

Updates

August 24, 2023

California's Newest Regulations Regarding Criminal Records



California's Civil Rights Council (the Council), a branch of the California Civil Rights Department, issued proposed revisions, earlier this year, to the Fair Employment and Housing Act (FEHA) regulations governing an employer's use and consideration of a job applicant's criminal history in employment decisions.

On July 24, 2023, the Council's revisions were [approved](#). The changes take effect on October 1, 2023.

Consideration of Criminal History Prior to Conditional Offers of Employment

With some exceptions, the new regulations prohibit employers 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.

Definitions

The Council expanded the definitions of the following terms:

- **Applicant** includes "individuals who have been conditionally offered employment, even if they have commenced employment when the employer undertakes a post-conditional offer review and consideration of criminal history; existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer; and an existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, policy, or practice."
- **Employer** includes "a labor contractor and a client employer; any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list."

- **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."
- **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."

Requirements Surrounding Denial of a Conditional Offer Due to Conviction History

Individualized Assessment

The new regulations require that 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 conduct an individualized assessment. As part of the individualized assessment, employers must consider (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense and/or completion of the sentence; and (3) the nature of the job held or sought.

Further, if an applicant wishes to present evidence of rehabilitation or mitigating circumstances during the individualized assessment, employers must consider the evidence.

Preliminary Decision and Opportunity To Respond

If, after conducting an individualized assessment, an employer makes a preliminary decision that the applicant's conviction history disqualifies them from the employment conditionally offered, the employer shall notify the applicant in writing. Employers must then permit applicants to respond by providing evidence of rehabilitation or mitigating circumstances and/or evidence challenging the accuracy of the conviction history report that is the basis for the preliminary decision to rescind the offer.

Reassessment

Employers shall consider any information submitted by an applicant before making a final decision regarding whether to rescind a conditional offer. Specifically, when considering evidence of rehabilitation or mitigating circumstances, employers may consider the following factors: (1) when the conviction led to incarceration; (2) the applicant's conduct during incarceration; (3) the applicant's employment history since the conviction or completion of sentence; (4) the applicant's community service and engagement since the conviction or completion of sentence; (5) the applicant's other rehabilitative efforts since the conviction or completion of sentence; and/or (6) other mitigating factors.

Additional Prohibitions

The new regulations prohibit employers from taking the following actions:

- Refusing to accept additional evidence voluntarily provided by an applicant or by another party at the applicant's request at any stage of the hiring process (including prior to making a preliminary decision to rescind the applicant's job offer).
- Requiring an applicant to submit additional evidence at any time in the hiring process.
- Requiring an applicant to provide a specific type of documentary evidence or disqualifying an applicant from the employment conditionally offered for failing to provide any specific type of documents or other evidence.

- Requiring an applicant to disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses.
- Requiring an applicant to produce medical records and/or disclose the existence of a disability or diagnosis.

What's Next?

Employers should seek experienced counsel if they have any questions about the regulations or need assistance updating or preparing policies.

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