

Employers Face New Hiring Requirements as California “Bans the Box”

New law prohibits most California-based employers from inquiring about an applicant’s criminal history before making a conditional offer of employment.

California Governor Jerry Brown has signed Assembly Bill (AB) 1008, which prohibits most public and private employers with five or more employees from asking applicants about criminal conviction histories until after a conditional offer of employment has been made.¹ The new law, which Governor Brown signed on October 14, 2017, will become effective January 1, 2018.²

AB 1008 repeals Labor Code section 432.9, which was enacted in 2013. Labor Code section 432.9 banned state agencies, cities, and counties from asking applicants about their conviction history until the public employer had determined that the applicant met the minimum qualifications for the job.³ AB 1008 has much broader restrictions than section 432.9. AB 1008 adds new provisions to California’s Fair Employment and Housing Act (FEHA), and prohibits criminal conviction history inquiries until after an employer has extended a conditional offer of employment.⁴ Additionally, AB 1008 prohibits employers from including any question seeking the disclosure of the applicant’s conviction history on any job applications, prior to a conditional offer.⁵

Individualized Assessment

In addition to restricting the timing of criminal conviction inquiries, AB 1008 requires employers to individually assess applicants and provide them with an opportunity to respond to the assessment before rejecting a candidate based on his/her criminal conviction history.⁶

Employers must determine whether the applicant’s conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. AB 1008 requires employers to consider:

- The nature and gravity of the offense or conduct
- The time that has passed since the offense or conduct and completion of the sentence
- The nature of the job held or sought⁷

Following this individual assessment, if the employer makes a preliminary determination that the applicant’s conviction history disqualifies the applicant for employment, then the employer must notify the applicant in writing. The notification must provide:

- Notice of the disqualifying conviction that is a basis for the preliminary decision
- A copy of the conviction report, if any
- An explanation of the applicant's right to respond before the decision becomes final
- The deadline by which to respond⁸

After receiving written notification, the applicant shall have at least five business days to respond before the employer may make a final decision.⁹ The applicant's response may include submission of evidence challenging the accuracy of the conviction history and/or evidence of rehabilitation or mitigating circumstances. If the applicant notifies the employer that the applicant disputes the accuracy of the conviction history and is obtaining evidence to support that assertion, then the applicant shall have five additional business days to respond to the notice.¹⁰

Upon receipt of the applicant's response, the employer may make a final decision to deny employment. However, to do so, the employer must notify the applicant in writing of:

- The final denial or disqualification
- Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration
- The applicant's right to file a complaint with the Department of Fair Employment and Housing¹¹

A Growing Trend

In passing AB 1008, California joins 29 states and at least 150 cities that have enacted some type of "ban the box" legislation.¹² To date, nine other states and 15 municipalities, including San Francisco and Los Angeles, have banned private employers from inquiring into job applicants' criminal history prior to extending conditional offers of employment.¹³

Practical Steps for Employers

California employers can take a number of practical steps to ensure proper compliance with AB 1008. In particular, employers should:

- Revise employment applications to remove questions that ask applicants to disclose criminal history
 - Consider adopting supplemental applications for employees who receive conditional offers of employment
- Review pre-offer interview and background check practices
 - Train all persons interacting with applicants to avoid inquiring into criminal history during the hiring and interview process
 - Revise company practices to obtain third party background checks after the company extends a conditional offer of employment
 - Modify any policies automatically disqualifying candidates based on criminal conviction history, unless disqualification is required by law

- Develop a process for documenting individualized assessments of a candidate's criminal conviction history, as well as forms of notice of preliminary and final disqualification based on a candidate's criminal conviction history

Conclusion

California's "ban-the-box" law comes on the heels of several other employment-related bills that the state has recently passed covering a range of policies. In light of these new requirements, California-based employers may wish to consider reviewing their hiring practices holistically. Latham will continue to monitor developments in this area of strong legislative focus.

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Endnotes

1 AB 1008 will be codified at Gov't Code § 12952.

2 Notably, AB 1008 does not apply to: (1) positions for which a state or local agency is required by law to conduct a conviction history background check, (2) criminal justice agencies, (3) farm labor contractors, and (4) employers required by state, federal, or local law to conduct background checks or restrict employment based on criminal history.

3 AB 1008 §§ 1(a), 3.

4 Gov't Code § 12952(a)(2).

5 *Id.* § 12952(a)(1).

6 *Id.* § 12952(c).

7 *Id.* § 12952(c)(1)(A)(i)-(iii).

8 *Id.* § 12952(c)(2).

9 *Id.* § 12952(c)(3).

10 *Id.*

11 *Id.* § 12952(c)(4)-(5).

12 *See* AB 1008 § 1(c).

13 *Id.* § 1(d). These states include Connecticut, Hawaii, Illinois, Massachusetts, Minnesota), New Jersey, Oregon, Rhode Island, and Vermont.