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California's Statewide "Ban the Box" Law Goes Into Effect January 1

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Effective January 1, 2018, California joins a number of other states and major cities in prohibiting private employers from making pre-offer inquiries regarding an applicant's criminal history (so-called "ban the box" laws).

The new statewide law makes it unlawful for a California employer with five or more employees to:

- Include on employment applications any questions that seek disclosure of an applicant's conviction history;
- Inquire into or consider an applicant's criminal history before the employer has made a conditional employment offer; and
- Consider, distribute or disseminate information relating to arrests that did not result in a conviction, referral to or participation in a diversion program, or convictions that have been sealed, dismissed, expunged or statutorily erased.

Under the new law, inquiries into criminal history are permissible only ***after*** a conditional offer of employment has been made. Further, once apprised of an applicant's conviction history, California employers may rescind an employment offer based solely or in part on criminal history only after following a specified process.

The employer must first conduct an **individualized assessment** of the relationship between the conviction and the specific duties of the position. This requires consideration of: (1) the nature and gravity of the offense or conduct, (2) the time that has passed since the offence and completion of the sentence, and (3) the nature of the job. The employer "may, but is not required to, commit the results of this individualized assessment to writing."

If this assessment results in a preliminary decision to deny employment, the employer must provide **written notice** to the employee. The employer is not required to explain or justify its reasoning. The notification must, however, contain: (1) notice of the disqualifying conviction(s) that are the basis for the preliminary decision to rescind the offer, (2) a copy of the conviction report, if any, and (3) an explanation of the applicant's right to respond before the employer's decision becomes final (including the right to challenge the accuracy of the conviction history report or provide information about mitigating circumstances). Applicants must be given at least five days to respond (or up to 10 if the applicant disputes the accuracy of the report and is obtaining evidence to support that assertion).

Employers are then required to consider any information submitted by the applicant in his or her response. If after this consideration period, an employer makes a final decision to rescind an offer to an applicant, the employer must send a **second written notice** to the applicant, which: (1) includes the final denial or disqualification, (2) explains the procedures or processes, if any, the employer allows to challenge the decision, and (3) explains that applicants have the right to file a complaint with the Department of Fair Employment and Housing.

The requirements of the new ban-the-box law do 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.

California employers should remove from their employment applications any questions or boxes that ask applicants to disclose criminal convictions and train managers not to ask about criminal history during the interview process. Employers should also continue to be mindful of the various laws that impact the use of criminal records in the hiring process, including the California Fair Employment & Housing Council's regulations on criminal history and adverse impact, other state fair employment laws, municipal ban-the-box ordinances (such as those in Los Angeles and San Francisco), and federal and state fair credit reporting laws, such as the Fair Credit Reporting Act.

Our lawyers have deep counseling and litigation experience on these issues. If you would like to discuss these issues further or have questions about this alert, please contact one of the lawyers listed here.

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