

LA COUNTY'S "FAIR CHANCE ORDINANCE" JUST TOOK EFFECT: WHAT EMPLOYERS MUST KNOW ABOUT THE STRICT CRIMINAL HISTORY RULES AND NEW ERA FOR HIRING PRACTICES

Insights
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Los Angeles County's "Fair Chance Ordinance" took effect today, requiring employers in the unincorporated areas of the county to comply with criminal background check rules that are more restrictive than those that apply statewide or in other localities, such as the cities of Los Angeles or San Francisco. The new rules impose stringent requirements on employers related to job postings, offer letters, and hiring protocols. We'll explain everything and give you the steps you must take now to comply.

Who Must Comply?

The [Fair Chance Ordinance](#) (FCO) applies to any employer (including temporary agencies, staffing agencies, non-profit organizations, and entities that complete criminal history checks on an employer's behalf) that:

- is located or doing business in the [unincorporated areas](#) of Los Angeles County; and
- employs five or more employees (regardless of location).

For covered employers, the ordinance applies to any individual whose position involves performing at least two hours of work on average each week within the county's unincorporated areas.

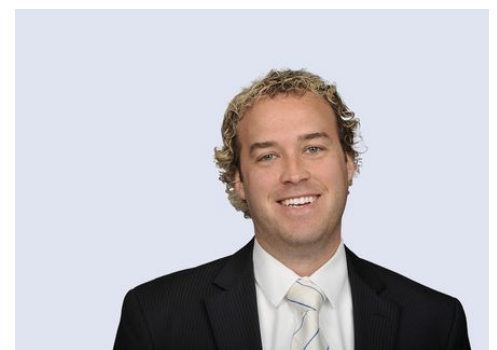
Notably, the ordinance applies to background checks for employees, as well as contract and freelance workers.

Related People



Jill Kleinkauf
Associate

[949.798.2123](tel:949.798.2123)



Spencer W. Waldron
Partner

What Does the FCO Require?

949.798.2170

The FCO requires employers to comply with various rules related to job postings, offer letters, and hiring protocols.

Job Postings

Job postings must:

- **not include job language that excludes or discourages** applicants with criminal histories from applying;
- **include affirmative language** stating that qualified applications with arrest or conviction records will be considered for employment in accordance with both the FCO and the California Fair Chance Act (FCA);
- **specify the laws or regulations that impose any restrictions** if the employer intends to condition a job offer or promotion on completion of a criminal background check, and an existing law prevents them from hiring individuals with a criminal history; and
- **include a list of all “material job duties”** for which the employer believes a criminal history may have a direct, adverse, and negative relationship potentially resulting in the withdrawal of a conditional offer of employment.

Employers must also post a notice of the FCO in their workplace and on any webpages frequently visited by employees or applicants, and employers with unionized employees must also provide a copy of the notice to the unions. A copy of the required notice can be found [here](#). The notice must be made available to applicants and employees in English and any other languages spoken by at least 10% of the employer’s workforce.

Offer Letters

Employers cannot ask about criminal history or background checks at any time before a conditional offer of employment has been extended. If the employer intends to consider criminal history, the conditional offer letter **must include a complete list of all types of background or history that will be reviewed by the employer**, including education, social media history, employment history, motor vehicle or driving history, reference checks, credit history, license or credential verification, drug testing, and/or medical examinations.

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Consideration of Criminal History

With some exceptions, employers generally cannot inquire about, require disclosure of, or consider any of the following types of criminal history:

- **an arrest not followed by conviction** (subject to limited exceptions);
- **referral to or participation in a pretrial or post-trial diversion program or a deferral of judgment program;**
- **convictions that have been sealed, dismissed, expunged, inoperative, invalidated, statutorily eradicated, pardoned, or when the convicted person has been issued a certificate of rehabilitation;**
- **juvenile** court arrests, detention, processing diversion, supervision, adjudication, or other court disposition;
- **a non-felony conviction for possession of marijuana that is over two years old;**
- **a conviction that is more than seven years old** from the date of disposition (exceptions apply if the employee will be providing care or services to vulnerable populations);
- **offenses other than a felony or a misdemeanor** (i.e., an infraction) (except driving records if driving is more than a “de minimis” element of the job); or
- **a conviction that arises out of conduct that has been decriminalized** since the date of the conviction.

Taking Adverse Action Based on Criminal History

If an employer is not prohibited from considering criminal history and intends to take adverse action against an employee based on criminal history, it must:

- **conduct an individualized assessment** of the applicant’s criminal history; and
- **provide the applicant with written notice of the preliminary decision** to take adverse action.

Unlike the state’s FCA, the FCO **requires employers to keep written documentation of the individualized assessment** of whether the candidate’s criminal history has a direct, adverse, and negative bearing on the person’s ability to

perform the job duties such that it justifies denial of the job or adverse action.

If, after an **initial individualized assessment**, the employer wants to take adverse action, it must then:

- **send a pre-adverse action notice and copy of the individualized assessment** to the applicant or employee;
- **wait at least 5 business days for a response** before taking any action or otherwise filling the position;
- if the applicant provides information within the five-day period, **wait another 10 business days and allow the applicant to submit any additional information** before making any final decisions; and
- **perform a second documented individual assessment**, considering any evidence provided.

If, after completion of the **second individualized assessment**, the employer decides to withdraw the conditional offer or take other adverse action, the employer must send:

- written notice with a copy of the second individualized assessment;
- notice of the disqualifying conviction; and
- information regarding procedures for challenging the decision or otherwise filing a complaint.

Delays in Receipt of Criminal Background Check Report

Generally, employers cannot base a decision to withdraw the conditional offer or take other adverse action solely on the fact that there has been a delay in receiving a criminal background check report of the applicant or employee requested by the employer from any source. However, an employer may do so if they can demonstrate that:

- the employer would have suffered an **undue burden in its business operations** if the employer continued to hold the job position open pending receipt of the criminal background check report; and
- **10 business days have passed** since the time the employer requested the criminal background check

report.

If the employer is making this decision, it must affirmatively include in the preliminary notice of adverse action that the conditional offer has been rescinded due to the delay and explain the reasons why it is an undue burden.

What Are the Consequences for Violating the FCO?

Violations of the FCO expose an employer to a penalty of up to:

- **\$5,000** for a first violation;
- **\$10,000** for a second violation; and
- **\$20,000** for the third and subsequent violations.

Penalties are awarded on a per-violation basis and an employer may be liable for penalties per each aggrieved employee. Significantly, the county's Department of Consumer and Business Affairs (DCBA) also may recommend that any license issued by the county or its departments be suspended, revoked, or denied. Employees may file a complaint with the DCBA for violations of the FCO or with the state's Civil Rights Department for violations of the FCA.

What Should Employers Do Next?

All employers in unincorporated areas of LA County should review your hiring and screening process and revise any hiring materials, including:

- applications and related forms;
- offer letters;
- background check disclosures and related forms;
- workplace postings; and
- online job postings,

You'll also want to ensure your record retention policies are adequate (for example, the FCO requires employers to maintain all relevant documents, including the application, any assessments, and any communications, for four years from the receipt of the employee's application). This

includes coordinating with any third-party services you enlist to assist you with this 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](#). We will provide updates as more information becomes available, so make sure you are subscribed to [Fisher Phillips' Insight System](#) to receive updates directly to your inbox.