

Publications

Labor and Employment Alert: New California Regulations Further Restrict Criminal Background Checks

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California law already prohibits employers from using certain criminal history in hiring, discipline, termination and other employment decisions. Employers are also generally prohibited from using criminal history if doing so would have an adverse impact on individuals because of a protected characteristic like race, gender or national origin. The California Department of Fair Employment and Housing has adopted regulations that make it even more difficult for employers to use an applicant's or employee's criminal history.

Marijuana Convictions

The regulations prohibit employers from considering, or seeking history about, an employee's non-felony conviction for marijuana possession that is two or more years old unless otherwise permitted by law.

Prohibiting Reliance on Criminal History When There is an Adverse Impact

Employers are prohibited from considering criminal history if the applicant or employee proves that doing so will adversely impact them because of a protected characteristic. An applicant or employee may demonstrate adverse impact with conviction statistics. Under the regulations, state- or national-level statistics showing "substantial disparities" in conviction records of protected classes "are presumptively sufficient to establish an adverse impact." An employer can overcome this presumption by showing different results are expected after accounting for 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.

Defending Against an Adverse Impact

If a policy creates an adverse impact, the employer must show its policy is justifiable because it is job-related and consistent with business necessity. This means the policy must bear "a demonstrable relationship to successful performance on the job and in the

workplace” and measure “the person's fitness for the specific position.” The policy must be “appropriately tailored,” taking into account at least: the nature and gravity of the offense or conduct; the time that has passed since the offense or conduct and/or completion of the sentence; and the nature of the job held or sought. Demonstrating that a policy of considering conviction history is appropriately tailored requires that an employer do one of the following:

1. Demonstrate that any “bright-line” conviction disqualification (one that does not consider individualized circumstances, such as all those with murder convictions are excluded) can properly distinguish between those who do and do not pose an unacceptable level of risk **and** that the convictions being used have “a direct and specific negative bearing on the person's ability to perform the duties or responsibilities necessarily related to the employment position.” Criminal history that is seven or more years old is presumed not to be job-related and consistent with business necessity (unless a law otherwise requires considering it).
2. Conduct an individualized assessment of the qualifications of those excluded by the conviction screen. This requires notifying those adversely impacted (before any adverse action) that they have been screened out because of a criminal conviction; a reasonable opportunity for them to demonstrate the exclusion should not be applied; and consideration as to whether the additional information provided by the individuals warrants an exception to the exclusion.

Employer Notice

Regardless of whether the employer uses a bright line policy or conducts individualized assessments, before taking any adverse action based on criminal history obtained from other than the applicant or employee, the employer must give notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee does so, then that record cannot be considered in the employment decision.

Compliance with Other Laws

Compliance with federal or state laws that mandate particular criminal history screening or require that an employee or applicant possess occupational licenses provides a rebuttable defense to an adverse impact claim.

Less Discriminatory Alternatives

If an employer demonstrates that its policy is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail by showing there exists a less discriminatory policy that serves the employer's goals as effectively as the challenged. This could entail, for example, a more narrowly targeted list of convictions or a form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

Conclusion

Employers should ensure their background check procedures comply with California's requirements. To that end, the regulations remind employers they may also be subject to local laws that further limit the use of criminal history, and employers obtaining investigative consumer reports such as background checks may also be subject the federal Fair Credit Reporting Act and the California Investigative Consumer Reporting Agencies Act. The rules become effective on July 1, 2017. Contact your Vorys lawyer if you have questions about best practices for conducting background checks.