



California Employers Will Soon See New Workplace Regulations Take Effect

RULES ON TRANSGENDER DISCRIMINATION AND CRIMINAL HISTORY USE WILL BE EFFECTIVE JULY 1

Insights

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In recent months, the California Fair Employment and Housing Council (FEHC) has finalized two new sets of regulations that will both go into effect on July 1, 2017. California employers should pay close attention to these new rules touching on criminal history use and transgender discrimination; you may need to adjust your policies and practices for compliance in the very near future.

New Regulations On Use Of Criminal History Information

The FEHC approved proposed regulations related to employer use of criminal history information in January. 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, once the regulations take effect, you may not consider any non-felony misdemeanor conviction related to marijuana possession that is more than two years old (rather than the current list of only specified misdemeanors). In addition, the regulations also add significant new language prohibiting you 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 new standards that must be met and a complex procedural process that must be followed when considering criminal convictions in hiring, with most of the burden falling on employers to satisfy certain requirements of the law.

> Adverse Impact

The regulations largely echo federal cases and a 2012 informal 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. Employers could overcome this presumption 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. Nevertheless, California employers will soon be faced with the responsibility to comply with these regulations.

> Employer Rebuttal: Job-Related And Business Necessity

Once the employee establishes that an adverse impact exists (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, employers 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.

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 regulations require employers to 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 providing notice that the person has been screened out because of a criminal conviction. The individual must be provided a reasonable opportunity to demonstrate that the exclusion should not apply in that 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

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, if the employer obtains the criminal history information from a source other than the applicant, 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, 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 establish a violation of law by demonstrating that there is a less discriminatory alternative that serves the employer’s goals. This could include 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 you must soon follow when considering criminal convictions in the hiring process, for which any misstep can give rise to litigation.

> Big Year For “Ban The Box” Movement

This likely will not be the end of legislative or regulatory involvement in the use of criminal history information by employers. Many state and local governments (including San Francisco and Los Angeles) have adopted “ban the box” measures that require private employers to remove questions or “boxes” about criminal history from job applications and reserve those inquiries for later in the decision-making process. Therefore, you should always be mindful of local ordinances with which you must comply, in addition to state statute or regulations.

Under legislation enacted in 2014 (AB 218), state or local agency employers are already subject to such “ban the box” restrictions. Labor Code section 432.9 prohibits these public employers from asking about conviction history until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for position. And there is pending legislation in Sacramento – AB 1008 (McCarty) – that seeks to impose a version of the Los Angeles ban the box ordinance on all private and public employers throughout the State of California. It would prohibit inquiries into criminal history until after a conditional offer of employment has been made. AB 1008 has already passed the Assembly and is now pending in the Senate; we will keep you posted as developments warrant.

New Regulations On Transgender Identity And Expression

Several weeks ago the Office of Administrative Law also approved regulations related to transgender identity and expression promulgated by the FEHC, which also go into effect on July 1, 2017. As formal regulations, these rules represent a more formal follow-up to guidance on transgender

former regulations, these rules represent a more formal follow-up to guidance on transgender employees' rights (entitled "Transgender Rights in the Workplace") issued by the Department of Fair Employment and Housing last year.

These regulations represent the latest effort in a movement to expand the scope and applicability of California's employment discrimination statute, the Fair Employment and Housing Act (FEHA). In 1999, the California Legislature amended FEHA to prohibit discrimination in employment and housing on the basis of "sexual orientation." Four years later, the definition of "sex" in FEHA was expanded to include discrimination on the basis of a person's gender identity or gender-related appearance and behavior. The Legislature further amended FEHA in 2011 to expressly enumerate "gender identity" and "gender expression" as protected classes. You should be aware of the following major provisions of the new regulations.

> Expanded And New Definitions Of Terms

The regulations broaden the existing definitions of the terms "gender expression" and "gender identity," most notably to include the "perception" of an individual's gender expression or gender identity. In addition, the regulations add a new definition of "transitioning" to mean a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth. This process may include, but is not limited to, changes in name and pronoun usage, facility usage, participation in employer-sponsored activities (e.g. sports teams, team-building projects, or volunteering), or undergoing hormone therapy, surgeries, or other medical procedures.

> Use Of Preferred Gender Name

The regulations provide that, if an employee requests to be identified with a preferred gender, name, or pronoun (including gender-neutral pronouns), an employer who fails to abide by the employee's stated preference may be liable under FEHA. Moreover, the new regulations state that you are permitted to use an employee's assigned sex at birth or legal name as indicated in a government-issued identification only as necessary to meet a legally-mandated obligation, but otherwise must identify the employee in accordance with their gender identity and preferred name.

> Grooming And Dress Standards

The new regulations prohibit you from imposing any grooming or dress standards which are inconsistent with an individual's gender identity or gender expression, unless you can establish a business necessity.

> Use of Facilities

The new regulations require you to permit employees to use facilities (such as restrooms, locker rooms, and similar facilities) that correspond to the employee's gender identity or gender expression, regardless of the employee's assigned sex at birth. The regulations also provide that

employees shall not be required to undergo, or provide proof of, any medical treatment or procedure, or provide any identity document, to use facilities designated for use by a particular gender. In addition, the regulations require those employers with single-occupancy facilities to use gender-neutral signage for those facilities, such as “Restroom,” “Unisex,” “Gender Neutral,” or “All Gender Restroom.”

> Unlawful Inquiries

The new regulations make it unlawful for you to inquire about or require documentation or proof of an individual’s sex, gender, gender identity, or gender expression as a condition of employment. Moreover, inquiries that directly or indirectly identify an individual on the basis of sex, including gender, gender identity, or gender expression, are generally unlawful. However, you may ask an applicant to provide such information solely on a voluntary basis for specified recordkeeping purposes only as authorized under existing law.

In addition, the regulations provide that nothing precludes you from communicating about these issues with your employee when the employee initiates communication regarding working conditions.

> Discrimination Against “Transitioning” Employees

The regulations prohibit you from discriminating against an individual who is transitioning, has transitioned, or is perceived to be transitioning. As discussed above, “transitioning” is defined in the regulations as a process some transgender people go through to begin living as the gender with which they identify, rather than the sex assigned to them at birth, and may include things like changes in name and pronoun usage, facility usage, undergoing hormone therapy, surgeries, or other medical procedures.

Conclusion

As noted above, these regulations will become effective in just a few short weeks, on July 1, 2017. If you conduct business in California, you should immediately review your policies and practices to ensure compliance with these requirements. For more information, contact your regular Fisher Phillips attorney, or one of the attorneys in any of our California offices:

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This Legal Alert provides information about specific new state regulations. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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