

Management Alert



UPDATE: Los Angeles Ban the Box - New Individualized Assessment and Reassessment Form

By Pamela Q Devata, Courtney S. Stieber, Robert T. Szyba and Stacey L. Blecher

Seyfarth Synopsis: *The City of Los Angeles recently issued its Rules and Regulations Implementing the Fair Chance Initiative For Hiring (Ban the Box) Ordinance, providing critical guidance to employers on compliance with the new ban the box ordinance.*

UPDATE: The LA Bureau of Contract Administration has posted a "Fair Chance Initiative for Hiring Ordinance (FCIHO) Individualized Assessment and Reassessment Form" (the "Form"). It is unclear whether the Bureau expects employers to use this Form verbatim or whether modifications are permitted. Until the Bureau clarifies expectations, we recommend using the Form the Bureau has posted. The Bureau's Form is available [here](#).

The Form combines the two separate form requirements (individualized assessment and reassessment) into one document, which is likely easier for administrative purposes. The portion of the document beginning "To be completed for a Reassessment" need only be completed if the applicant provides additional information after receipt of the pre-adverse package.

As previously [reported](#), the Los Angeles Fair Chance Initiative for Hiring (the "Ordinance") became effective on January 22, 2017, with enforcement beginning on July 1, 2017. The Department of Public Works Bureau of Contract Administration (the "Department"), who bears administrative responsibilities for the Ordinance, just issued its [Rules and Regulations](#) (the "Regs") to guide private employers (and city contractors/subcontractors) with compliance.

New Definitions

An "Applicant" is someone who submits an application or other documentation for employment to a covered employer *regardless of location*. In other words, if the prospective employee will perform at least two hours of work during an "Average Week" (determined by the last 4 complete weeks before the position is advertised) within the geographic boundaries of the City, it does not matter where the individual is located when applying for the position.

"Criminal History" refers to information regarding *convictions* (i.e., a plea, verdict or finding of guilt regardless of whether sentence is imposed by the court), in any format (oral, written, etc.), and from any source (including, the individual him/herself). Consideration of arrests (or pending records) is impermissible.

"Employee" is defined broadly to include full-time, part-time, seasonal, and temporary workers. Owners, management, and supervisors are also included—as are independent contractors—so long as they meet the definition of Employee. As a reminder, the Ordinance applies to any private employer that employs at least 10 individuals.

Notable exceptions:

- Time spent traveling through Los Angeles with no employment-related stops (except for refueling or personal meals) is **NOT** considered time worked within the City.
- An individual who lives in Los Angeles and works from home, including telecommuting, is an Employee in the City.
- An individual who lives outside of Los Angeles works from home is **NOT** an Employee, even if the employer is a Los Angeles-based company, unless the individual also works in the City two hours or more during an Average Week.

An “Individualized Assessment” is a written determination made by the Employer whether there is an effective link between the Applicant’s Criminal History and the risks inherent in the job duties and responsibilities in question.

“Temporary Help Firms” are businesses that recruit, hire, and assign their own employees to temporarily work at other organizations. Specific to these businesses, a background check can be performed after a conditional offer to include the applicant in a pool of individuals from which the applicant may be sent to temporary positions.

Application and Interview Procedure

Questions regarding an Applicant’s Criminal History cannot be included on employment applications. The Regs propose that multistate employers can either: completely remove any question pertaining to criminal history from the employment application across the board; create and use applications specific to positions in Los Angeles; or include a disclaimer next to the question asking for criminal history, such as “For jobs located in the City of Los Angeles, you should not answer this question.”

Similar to the New York City Fair Chance Act, the Regs clarify that the Ordinance also prohibits statements such as “criminal background checks must be passed to be considered for a position.”

Employers may not ask about an Applicant’s Criminal History until a conditional offer of employment has been made to the Applicant. The conditional offer is explicitly defined as “conditioned only on an assessment of the Applicant’s Criminal History” and the duties and responsibilities of the position. The Regs, however, provide no clarification as to whether an offer conditioned upon the successful passing of *any other type of screen* (e.g., drug testing, physical exam) will still constitute a conditional offer for purposes of this Ordinance.

Employer Assessment of Criminal History

In conducting an Individualized Assessment, employers are required to, at a minimum, consider the list of factors identified by the EEOC Enforcement Guidance issued in 2012, such as: the nature and gravity of the offense; whether the offense was recent; and the nature of the job duties and responsibilities. The written Individualized Assessment must be provided to the Applicant, accompanied by any other documentation or information supporting the adverse action (i.e., rescission of the offer).

The “Fair Chance Process”

Employers are required to follow the “Fair Chance Process,” which includes allowing an Applicant to provide information about the accuracy of the Criminal History information, evidence of rehabilitation, or other mitigating factors. The employer must wait 5 business days from the time of sending the written pre-adverse action notification. If the Applicant does not submit anything in that time, the employer can proceed with the adverse action.

On the other hand, if the Applicant submits any information, the employer must perform a reassessment to account for the new information, following the same process as before. After the reassessment, the employer should notify the Applicant of the final decision and provide him/her with a copy of the written reassessment.

Notice and Posting Requirements

Employers must state in all advertisement or solicitations that it will consider qualified applicants with Criminal Histories in a manner consistent with the requirements of the Ordinance. This is analogous to the San Francisco Fair Chance Act.

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 the employer's control and visited by Applicants. The Department has provided a [form of notice](#). Employers also must send a copy of the notice to each labor union with which it has a collective bargaining agreement covering Employees located in the City.

Maintenance of Records

Employers are required to maintain Individual Assessments, *and any other type of documentation*, to demonstrate compliance with the Ordinance, for 3 years following receipt of the employment application. Such documents include all records related to Applicant's employment applications, written Individualized Assessment, and Fair Chance reassessment. It is unclear from the Regs, however, whether records for all Applicants (not just those with Criminal History) should be maintained for 3 years. Given this potential confusion, employers may want to err on the conservative interpretation.

Exceptions

The Ordinance contains several exceptions, such as employers who are required by law to perform background checks, or those who are legally prohibited 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. The Ordinance also does not apply to an Applicant required to possess or use a firearm in the course of employment. Significantly, the Department does not assume that an entire employer or industry will receive an exception. Instead, the Department will investigate how an exception applies to a particular position or role.

Employers claiming an exception must be able to show that the position falls under the enumerated exceptions above. Similar to New York City's Stop Credit Discrimination in Employment Act, the Department requires employers to keep a log or records of their use of such exception for a period of 3 years following the receipt of an Applicant's application. The exception log should include which exception is claimed and how the position fits into the exception and the federal, state or local law allowing the exception. The Department recommends that employers inform the Applicant of the exception they believe applies.

Best Practices

To the extent not yet undertaken, employers in the City of Los Angeles should review their employment advertisements and applications and take appropriate steps towards compliance, such as removing inquiries into criminal history or adding the suggested disclaimer. Employers should also become familiar with the newly posted written assessment and reassessment Forms that are required under the Ordinance. Likewise, the requisite notices should be posted/displayed. Most importantly, if any of the exceptions under the Ordinance apply, employers should explore which positions justify each exception and begin to keep an exception log in the event of challenge/audits. Although the additional guidance provides some welcome clarification, several open issues remain. Employers seeking additional clarification of these requirements should consult with experienced counsel to further assess the practical applications and compliance requirements.

If you would like further information, please contact your Seyfarth attorney, [Pamela Q. Devata](#) at pdevata@seyfarth.com, [Courtney S. Stieber](#) at cstieber@seyfarth.com, [Robert T. Szyba](#) at rszyba@seyfarth.com or [Stacey L. Blecher](#) at sblecher@seyfarth.com.

www.seyfarth.com

Attorney Advertising. This Management Alert is a periodical publication of Seyfarth Shaw LLP and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only, and you are urged to consult a lawyer concerning your own situation and any specific legal questions you may have. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer. (The foregoing legend has been affixed pursuant to U.S. Treasury Regulations governing tax practice.)

Seyfarth Shaw LLP Management Alert | February 21, 2017

©2017 Seyfarth Shaw LLP. All rights reserved. "Seyfarth Shaw" refers to Seyfarth Shaw LLP (an Illinois limited liability partnership). Prior results do not guarantee a similar outcome.