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San Francisco Amends "Fair Chance Ordinance" to Align with Portions of California's New Statewide Ban-the-Box Law

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***Seyfarth Synopsis**: On April 3, 2018, San Francisco amended its Fair Chance Ordinance to align, in some respects, with California's new ban-the-box law. San Francisco employers with more than five employees still must be mindful of the Ordinance's provisions that go beyond the broader state law.*

As previously reported here, California's statewide ban-the-box law (AB 1008) went into effect on January 1, 2018. That law requires employers with five or more employees (subject to few exceptions) to:

- wait until ***after a conditional offer of employment*** is made to inquire about an applicant's criminal history, which means asking the applicant directly whether the applicant have been convicted of a crime, ordering a criminal history background check, or making any other inquiry about an applicant's criminal history;
- conduct an individualized assessment of an applicant's conviction to determine whether it has a "direct and adverse relationship with the specific duties of the job that justify denying the applicant the position";
- notify the applicant of any potential adverse action based on the conviction history, which must, among other things, identify the conviction at issue, include a copy of any conviction history report (regardless of the source), and state the deadline for the applicant to provide additional information, such as evidence of inaccuracy, rehabilitation or other mitigating circumstances; and
- after waiting the requisite time period, notify the applicant of any final adverse action, which must, among other things, describe any existing procedure the employer has to challenge the decision or request reconsideration and notify the applicant of the right to file a complaint with the Department of Fair Employment and Housing.

Los Angeles and San Francisco have their own ban-the-box laws. In some respects, both provide stronger protections to job applicants, especially Los Angeles. However, in some ways, California's new law protects job applicants more favorably than does San Francisco. Because of this, on April 3, 2018, the City and County of San Francisco Board of Supervisors approved amendments to its Fair Chance Ordinance (Article 49) to align with the California law (in some respects). The amendments are effective October 1, 2018.

The Board amended the San Francisco Fair Chance Ordinance in the following ways:

- It reduced the number of employees needed to qualify as a covered employer from twenty to five (the same number required to qualify for coverage under California's law).

- Although the original version of the Ordinance allowed employers to inquire about criminal history after either a live interview or a conditional offer, the Ordinance now requires that, consistent with California law, covered employers wait until ***after a conditional offer*** of employment is made to make any such inquiry.

- For any violations occurring after the effective date of the amended Ordinance (October 1, 2018), employers are subject to increased penalties for non-compliance: $500 for the first violation; $1,000 for the second violation; and $2,000 for any subsequent violations (under the initial Ordinance, the maximum penalty was $50). If more than one applicant or employee is impacted by an alleged violation, the penalties apply to ***each*** employee or applicant.

- The initial Ordinance granted to the Office of Labor Standards Enforcement ("OLSE") the right to file a civil action against an employer to recover any legal or equitable relief that may be appropriate to remedy the violation, including, but not limited to, reinstatement, back pay and attorney's fees and costs. The amended Ordinance now grants that same right to file a civil action to aggrieved individuals, provided that he or she files a complaint with the OLSE and exhausts their administrative remedies.

In some respects, however, San Francisco's Ordinance provides ***greater*** protections to job applicants than does California law. Subject to very few exceptions, all California employers are prohibited from considering certain types of criminal history information, including arrests that did not lead to a conviction, juvenile records, non-felony marijuana convictions that are older than two years, and diversions or deferrals. San Francisco, however, currently goes beyond this by barring covered employers from considering convictions that are more than seven years old (measured from the date of sentencing) and infractions.

The Board further amended the Ordinance to add a new category of "off limits" information: "A conviction that arises out of conduct that has been decriminalized since the date of the Conviction," measured from the date of sentencing. The amendment provides examples of such convictions to include those for certain marijuana and cannabis offenses. San Francisco employers will now have to evaluate any potentially disqualifying conviction to determine whether the charge at issue was decriminalized post-conviction.

Next Steps

Most immediately, San Francisco employers, particularly those with fewer than twenty employees, should determine whether they need to revise job applications, interview guidelines, and policies and procedures for criminal background checks. Employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of credit history information and the fair credit reporting laws.

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