New California Background Check Requirements Take Effect October 1: The 7 Things Every Employer Needs to Know

Insights
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California employers will need to make changes to their background check and criminal history review process thanks to new Fair Chance Act regulations taking effect October 1. You should begin to prepare now for these new compliance obligations, starting with reviewing our list of seven things you need to know. You should also sign up for our complimentary interactive webinar taking place on September 20 by registering here.

California's Fair Chance Act, Explained

The California Fair Chance Act went into effect in 2018. It prohibits employers from asking about an applicant's criminal history until after a conditional offer of employment has been made to the applicant. If an employer contemplates not hiring an individual because of their criminal history, the company must perform an individualized assessment as to whether the applicant's criminal history "has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position."

The assessment is done considering the following factors:

- the nature and gravity of the offense or conduct;
- the time that has passed since the offense or conduct and/or completion of the sentence; and
- the nature of the job held or sought.

If an employer believes an individual should not be hired after completing an individualized assessment, it must send written notice to the individual of the potential adverse action (commonly referred to as a pre-adverse action letter) and give them an opportunity to respond. The applicant must be given at least five business days to respond with additional information such as rehabilitation efforts or mitigating circumstances.

The employer must consider any new information provided and conduct a reassessment. If the employer then decides to not hire the individual, it must send a notice to the applicant regarding its decision and notify the applicant of their rights.

5 Things to Know About the New Regulations

The law will change as of October 1

1. *Broader "Employee" Definition*

Previously the FCA was interpreted to only apply to applicants or current employees seeking a position within the company. The term "applicant" now also includes an employee who undergoes a background check in connection with a change in ownership, a change in management, or a change in policy or practice.

2. *Broader "Employer" Definition*

The term "employer" now includes not only direct employers but also entities acting as agents or evaluating an applicant's criminal history on behalf of an employer, staffing agencies, and entities obtaining workers from a pool or availability list.

3. *Advertising or Recruiting Prohibition*

Employers cannot include statements in job advertisements, postings, applications, or other materials that persons with criminal history will not be considered for hire.

4. *Information Volunteered Before an Offer is Made is Off Limits*

If an applicant voluntarily offers information about the applicant's criminal history prior to receiving a conditional offer, the new regulations make clear that the employer still cannot consider such information.

5. *Revamped Individualized Assessment*

The new regulations provide a list of non-exclusive sub-factors that employers must consider **at a minimum** as part of the individualized assessment, including:

- *The Nature and Gravity of the Offense or Conduct* – Consideration of this factor may include but is not limited to:
  - The specific personal conduct of the applicant that resulted in the conviction;
  - Whether the harm was to property or people;
  - The degree of the harm (e.g., amount of loss in theft);
  - The permanence of the harm;
  - The context in which the offense occurred;
  - Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to the offense or conduct, and if so, whether the likelihood of harm arising from

similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise;

- Whether trauma, domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct; and/or
- The age of the applicant when the conduct occurred

- *The Time That Has Passed Since the Offense or Conduct and/or Completion of the Sentence* – Consideration of this factor may include but is not limited to:
  - The amount of time that has passed since the conduct underlying the conviction, which may significantly predate the conviction itself; and/or
  - When the conviction led to incarceration, the amount of time that has passed since the applicant's release from incarceration.

- *The Nature of the Job Held or Sought* – Consideration of this factor may include but is not limited to:
  - The specific duties of the job;
  - Whether the context in which the conviction occurred is likely to arise in the workplace; and/or
  - Whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.

Since most of this information is not readily available, you should consider asking for this information before conducting an individualized assessment and sending a pre-adverse action letter. You can request this information from an individual with criminal history. However, you cannot require that an individual respond. The individual has the choice as to what information to provide. Further, you must consider any information provided from the individual.

6. *More Defined Waiting Period for Individuals to Respond*

After sending a pre-adverse action letter, you must wait at least five *business days* from the individual's *receipt* of the pre-adverse action letter before taking action and making its decision final. However, if an employer cannot show when the letter was received, it must assume as follows based on the method of delivery: email (two business days); mailing to a California address (five calendar days); mailing to address elsewhere in the United States (10 calendar days); or mailing outside of the United States (20 calendar days).

7. *Evidence of Rehabilitation and Mitigating Circumstances*

Under the FCA, employers must consider evidence of rehabilitation and mitigating circumstances provided from the individual. This has always been a requirement, but the new regulations set forth

a fairly broad list of examples of such evidence that employers should consider.

What Should You Do Next?

Before October 1, you should revise your background check policies for compliance and educate any individuals involved in the applicant screening / background check process. This includes coordinating with any third-party services you enlist to assist you with this process.

We also recommend you attend our upcoming complimentary webinar on September 20 to engage in an interactive session regarding these changes and how to navigate the new process.

Conclusion

If you need help updating your policies or have questions, contact your Fisher Phillips attorney, the authors of this Insight, any member of our FCRA and Background Screening Group, or any of our attorneys in our California offices. Make sure you subscribe to Fisher Phillips' Insight System to gather the most up-to-date information on the workplace.

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