
“Ban the Box” Has Arrived in the City of Los Angeles—Are You in Compliance?

Employers with ten or more employees performing services in Los Angeles should review their employment hiring practices.

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Is your organization located in or doing business in the City of Los Angeles? Does your organization have 10 or more employees who spend time working there? If yes to both, it is time to take a look at your employment application and hiring practices with fresh eyes.

- The City of Los Angeles joined the growing movement to curb use of an applicant’s criminal history in hiring decisions.
- Inquiries into criminal history can now only be conducted post-offer.
- Adverse decisions based on a criminal history must be supported by a written assessment linking specific aspects of the crime with inherent risks of the position’s job duties.

The City of Los Angeles recently passed the Los Angeles Fair Chance Initiative for Hiring (Ban the Box), [Ordinance No. 184652](#), effective January 22, 2017. The ordinance is part of a growing, nationwide movement to curb the use of an applicant’s criminal history in making hiring decisions. Though cities like New York and San Francisco, and even the federal government, beat Los Angeles to the punch in implementing various regulations restricting the use of background checks and consideration of criminal convictions in the hiring process, the Los Angeles ordinance is among the most demanding.

The ordinance applies to private employers located or doing business in Los Angeles with 10 or more employees. It prohibits them from inquiring about a job applicant’s criminal history unless and until a conditional offer of employment has been made to the applicant.

Key provisions of the ordinance to keep in mind as you analyze your own practices are as follows:

Is Your Company Impacted by This Ordinance?

A covered employer is one which:

1. Is either located in the City of Los Angeles or is doing business in the city; and
2. Employs 10 or more “employees.” Under the ordinance, an “employee” is an individual who performs on average at least two hours of work each week within city boundaries for a covered employer.

These definitions are important when analyzing whether your organization must comply with the ordinance. For example, a company may be covered by the ordinance even if it does not have a brick and mortar location in the city. The company will be subject to the ordinance if it has sufficient business activities within the city to be considered “doing business” here, and if 10 employees drive into the city for an average of only two hours of work per week to conduct business. Therefore, companies with facilities outside Los Angeles are advised to assess their practices and workforce to determine whether the ordinance applies, particularly if some of their employees routinely travel into the city for sales or other client-related visits.

Required Changes in the Application and Hiring Process

All covered employers must ensure their application materials exclude questions soliciting the disclosure of an applicant’s criminal history. Covered employers also must not otherwise inquire about or require applicants to disclose their criminal history unless and until a conditional offer of employment has been made. This prohibition includes “off the record” diligence activities and oral questions during in-person interviews. Once a conditional offer has been made, the employer may then inquire into the applicant’s criminal history. The employer may not revoke the applicant’s offer based on his or her criminal history without following the Fair Chance Process described below.

Employer’s Written Assessment and the Fair Chance Process

The Fair Chance Process requires a covered employer to do all of the following before it takes any adverse action based on the criminal history of a particular applicant to whom a conditional job offer was made:

1. **Written Assessment:** Upon receiving criminal history information, the employer must perform a written assessment that “effectively links the specific aspects” of the applicant’s criminal history with inherent risks in the applicant’s potential job duties. As part of this assessment, employers should consider—at a minimum—the factors identified by the Equal Employment Opportunity Commission, Enforcement Guidance No. [951.002](#) regarding job-relatedness and business necessity, as well as any rules or guidelines eventually issued by the city’s enforcement agency. Ideally, the assessment should state all of the employer’s business justifications for rescinding the applicant’s job offer based on his or her criminal history.
2. **Five-Day Waiting Period:** The employer’s written assessment must be provided to the applicant. It must state the proposed adverse action and disclose any other documents or information relied on by the employer (e.g. background check or criminal history record) in reaching its conclusion. Once notice is provided to the applicant, the employer must keep the position open and cannot render a final decision regarding the applicant’s job offer for at least five business days.

3. **Written Reassessment:** During the five-day waiting period, an applicant may provide the employer with additional information or documentation to clarify, rebut or otherwise demonstrate mitigating circumstances regarding his or her criminal history. The employer must review and consider any information provided and perform a written reassessment of the proposed adverse action.
4. **Notice of Final Decision:** If the employer decides to move forward with the adverse action despite the reassessment, it must notify the applicant of the final decision and provide a copy of the reassessment.

Exceptions

There are a few common-sense exceptions from the application requirements and Fair Chance Process. These include circumstances when: (1) the employer is prohibited by law from hiring individuals with a criminal conviction; (2) the employer is required by law to obtain information regarding convictions; or (3) the applicant would be required to possess or use a firearm as part of their job duties.

No Retaliation

Similar to other anti-discrimination laws, an employer may not discharge or otherwise take adverse employment action against an employee who complains about non-compliance with this ordinance, opposes any practices not in conformance with this ordinance, or seeks to enforce his or her rights under the ordinance by lawful means.

Required Notices, Postings and Record Retention

A covered employer must state in all of its solicitations or advertisements for open positions that it “will consider qualified applicants with criminal histories for employment in a manner consistent with the requirements of the Los Angeles Fair Chance Initiative for Hiring, Ordinance No. 184652.”

It must also conspicuously post a notice informing applicants of the provisions of the ordinance at every workplace, job site or other location in the city within its control, and send a copy of the notice to each labor union or other representative of workers with which it has a collective bargaining or other services agreement that is applicable to employees working in Los Angeles.

Regarding record retention, covered employers must retain all records and documents related to an applicant’s employment application, written assessment and/or reassessment for a period of three years from the date the initial application is received. These records may be requested by the enforcement agency in an administrative enforcement proceeding.

Enforcement and Penalties

An affected applicant or employee may file a complaint with the Department of Public Works within one year of the alleged violation. After exhausting administrative remedies, an affected individual may also bring a civil action in state court. The penalties and fines for violations of this ordinance are progressive—up to \$500 for the first violation, up to \$1,000 for the second violation and up to \$2,000 for subsequent violations. The amount of the penalty or fine will be based on the totality of circumstances including whether the employer’s actions are found to be “willful.” There are also penalties and fines associated with violations of the notice, posting and record retention requirements.

Action Steps:

Though the ordinance went into effect on January 22, 2017, the city has provided a brief reprieve from the assessment of penalties until July 1, 2017. Until then, identified violations will only result in written warnings.

If your business touches the City of Los Angeles, we recommend you consider the following actions to ensure you are compliant:

1. Determine whether your business is a “covered employer” under the ordinance which includes determining, whether any employee works at least two hours on average per week in the city for your business. If yes:
2. Review all of your hiring applications, job postings, advertisements, policies and other job application materials for compliance and add the required notice language;
3. Immediately remove any questions requesting the disclosure of an applicant’s criminal history from your job applications or other application documents (this may include background check consent forms);
4. Post and distribute any required notices;
5. Notify and re-train all interviewing personnel (including outside employment agencies) to ensure they do not seek information regarding an applicant’s criminal background or history prior to a conditional offer of employment being made;
6. Review your criminal background policies and procedures and, should you choose to maintain them, revise them to comply with the ordinance and specifically its Fair Chance Process;
7. Review any record retention policies (especially regarding applications and other hiring materials) and revise as needed to include retaining required materials for at least three years.

As always, contact a legal professional should you have questions about whether this ordinance is applicable to you or how to implement its provisions.

If you have any questions about the content of this Alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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