

December 16, 2016

City of Los Angeles Absolutely, Positively Bans the Box, Even for Non-Resident Employers

Not to be outdone by San Francisco or New York City, the City of Los Angeles has enacted the strictest “ban the box” ordinance in the country, and its many requirements are detailed and onerous. The Los Angeles Fair Chance Initiative for Hiring, Ordinance No. 184652, prohibits most employers located or doing business in the City of Los Angeles from asking any questions about an applicant’s criminal history until after extending a conditional offer of employment. The Fair Chance Initiative becomes effective Jan. 22, 2017, although employers have a grace period through July 1, 2017, to ensure that practices, forms and postings are in compliance.

You May Be Covered—Even If You’re Not in Los Angeles

The Fair Chance Initiative covers most private employers with 10 or more employees who perform an average of at least two hours of work each week in the City of Los Angeles. Notably, the employer need not be located within the city. There are four categories of exemptions from the initiative’s requirements, in addition to exemptions applicable to certain public employers: (1) for employers who are required by law to obtain applicants’ conviction information; (2) where, by law, the position cannot be held by an applicant with a criminal conviction; (3) where the employer is prohibited by law from hiring an applicant with a criminal conviction; and (4) where the position requires the employee to possess or use a firearm.

What Has Changed?

For covered employers and positions, employment applications cannot ask anything about conviction history.

Once a conditional offer of employment has been made, employers are permitted to inquire about an applicant’s conviction history (as otherwise permitted by law). However, employers cannot withdraw the offer or otherwise refuse to employ the applicant based on that history until they have completed the “Fair Chance Process.”

The First Step: A post-offer written assessment

Under the Fair Chance Process, the employer must complete a written assessment that “effectively links” the applicant’s criminal history with risks inherent in the prospective job duties. This written assessment must include, at a minimum, factors identified by the Equal Employment Opportunity Commission (EEOC) and other factors that may be identified by the Department of Public Works (DPW), the agency responsible for the administration of the Fair Chance Initiative.

The initiative incorporates EEOC standards for employers’ use of conviction information. Specifically, in April 2012, the EEOC issued its “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.” (The guidance can be found [here](#).) The EEOC identified three factors to analyze when determining whether exclusion of an applicant due to criminal convictions is job related and consistent with business necessity: (1) the nature and gravity of the offense or conduct; (2) the time that has passed since the offense, conduct, or completion of the sentence; and (3) the nature

December 16, 2016

of the job held or sought. By analyzing these factors, additional factors that the DPW may identify, and other relevant information, employers must show—in writing—that the criminal conviction(s) impact risks inherent in the applicant's desired position.

Next, the applicant must be allowed to respond to the assessment

The Fair Chance Process requires that the employer give the applicant written notification of the proposed adverse action, a copy of the written assessment described above, and any other information or documentation supporting the proposed adverse action. ***Note that the employer must wait at least five business days after giving notice to the applicant before taking the adverse action or filling the position.*** During that time, the applicant has the opportunity to provide the employer with documentation regarding the accuracy of the criminal history report and other relevant information to be considered in the assessment.

Finally, the employer must prepare a written re-assessment

Upon receipt of any information or documentation from the applicant, the employer must consider the information or documentation and complete ***another*** written assessment of the proposed adverse action. If the employer decides to revoke the job offer or take other adverse action, it must provide the applicant with notification of that decision as well as a copy of the written re-assessment.

Notice and Recordkeeping Requirements

Covered employers must:

- Specifically state in all job postings, solicitation, and advertisements for employment that they will consider qualified applicants with criminal histories for employment pursuant to the Fair Chance Initiative;
- Post a notice regarding the Fair Chance Initiative at every location in the City of Los Angeles visited by applicants;
- Send the notice to labor unions or similar organizations with which they have collective bargaining or other similar agreements applicable to employees who work in Los Angeles; and
- Retain records related to all employment applications, written assessments, and reassessments for a period of three years.

Enforcement and Penalties

Applicants or employees can file complaints with the DPW within one year of an alleged violation of the Fair Chance Initiative. They may also bring a civil action against the employer within one year of the completion of the administrative process. The initiative also prohibits retaliation, which is a separate basis for a complaint.

During the grace period (i.e., through July 1, 2017), employers who violate the Fair Chance Initiative's requirements are subject to written warnings. Thereafter, most violations will expose employers to penalties and

December 16, 2016

finest of up to \$500 for the first violation, up to \$1,000 for the second violation, and up to \$2,000 for subsequent violations. Penalties and fines for posting and record retention requirements will be up to \$500 per violation.

What You Should Do Now

First, check a map of the City of Los Angeles—it's probably bigger than you think, and includes more areas than might be expected. - It includes West Hills and Eagle Rock, for example, but not Beverly Hills.

Covered employers should ensure their hiring policies, processes, documentation, and recordkeeping practices comply with this new law, including:

- Eliminate all questions related to criminal convictions on employment applications and during the interview process;
- Ensure that background checks that may include conviction information are not performed until after a conditional offer of employment is made;
- Update job postings and other employment-related advertisements to incorporate the Fair Chance Initiative;
- Post and distribute required notices;
- Analyze which jobs may permit you to justify taking any adverse action against an applicant based on conviction information, prepare your Fair Chance Process protocol, and adapt your hiring procedures, including post-offer inquiries of applicants, accordingly;
- Work with legal counsel to conduct the Fair Chance Process with respect to particular applicants to ensure compliance and minimize the risk of related legal claims (such as discrimination); and

Update record retention practices to encompass these legal requirements, including retaining evidence that required assessments and notices were prepared and sent to applicants rejected on the basis of criminal history.

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