

One Minute Memo®



UPDATE: The City of Los Angeles Adopts “Ban the Box,” Prohibiting Criminal Conviction Inquiry Prior to Job Offer

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Seyfarth Synopsis: The Los Angeles [Fair Chance Initiative for Hiring](#) (the “Ordinance”) imposes a host of new unlawful hiring practices upon private employers regarding inquiries into criminal convictions. Chief among them, an employer may not ask about an applicant’s criminal history, use any mode of communication, nor conduct a criminal background check until after extending a conditional offer that is only conditioned on the result of the check.

UPDATE: The Ordinance will become effective on January 22, 2017, however, it will not be enforced until July 1, 2017. Violations between January 22, 2017 and June 30, 2017 may result in a written warning.

Coverage

The Ordinance applies to any private employer that employs at least 10 individuals, including the owner(s), management, and supervisors, who perform at least two hours of work on average each week within the geographic boundaries of the City: the so-called “Covered Employer.” The Ordinance also covers job placement and referral agencies and other employment agencies.

“Employment” is defined broadly to include temporary or seasonal work, part-time, contracted or contingent work, work on commission, work through the services of a temporary or other employment agency or any form of vocational or educational training with or without pay.

The Ordinance does not cover employers who are required by law to obtain information regarding an applicant’s conviction, or those who are prohibited by law from hiring an applicant who has been convicted of a crime. The Ordinance also does not apply to an individual who, because of a criminal conviction, cannot lawfully hold the position, regardless of whether the conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation. Last, the Ordinance does not apply to an applicant required to possess or use a firearm in the course of employment.

Unlawful Hiring Practices

The Ordinance establishes several unlawful practices. Specifically, a Covered Employer is prohibited from inquiring into an individual's criminal background unless and until a conditional offer of employment is made. Importantly, the conditional offer can be conditioned only on the criminal background check. The "inquiry" can be any direct or indirect conduct that is intended to gather criminal history information from or about an individual using any mode of communication, such as application forms, interviews, and criminal history reports. Employers can, however, make these inquiries after first making a conditional offer of employment—that is, after making a job offer that is conditioned *only* on the employer's evaluation of the individual's criminal history.

Further, a Covered Employer cannot take "adverse action" because of an individual's criminal history without first conducting a "written assessment that effectively links the specific aspects" of the applicant's criminal history "with risks inherent in the duties" of the position sought. Here, "adverse action" means a withdrawal or cancellation of a conditional offer of employment, or a failure or refusal to employ the applicant. In this respect, the Ordinance is similar to the New York City Fair Chance Act.

In conducting an individualized assessment, a Covered Employer must, at minimum, consider the factors set forth by the U.S. Equal Employment Opportunity Commission, such as (i) the time that has elapsed since the offense, (ii) the individual's age at the time of the offense, (iii) circumstances surrounding the offense, (iv) the number of offenses for which the individual has been convicted, (v) employment history before and after conviction, (vi) evidence of rehabilitation, and other mitigating factors. But employers must also apply other factors as may be required by rules and guidance issued by the Department of Public Works, Bureau of Contract Administration ("Department"), who bears administrative responsibilities for this Ordinance.

Employer Assessment of Criminal History

As noted, prior to any adverse action, the Ordinance requires a written assessment that effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the position sought. A Covered Employer must also provide a "Fair Chance Process," which refers to an opportunity to provide information regarding the accuracy of the criminal history information, evidence of rehabilitation, or other mitigating factors. The Covered Employer must wait at least five business days after informing the applicant of the proposed adverse action before taking adverse action. If the applicant provides the information, the Covered Employer must consider it in the written reassessment. If adverse action still will be taken after further consideration, the Covered Employer must notify the applicant of the decision **and provide the applicant with a copy of the written reassessment.**

Notice and Posting Requirement

A Covered Employer must state in all advertisements that it will consider qualified applicants with criminal histories in a manner consistent with the requirements of the Ordinance. Employers also must post a notice informing applicants of the provisions of the Ordinance in a "conspicuous place at every workplace, job site or other location in the City under [its] control and visited by...applicants." There is no indication yet whether a form of notice will be provided by the Department. Covered Employers must also send a copy of the notice to each labor union with which they have a collective bargaining agreement covering employees located in the City.

Record Retention

Covered Employers must retain all records and documents related to applications, written assessments, and reassessments performed pursuant to the Ordinance for three years following the receipt of a job application.

Enforcement and Penalties

An applicant or employee alleging a violation of the Ordinance has one year to bring a claim to the Department. The Department is vested with subpoena power for items relevant to its investigation. If the Department determines that a Covered Employer has violated the Ordinance—whether based upon a complaint or its own investigation—the Department must issue a written notice to the Covered Employer requiring immediate cure and possibly imposing administrative fines.

The Ordinance also provides a private right of action against a Covered Employer, provided the civil action is not brought until administrative remedies are exhausted. Simply put, the individual must have reported the alleged violation within one year to the Department and the administrative enforcement process must be completed or a hearing officer's decision must be rendered, whichever is later. The civil action must be filed within one year of the later of the completion of the Department's enforcement process or the issuance of the hearing officer's decision.

Penalties and administrative fines for violations (with the exceptions of notice and record-retention violations) are up to \$500 for the first violation, up to \$1,000 for the second violation, and up to \$2,000 for the third and subsequent violations. Violations of the notice and record retention requirement provisions are up to \$500 per violation. Amounts are determined based on the willfulness of the employer's action(s) and other material factors determined by the Department.

Per the City, civil penalties will not be imposed for violations before July 1, 2017. But those violations may result in a written warning.

The Ordinance prohibits retaliation against individuals who complain to the City about an employer's compliance, who oppose any prohibited practices, who participate in a proceeding to enforce their rights, or who otherwise assert any rights under this Ordinance.

Employer Outlook

Employers in Los Angeles should review their employment applications and relevant employment forms to ensure compliance with federal, state, and local law, including requirements pertaining to conditional offers outside the context of criminal background checks. Employers who operate in multiple jurisdictions in addition to Los Angeles, such as New York, Philadelphia, San Francisco, Austin or Oregon, should particularly review any standardized forms that may be in use in multiple jurisdictions. Covered employers also should ensure that all hiring and recruiting personnel are aware of "ban the box" laws—whether they currently apply to them or not. Employers with questions regarding "ban the box" should consult with counsel.

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