

BAN-THE-BOX

NEW LAW REGARDING BACKGROUND CHECKS

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Effective January 1, 2018, California law prohibits private employers¹ from making **pre-offer inquiries** regarding an applicant's criminal history.

Specifically, this law makes it unlawful for a California employer with five or more employees to:

- 1) Include on employment applications any questions that seek disclosure of an applicant's conviction history;
- 2) Inquire into or consider an applicant's criminal history before the employer has made a conditional employment offer; and
- 3) Consider, distribute or disseminate information relating to arrests that did not result in a conviction, referral to or participation in a diversion program, or convictions that have been sealed, dismissed, expunged or statutorily erased.

However, inquiries into criminal history are permissible *after* a conditional offer of employment has been made. Further, upon learning of an applicant's conviction history, employers may rescind an employment offer based solely or in part on such criminal history; however, this may only be done after following the specified process explained below.

First, an employer considering denying an applicant the job due solely or in part to the applicant's prior convictions must conduct an "individualized assessment" to determine whether the conviction has a direct and adverse relationship with the specific job duties that justifies denying employment. All of the following factors must be considered in making this individualized assessment:

- 1) The nature and gravity of the offense or conduct;
- 2) The time that has passed since the offense or conduct and completion of the sentence; and
- 3) The nature of the job held or sought.

The employer "may, but is not required to, commit the results of this individualized assessment to writing."²

¹ The requirements of the new ban-the-box law do not apply to: (1) positions for which a state or local agency is required by law to conduct a conviction history background check, (2) criminal justice agencies, (3) farm labor contractors, and (4) employers required by state, federal or local law to conduct background checks or restrict employment based on criminal history.

If the foregoing assessment results in a decision not to hire the applicant, the employer must provide the applicant with written notice (“Notice of Preliminary Decision to Withdraw”). The employer is not required to explain or justify its reasoning in this notice; however, the notification must contain:

- (1) notice of the disqualifying conviction(s) that are the basis for the preliminary decision to rescind the offer;
- (2) a copy of the conviction report, if any; and
- (3) an explanation of the applicant's right to respond before the employer's decision becomes final (including the right to challenge the accuracy of the conviction history report or provide information about mitigating circumstances).

Applicants must then be given at least five days to respond (or up to 10 if the applicant disputes the accuracy of the report and is obtaining evidence to support that assertion).

Employers must consider any and all information submitted by the applicant in his or her response. If, after consideration of the response, the employer still wishes to rescind the offer of employment to the applicant, the employer must send a *second written notice* to the applicant which:

- (1) includes the final denial or disqualification;
- (2) explains the procedures or processes, if any, the employer allows to challenge the decision; and
- (3) explains that applicants have the right to file a complaint with the Department of Fair Employment and Housing.

In sum, California employers should make sure that their employment applications do not contain any questions or boxes that ask applicants to disclose criminal convictions and should train managers/interviewers not to ask about criminal history during the interview process.

That said, this law is not meant to and does not prevent employers from ultimately making the decision not to hire someone based on their criminal history. Rather, it is just intended to put in place certain safeguards to prevent blanket denial of employment on this basis without first properly examining whether or not the past offense truly relates to or impacts the present job opportunity.

If you have any questions regarding this or other recent developments or issues related to employment and labor law, please feel free to contact Sierra Spitzer of Schwartz Semerdjian Cauley & Moot, LLP at sierra@sscmlegal.com or 619.236.8821.

² Be aware that some municipalities have their own ban-the-box ordinances which may have different and/or additional requirements, i.e., those in Los Angeles and San Francisco.