or ordered sealed; and/or any referral to or participation in a work/education program as part of probation.)



Roxanne Wilson

#### Require Notice to the Applicant/Employee of Any Disqualifying Conviction and Provide a Reasonable Opportunity to Present Evidence of Factual Inaccuracy

Under the new regulations, if an employer obtains criminal background information from a source other

than the candidate (e.g., third-party background check), the employer must provide the applicant notice of the disqualifying conviction and give the applicant a reasonable opportunity to present evidence of factual inaccuracy before taking adverse action (e.g., declining to hire or promote, terminating). If the applicant produces such evidence, the conviction cannot be considered in the employment decision. This notice differs from the notice required by the Fair Credit Report Act, which mandates notices only if the employer takes adverse action based on information contained in a third-party background check.

This notice also differs from “ban the box” city ordinances, such as those of Los Angeles and San Francisco, where notice may be required if adverse action is taken from criminal background information from any source, including disclosure from the applicant/employee.

### **Prohibit Consideration of Criminal Background When Doing So Will Result in an Adverse Impact on Individuals Within a Protected Class**

Although “ex-offender” is not considered a protected characteristic under California law or Title VII, employers are prohibited from considering criminal background if doing so will result in an adverse impact (referred to by the EEOC as “disparate impact”) on individuals within a certain class (e.g., race, national origin, etc.). The regulations bring California into alignment with federal law on this point.

Applicants bear the initial burden of proving that the employer’s background screening policy has an adverse impact on a protected class. The regulations provide that 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 particular 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.

If adverse impact is demonstrated, the burden shifts to the employer to demonstrate that its policy is “job related and consistent with business necessity” and tailored to the specific circumstances, taking into account (1) the nature and gravity of the offense or conduct; (2) the amount of time since the offense or conduct and/or completion of the sentence; and (3) the nature of the job held or sought.[4] Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used requires that an employer either:

- Demonstrate that any "bright-line" rule disqualifying candidates with certain criminal convictions is necessary because of an unacceptable level of risk in that job and that it has a direct negative bearing on the person's ability to perform the job. (Note: Bright-line disqualification policies that include convictions that are older than seven years create a rebuttable presumption that they are not sufficiently tailored.); or

- Review the individual job applicant's report and give the applicant an opportunity to explain why a conviction shouldn't bar him or her from consideration for the job.

Even if an employer can demonstrate job-relatedness and consistency with business necessity, an applicant or employee can still bring a claim if he or she can show that there is a less discriminatory alternative (such as a narrower list of disqualifying convictions) that advance the employer's legitimate concerns as effectively as the current policy or practice.

Also, the new regulations exempt certain employers who are subject to federal or state laws or regulations that (1) prohibit individuals with certain criminal records from holding certain positions, and (2) mandate a screening process for employers before they can hire individuals in certain positions.

### **The Need for Employer Compliance Audits**

Employers in California should consider taking the following steps to ensure compliance with not only the new Fair Employment and Housing Council regulations but also the federal FCRA, the California Investigative Consumer Reporting Agencies Act, the California Consumer Credit Reporting Agencies Act, and applicable municipal "ban the box" ordinances, including the Los Angeles Fair Chance Initiative for Hiring (enacted in January 2017) and the San Francisco Fair Chance Ordinance (enacted in 2014):

- Audit their applications and policies on the use of criminal background checks of applicants and current employees;
- Have in place a written policy on the use of criminal background checks of applicants and current employees;
- Eliminate questions about criminal convictions on the job application and use criminal background checks only at the time a job offer is to be made;
- Tailor the use of criminal background checks to the nature of the job sought, the nature of the criminal offense and the amount of time that has elapsed since the conviction and completion of the sentence;
- Before taking an adverse hiring or employment action, be prepared to demonstrate that the use of criminal background checks is consistent with business necessity;
- Anticipate legal challenges to hiring and employment practices; and
- Consider conducting an adverse impact analysis on hiring or employment practices that exclude large numbers of job applicants or employees.

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[1] Cal. Code Regs. tit. 2, § 11017.1.

[2] [http://www.eeoc.gov/laws/guidance/upload/arrest\\_conviction.pdf](http://www.eeoc.gov/laws/guidance/upload/arrest_conviction.pdf)

[3] See, e.g., *United States v. McKnight*, 33 F. Supp. 3d 577, 586 (D. Md. 2014).

[4] *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975).

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