

San Francisco's New Fair Chance Ordinance Regulates Criminal Background Inquires for Job Applicants

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California Labor Code Section 432.7 has long provided that employers are forbidden from asking job applicants to disclose information concerning arrests or detentions that did not result in convictions. The statute also forbids employers from seeking information or utilizing information concerning arrest records that did not result in convictions with respect to hiring, promoting or terminating individuals. The statute, however, provides that the law does not prevent an employer from asking an employee or an applicant for employment about an arrest for which he or she is out on bail or his or her own recognizance pending trial. There are numerous exceptions to the statute's general prohibitions, however, those exceptions sensibly relate to employment by police departments, health facilities, positions with access to drugs and medications and situations where an employer is required by law to obtain information regarding convictions.

As of August 13, 2004, the City of San Francisco greatly expanded *Section 432.7's* prohibitions. Under a San Francisco City Ordinance entitled the "Fair Chance Ordinance", employers are forbidden from making any inquiry into criminal history information on job applications. In general, the ordinance prohibits employers from requesting job applicants to disclose information concerning convictions or unresolved arrests. The ordinance does allow inquiries concerning criminal history only after an initial interview of a conditional offer of employment. Moreover, the ordinance forbids employers from making any inquiry at any time or from taking any adverse action with respect to an arrest not leading to a conviction, participation or completion of a diversion program, or a conviction that was judicially dismissed or expunged, or juvenile convictions or convictions that are over seven years old from the date of sentencing or offenses other than felonies or misdemeanors.

The ordinance places a burden on employers who refuse to hire or who take adverse actions against employees based on their criminal conviction history to conduct individualized assessment of whether the conviction has a direct negative bearing on the person's ability to

perform his or her job duties. The assessment takes into consideration the amount of time between the conviction and the job application. If the employer decides to take an adverse action based upon the employee's conviction history, the employee or job applicant must be provided with a copy of the background check report that the employer is relying upon. The employee then has a seven day period within which to provide a response concerning evidence of inaccuracy, rehabilitation or other mitigating factors. If the employee provides such a response, the employer must wait at least five more days to reconsider the prospective adverse action in light of the new information supplied by the applicant or employee.

While the ordinance contains notice and disclosure requirements, it also provides that all job solicitations or advertisements contain a written provision that the employer will consider qualified applicants with criminal histories in a manner that is consistent with the provisions of the ordinance itself. In addition, employers are required to post notices published by the San Francisco Office of Labor Standards Enforcement which informs applicants that employees have their rights under the Ordinance. The notice must be published in English, Spanish and Cantonese/Mandarin and any other languages spoken by more than 5% of the employer's San Francisco based workforce.

The breadth of the ordinance is quite extensive and covers companies wherever located which have at least one employee doing at least 8 hours of work each week in San Francisco regardless of whether the employee is a permanent, temporary or part time employee.

If the employer is a contractor it has additional obligations under the statute. Contractors are required to send the Fair Chance Ordinance notice to labor unions with which it has either collective bargaining agreements or memorandums of understanding if those unions provide labor from or within San Francisco.

In response to the ordinance, employers must review and revise their hiring policies and practices. Job applications and website postings must be revised to insure compliance with the ordinance. Further, all required notices published by the OLSE must be posted in break rooms and conspicuous places of employment. In addition, HR managers and those employees who conduct job interviews must be counseled with respect to criminal history inquires, individual assessments and the retention of documents.

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