



Final FEHC Criminal History Regulations Approved, Move One Step Closer to Implementation

Insights

2.01.17

On January 10th, the California Fair Employment and Housing Council (FEHC) approved proposed regulations related to employer use of criminal history information. The regulations will be filed with the Office of Administrative Law and will likely go into effect July 1, 2017.

Overview

On the one hand, the regulations reiterate various provisions of existing state law that prohibit employers from using very specific criminal history information in employment decisions (such as hiring, promotion, or termination). However, the regulations also add significant new language prohibiting employers from using criminal history information that has an “adverse impact” on employees based on protected category (such as gender, race and national origin), unless use of such information is job-related and consistent with business necessity.

The regulations also set forth a complex procedural process and standards that must be followed by employers when considering criminal convictions in hiring, with most of the burden falling on employers to satisfy certain requirements of the law. Several employer groups raised a number of significant concerns with the proposal during the public comment period, and the FEHC made some changes during that process, but nevertheless largely approved the proposal over these employer objections.

Adverse Impact

The regulations largely echo federal cases and a 2012 Guidance issued by the federal Equal Employment Opportunity Commission (EEOC) that state that use of criminal history may have a “disparate impact” on individuals in protected classifications. The FEHC regulations use the term “adverse impact,” but provide that this term means the same as “disparate impact” as used by the EEOC.

While the applicant or employee bears the initial burden of proving an adverse impact, the regulations state that this may be done through the use of conviction statistics or other evidence. The regulations specifically provide that state or national-level statistics that show a substantial disparity are presumed to be sufficient to establish an adverse impact. Given the widespread availability of data correlating criminal history, employment and protected categories, it would be relatively easy to meet this burden of proof. The employer could overcome this presumption based

on state or national data by showing there is reason to expect a markedly different result based on things like geographic area, the particular criminal conviction at issue, or the particular job at issue.

Employer groups that opposed the FEHC regulations objected strenuously that there is absolutely no legal authority or support to establish a presumption of adverse impact based on national or state statistics. Even the EEOC Guidance (upon which these regulations are purportedly based) did not create such a presumption, instead merely stating that national statistics are only one factor among many that the EEOC will consider in deciding whether to conduct an investigation.

Employer Rebuttal – Job-Related and Business Necessity

Once the employee meets their burden of proving that there is an adverse impact (which, as described above, is not a heavy lift), the burden shifts to the employer to prove that the use of the criminal history information is nonetheless justifiable because it is job-related and consistent with a business necessity.

In order to do so, the employer must show that the use of criminal history information is appropriately tailored, taking into account 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.

The regulations provide that, in order for an employer to demonstrate that a policy or practice of considering conviction history is appropriately tailored for the job for which it is used as an evaluation factor, the employer must either:

- Show that any “bright-line” conviction disqualification policy can properly distinguish candidates who do and do not pose an unacceptable level of risk and that the convictions have a direct and specific negative bearing on the person’s ability to perform the duties of the position; or
- Conduct an individualized assessment of the applicant or employee, including notice informing them that have been screened out because of a criminal conviction. The individual must be provided a reasonable opportunity to demonstrate that the exclusion should not apply to their specific case. The employer, in turn, must consider whether this additional information warrants an exception to the exclusion.

Moreover, the regulations provide that a “bright line” policy that takes into account convictions that are seven or more years old creates a rebuttable presumption that such a policy is not sufficiently tailored to be job-related and consistent with business necessity.

In addition, the regulations state that regardless of whether the employer has a “bright-line” policy or completes an individual assessment, the employer must give the person notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is

factually inaccurate. If the individual does so, that information cannot be considered in the employment decision.

The Employee's Last Bite at the Apple – Less Discriminatory Alternative

Even after the employer does all of that (whew!), the employee still gets one final shot at proving a violation of the law. The regulations provide that even if an employer shows that the use of conviction information is job-related and consistent with business necessity, the employee can still prove there is a violation by demonstrating that there is a less discriminatory alternative that serves the employer's goals, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualifications or risk as accurately without significantly increasing the cost or burden on the employer.

All of this adds up to a complicated series of obligations and procedures an employer must follow in considering criminal convictions in the hiring process, for which any misstep can give rise to litigation.

What's Next?

Now that the regulations have been approved, the FEHC will be submitting the complete rulemaking package to the Office of Administrative Law (OAL) by February 20, 2017. OAL will then have 30 days to review the file and submit it to the Secretary of State's office. Therefore, under timelines established in Government Code section 11343.4, the regulations will most likely become effective July 1, 2017.

Related People



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