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Sidebar:
New FEHA Regulations Take Effect April 1, 2016

THE CALIFORNIA FAIR EMPLOYMENT AND HOUSING COUNCIL ISSUES PROPOSED REGULATIONS TO LIMIT CONSIDERATION OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS

By Lucía X. Roibal

Employers take great measures to avoid hiring dangerous employees—not just to avoid legal liability but, more importantly, to ensure the safety of their employees. One way to achieve this is through the use of application forms, which often ask an applicant whether he or she has been convicted of a crime. Employers also conduct criminal background checks prior to hiring new employees and sometimes before promoting or terminating a

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current employee. But the use of criminal history in employment decisions comes with its own legal risks, including various federal, state, and local laws that dictate that employers around the country may not freely use this criminal history when making employment decisions. On February 19, 2016, the California Fair Employment and Housing Council (CFEHC) proposed new regulations that lay out various ways in which an employer could be held liable for its use of a potential or current employee's criminal history in making an employment-related decision. These proposed regulations do not "ban the box" for all criminal history, meaning that they do not prohibit an employer from considering any criminal history of a potential applicant. But the proposed regulations do restrict the type of criminal history and the ways in which an employer may consider criminal history in making employment-related decisions.

BACKGROUND

Employers may face potential liability when using a potential or current employee's criminal history under Title VII of the Civil Rights Act of 1964.[1] In 2012, the United States Equal Employment Opportunity Commission (EEOC) issued guidance detailing how an employer's consideration of an individual's criminal history in making an employment decision could violate prohibitions against employment discrimination under Title VII.[2] Specifically, the EEOC detailed how an employer's treatment of criminal history could lead to disparate treatment of or have a disparate impact on employees based on their race or national origin.

A disparate treatment violation under Title VII might occur when an employer treats criminal history information differently for applicants based on their race or national origin. Disparate impact, on the other hand, might occur if an employer's neutral policy, such as excluding applicants from employment based on certain criminal conduct, might disproportionately impact some individuals protected under Title VII. The EEOC pointed to national data, such as high arrest and incarceration rates among African American and Hispanic men, to demonstrate how criminal record exclusions might result in a higher exclusion of African American and Hispanic men from eligibility for jobs. This could result in a violation of Title VII if the employer's policy of excluding potential employments based on a criminal record was not job-related and consistent with business necessity.

Title VII protections extend to all states, and states may not make laws that would diminish the protections afforded by Title VII. To this end, the guidance notes that state and local laws or regulations are preempted by Title VII if they "purport[] to require or permit the doing of any act which would be an unlawful employment practice" under Title VII. But Title VII does allow for states to expand upon and elaborate Title VII protections.

CALIFORNIA REGULATIONS

A year after the EEOC released the new guidance, California did just that. The CFEHC enacted Title 2, Section 11017 in order to address the potential adverse impact of employer policies and practices on potential employees.[3] Unlike Title VII, the regulation lists specific employment practices that are unlawful, such as utilizing an arrest or detention that did not result in conviction in making an employment decision.

Recently, on February 19, 2016, the CFEHC sought to expand upon this Section, and issued a Notice of Proposed Rulemaking recommending amendments to Section 11017.[4] The Council proposed these amendments with the objective of describing how the consideration of criminal history in employment decisions might violate California's Fair Employment and Housing Act if such consideration adversely impacts one of the protected classes. The majority of the changes occurs in a new section, titled Consideration of Criminal History in Employment Decisions. These changes prohibit employers from using certain criminal history in hiring, promotion, training, discipline, termination, and other employment decisions.[5]

PROHIBITION ON CONSIDERATION OF CRIMINAL HISTORY, IRRESPECTIVE OF ADVERSE IMPACT

Like the previous regulations, the new proposed regulations prohibit employers from inquiring or seeking information regarding certain criminal records. Employers are strictly prohibited from seeking or considering these types of criminal history, irrespective

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of any adverse impact analysis. Like the previous rules, this list includes arrests or detentions that did not result in a conviction, referral to or participation in a pretrial or post-trial program, and convictions that have been judicially dismissed or ordered sealed, expunged, or statutorily eradicated by law.

Unlike the previous regulations, however, the proposed regulations add to the list the consideration of a non-felony conviction for possession of marijuana that is two or more years old. The necessity of this addition is clear, especially if you consider current rates for drug convictions in the United States. The National Association for the Advancement of Colored People, in its Criminal Justice Fact Sheet, describes drug conviction disparities between African Americans and whites in the United States.[6] For example, while five times as many whites are using drugs as African Americans, African Americans are sent to prison for drug offenses at 10 times the rate of whites. This means that an employer's practice of excluding potential employers based on old, non-felony convictions could result in a disproportionally large number of African Americans being excluded from job positions.

The regulations also prohibit a state or local agency employer from asking an applicant to disclose information regarding conviction history until the employer has first determined that the applicant meets the minimum employment qualifications as stated in the notice for the position. In essence, this acts to "ban the box" during an initial screening of potential applicants before the state knows whether the potential employee meets the minimum employment qualifications. The intent is to require a meaningful analysis of the candidate as a whole, taking into consideration a potential employee's qualifications, without regard to past convictions. Where a state employer might initially exclude all applicants based on a certain conviction, that candidate now must first see whether a potential candidate is qualified and then determine whether he or she should be hired. This allows for the hiring of candidates who have perhaps undergone rehabilitation, and are committed to living a crime-free life. The regulation does not require a state employer to hire someone with a conviction, but merely requires an assessment of whether an applicant meets minimum employment qualifications before asking an applicant to disclose his or her conviction history.

New FEHA Regulations Take Effect April 1, 2016

By Nicole Elemen

On April 1, 2016, the Department of Fair Employment and Housing's amendments to the Fair Employment and Housing Act (FEHA) regulations take effect. (*See* 2 C.C.R. 11008, *et seq.*) There were several amendments made to the regulations, some of which recite recent changes to FEHA and others of which impose new requirements on employers. Here are some of the most notable amendments:

- Employers must now have a harassment, discrimination, and retaliation prevention policy. The policy must: (1) be in writing; (2) list all protected categories; (3) prohibit conduct by coworkers, third parties, supervisors, and managers which violates FEHA; (4) include a complaint process that provides: (a) a timely response, (b) impartial investigation by qualified personnel, (c) documentation and tracking for progress, (d) options for remedial action, and (e) timely closure; (5) not require an employee to complain to his or her immediate supervisor; (6) instruct supervisors to report complaints of misconduct to a designated company representative, such as an HR manager; (7) indicate that, upon receipt of a complaint, the employer "will conduct a fair, timely and thorough investigation that provides all parties appropriate due process and reaches reasonable conclusions based on the evidence collected"; (8) state the investigation will be kept confidential to the extent possible; (9) indicate that remedial measures will be taken if misconduct is found; and (10) make clear that

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CONSIDERATION OF CRIMINAL CONVICTIONS AND THE POTENTIAL ADVERSE IMPACT

One important addition to the current regulations regards utilization of criminal history that might result in an adverse impact on a protected class. Adverse impact has the same meaning as "disparate impact," as described by the EEOC above. Specifically, an employer is prohibited from using criminal history in employment decisions if doing so would have an adverse impact on an individual within a protected class, and the employer is unable to demonstrate that the criminal history is job-related and consistent with business necessity or if the employee or applicant has demonstrated a less discriminatory alternative means of achieving the specific business necessity as effectively. This addition in essence codifies the EEOC guidelines involving disparate impact in state law.

The proposed regulation also seeks to explain "job-relatedness and business necessity," in order to demonstrate when this could be used as a defense by an employer and what procedures an employer must follow to use criminal history in an employment decision. The explanation is largely derived from *Green v. Missouri Pac. R.R. Co.*,[7] as well as subsequent Title VII case law. In order to show that the action is job-related and consistent with business necessity, the employer must demonstrate that the policy or practice is appropriately tailored to the job for which it is used as an evaluation factor, taking into account 1) the nature and gravity of the offense or conduct, 2) the time that has passed since the offense or conduct and/or completion of the sentence, and 3) the nature of the job held or sought. Additionally, the criminal conviction consideration policy or practice must bear on a demonstrable relationship to successful performance on the job and in the workplace, and measure the person's fitness for the specific job, not merely to evaluate the person in the abstract.

The employer must also demonstrate either 1) that any bright-line conviction disqualification can properly distinguish between applicants or employees that do and do not pose an unacceptable level of risk, and that the conviction disqualification has a direct and specific negative bearing on the person's ability to perform the duties or responsibilities of the position;

employees will not be retaliated against for making a complaint or participating in an investigation. In addition, the policy must be distributed in a manner which ensures employees receive and understand it and it must be translated into any language spoken by at least ten percent (10%) of employees. (§ 11023)

- Employers are liable for the harassment of employees, unpaid interns, volunteers, applicants, independent contractors, and persons providing services pursuant to a contract. (§ 11034) Employers are also liable for harassing conduct of nonemployees towards employees (§ 11034), and unpaid interns are also protected from discrimination in regards to selection, termination, and training, among other things. (§ 11009)

- Employers must keep the records of any webinar used for AB1825 sexual harassment prevention training, including written materials, questions, and responses, for two (2) years. (§ 11024) In addition, the training must now include a discussion of abusive conduct, remedial measures to correct harassment, and supervisors' obligation to report harassment, discrimination, and retaliation of which they become aware. (§ 11024)

Many employers are now in the process of updating their handbooks in order to comply with the harassment, discrimination, and retaliation prevention policy requirement by April 1, 2016.

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Proposed Regulation – Commenting Period and Public Hearing

The Fair Employment and Housing Council is currently accepting written comments, which can be mailed to:

Fair Employment and Housing Council
c/o Brian Sperber, Legislative & Regulatory Counsel
Department of Fair Employment and Housing
320 West 4th Street
10th Floor
Los Angeles, CA 90013

The comments can also be submitted by mail to FEHCouncil@dfeh.ca.gov. The written comment period closes at 5:00 p.m. on April 7, 2016.

On April 7, 2016 at 10:00 a.m., the Council will hold a public hearing, where any person will be allowed to present statements or arguments orally or in writing. The hearing will be located at:

Maudelle Shirek Building
2134 Martin Luther King Jr. Way
City Council Chambers, Second Floor
Berkeley, CA 94704

or 2) that an employer conducted an individualized assessment of the circumstances or qualifications of the applicants or employees excluded by the conviction screen. If the employer does not include an individualized assessment or considers conviction-related information that is seven or more years old, the employer's policy or action is subject to the presumption that it is not job-related and consistent with business necessity.

REQUIREMENT OF INDIVIDUAL NOTICE

Before an employer may take an adverse action, such as declining to hire, discharging, or declining to promote an adversely impacted individual based on conviction history, the employer is required to give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence if the information is factually inaccurate.

COMPLIANCE WITH FEDERAL OR STATE LAWS, REGULATIONS, OR LICENSING REQUIREMENTS PERMITTING OR REQUIRING CONSIDERATION OF CRIMINAL HISTORY

There are instances where federal or state laws, regulations, or licensing requirements prohibit individuals with certain criminal records from holding specific positions or mandate a screening process before hiring. This includes, for example, certain positions in government agencies, like peace officers, or certain individuals employed in health facilities or pharmacies. In these circumstances, compliance with these laws is considered to be job-related and consistent with business necessity, and acts as a defense to an adverse impact claim under the Act.

LESS DISCRIMINATORY POLICY OR PRACTICE

Lastly, even if an employer is able to demonstrate job-relatedness and business necessity, the adversely impacted employee may still prevail in a claim if he or she can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a narrowly targeted list of convictions.

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LOCAL RULES

The proposed rules also note that employers are required to follow local laws or city ordinances that might provide additional limitations ("FEHA is a floor, not a ceiling for rights."). San Francisco, for example, has implemented the Fair Chance Ordinance (FCO),[8] which covers employees who perform work in San Francisco and whose employers are located or doing business in San Francisco and have 20 or more employees. The FCO prohibits employers from asking about arrest or conviction records on a job application. It also forbids employers from considering such things as 1) convictions in the juvenile justice system; 2) non-misdemeanor or felony convictions, such as an infraction; and 3) a conviction that is more than seven years old, unless the position being considered supervises minors or dependent adults. For more information on the FCO, visit: http://sfgov.org/olse/fair-chance-ordinance-fco.

TIPS FOR GOING FORWARD

If the proposed regulations are approved, employers in California will have to ensure that their current practices and policies align with the new regulations. Below is a list of tips to aid in this process. The list incorporates an EEOC-issued list of best practices on an employer's use of criminal history.

- Train managers and other officials and decisionmakers about Title VII and employment discrimination, and pay particular attention to state and local laws that might expand upon laws regarding the use of criminal history in employment decisions.
- Develop a narrowly tailored written policy and procedure for screening potential and current employees for criminal history
    - Identify essential job requirements
    - Determine offenses that may demonstrate unfitness for performing the job
    - Record justifications for the policy and procedures
    - Note and keep a record of consultations and research considered in crafting the policy and procedures
- Train managers, hiring/firing/promoting/demoting officials, and decisionmakers on how to implement the policy and procedures consistently with Title VII and state and local laws.
- Review and update any criminal history policies and practices to ensure compliance with all federal, state, and local laws.
- When asking or searching for criminal history and records, limit inquiries to records or history for which exclusion would be job-related for the position in question and consistent with business necessity.
- Keep information about applicants' and employees' criminal records and history confidential. Only use such information for the purpose for which it was intended.
- If and when criminal history is used when making an employment-related decision, keep a record of the decision, detailing the business reasons for the decision.
- If in doubt, contact an attorney.

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To view prior issues of the ELC, click here.

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1 *Available at* http://www.eeoc.gov/laws/statutes/titlevii.cfm.

2 *See* EEOC Enforcement Guidance, Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *available at* http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm; *see also* our Employment Law Commentary, July 2012 Article, EEOC Updates Guidance on Using Criminal Records in Hiring Decisions.

3 Cal. Code Regs., tit. 2, § 11017.

4 *Available at* http://www.dfeh.ca.gov/res/docs/Rulemaking/Council/Notice_ConsiderCriminalHistory.pdf.

5 Proposed changes *available at* http://www.dfeh.ca.gov/res/docs/FEHC/FEHC2016Jan/AttachB-CriminalHistory.pdf.

6 *Available at* http://www.naacp.org/pages/criminal-justice-fact-sheet.

7 *Green v. Missouri Pac. R.R. Co.* (8th Cir. 1975) 523 F.2d 1290).

8 *Available at* http://sfgov.org/olse/fair-chance-ordinance-fco.

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