

## Publications

### *Labor and Employment Alert: California Bans-the-Box on Criminal Histories*

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#### CLIENT ALERT | 10.18.2017

California law generally prohibits an employer from asking applicants to disclose, or from using as a factor in determining any condition of employment, information concerning arrests or detentions not resulting in a conviction. A recent change to that law makes California the tenth state to adopt a broad ban-the-box law making it unlawful for private employers to inquire into or consider an applicant's criminal conviction history.

### Criminal Conviction Inquiries

Effective January 1, 2018, it will be an unlawful employment practice for an employer with five or more employees:

- (1) To include on any employment application, before the employer makes a conditional offer of employment, any question that seeks the disclosure of conviction history.
- (2) To inquire into or consider conviction history until after the employer has made a conditional offer of employment to the applicant.
- (3) To consider, distribute, or disseminate information about (a) arrests not followed by conviction, (b) referral to or participation in a pre- or post-trial diversion program, or (c) sealed, dismissed, or expunged convictions, while conducting a conviction history background check.
- (4) To interfere with, restrain, or deny the exercise of, or the attempt to exercise, any of the rights applicants have under the new law.

An employer is permitted to conduct conviction history background checks that do not conflict with these provisions.

## Individualized Assessment

An employer that intends to deny employment solely or in part because of an applicant's conviction history must make an individualized assessment of whether the conviction history has "a direct and adverse relationship" with the specific duties of the job. In making this assessment, the employer must consider the nature and gravity of the offense; the time that has passed since the offense and completion of the sentence; and the nature of the job held or sought. An employer may commit the results of the assessment to writing.

## Adverse Action

If the employer makes a preliminary decision that the conviction history disqualifies the applicant, the employer must notify the applicant in writing. That notification may explain the employer's reasoning. The notification must contain:

- (A) Notice of the disqualifying conviction that is the basis for the preliminary decision to rescind the offer;
- (B) A copy of any conviction history report; and
- (C) An explanation of the applicant's right and deadline to respond before that decision becomes final. The applicant must be informed that he or she may include evidence challenging the accuracy of the report and evidence of rehabilitation or mitigating circumstances.

The applicant has five business days to respond before the employer can make a final decision. If the applicant gives written notice that he or she disputes the accuracy of the report and is taking specific steps to obtain evidence supporting that assertion, then the applicant must be given five additional business days to respond. The employer must consider the applicant's information before making a final decision.

If an employer makes a final decision to deny an application solely or in part because of the conviction history, the employer must notify the applicant in writing of the denial, any procedure the employer has to request reconsideration, and the right to file a complaint with the Department of Fair Employment and Housing. The employer may justify or explain the employer's reasoning for making the final denial or disqualification.

## Exceptions

The law's requirements do not apply to positions for which state or local agencies are required by law to conduct a conviction history background check; to positions with a criminal justice agency; to positions as a farm labor contractor; and to positions where an employer 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.

## Remedies

Aggrieved individuals may sue for compensatory damages, attorney's fees and costs. They also may pursue claims under local ban-the-box ordinances.

Employers should review their hiring practices and policies, including their employment applications, to ensure that they conform to these new state-wide requirements. Additionally, employers should ensure their practices comply with local ban-the-box ordinances, which may differ from state law. Contact your Vorys lawyer if you have questions about criminal history checks or other pre-employment inquiries.