

The City of Los Angeles' Fair Chance Initiative For Hiring (Ban The Box) Ordinance

Employment Law Update - May, 2017

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A change in Los Angeles' municipal code that prevents employers from asking about criminal history will come as a significant surprise to many who have grown accustomed to being able to ask about felonies as part of the interview process. And if you don't think your firm is subject to its requirements, you may want to think again.

by **Andrea F. Oxman, Esq.**

When picking the right person for the job, a job applicant's past seems to be a good indicator of future performance. The primary reason that employers conduct pre-employment background checks during the hiring process is to identify any criminal convictions in an applicant's past. However, employers now face further restrictions on such screenings pursuant to the City of Los Angeles' Fair Chance Initiative for Hiring Ordinance (also known as "Ban the Box") which took effect on January 22, 2017. Under the Ordinance, employers that are

either physically located in the City of Los Angeles or doing business in the City of Los Angeles are prohibited from: (1) including any question on an application for employment that seeks the disclosure of an applicant's criminal history; and (2) inquiring about or requiring disclosure of an applicant's criminal history at any time until a conditional offer of employment has been made to the applicant.¹ L.A. Municipal Code § 189.02(A), (B). This change will come as a significant surprise to many employers who have grown accustomed to

¹ The Fair Chance Initiative For Hiring Ordinance contains precise definitions that effect the interpretation of the Ordinance. For example, the phrase employer "means any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that is located or doing business in the City [of Los Angeles], **and that employs ten or more Employees, including the owner or owners and management and supervisory employees.**" L.A. Municipal Code § 189.01(J) (emphasis added). Likewise, the term "inquire" is defined to mean "any direct **or indirect conduct** intended to gather Criminal History information from or about an Applicant, using any mode of communication, including, but not limited to, application forms, interviews and Criminal History Reports." L.A. Municipal Code § 189.01(M)(emphasis added). The Ordinance does not define what it means to "do business" within the City of Los Angeles, but defines the term "employee" to mean an individual who "performs at least two hours of work on average each week within the geographic boundaries of the City of Los Angeles." L.A. Municipal Code § 189.01(I)(1). Accordingly, employers who have employees working at least two hours each week in the City of Los Angeles are likely to be considered as "doing business" in the City of Los Angeles and required to comply with the Ordinance.



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being able to ask about felonies as part of the interview process and prior to an offer of employment being extended.²

There are four narrow exceptions to the Fair Chance Initiative For Hiring Ordinance's ("FCIHO") prohibitions. An employer may inquire about an applicant's criminal history at the outset of the hiring process and on an employment application if:

(1) the employer is required by law to obtain information regarding whether the applicant has been convicted of a felony or misdemeanor that resulted in probation, fine(s), imprisonment, or parole (L.A. Municipal Code § 189.07(A); see also §189.01(E) (defining "Conviction"));

(2) the applicant would be required to possess or use a firearm in the course of his or her employment (L.A. Municipal Code § 189.07(B);

(3) an individual who has been convicted of a crime is prohibited by law from holding the position the applicant seeks, regardless of whether any conviction has been expunged, judicially ordered sealed, statutorily eradicated or judicially dismissed following probation (L.A. Municipal Code § 189.07(C); and

(4) the employer is prohibited by law from hiring an individual who has been

convicted of a crime (L.A. Municipal Code § 189.07(D)).

Even disregarding the exceptions listed above, the FCIHO does not prohibit employers from making any inquiries about applicants' prior convictions or criminal histories. Rather, it is a matter of timing; under the FCIHO, employers may only solicit such information and run a criminal background check on a prospective employee after a conditional offer of employment has been extended.

If the employer elects to proceed with a criminal background check or inquiry after extending a conditional offer of employment,³ the employer discovers that the applicant has a criminal history, and thus the employer wishes to rescind or cancel the conditional offer of employment, the employer must take the following steps before doing so.

Step 1: The employer must complete a written individualized assessment that "effectively links the specific aspects of the applicant's criminal history with risks inherent in the duties of the position sought." L.A. Municipal Code § 189.03(A). Pursuant to the rules and regulations implementing the FCIHO, an employer must at least consider the following factors drafted by the Equal Employment Opportunity Commission ("EEOC")⁴:

² Prior to the enactment of the Fair Chance Initiative For Hiring Ordinance, employers were free to ask about applicants' convictions and arrests which had resulted in conviction, but could not require applicants to disclose all arrests or convictions for marijuana related offenses more than two years old, nor could they question applicants about such arrests or convictions. Employers have always been prohibited in California from asking about arrests that did not result in a conviction. Labor Code § 432.7.

³ The FCIHO does not require employers to complete a criminal history background check on all prospective employees; however, if an employer elects to do so, the employer must comply with all local, state and federal laws and regulations regarding background checks and written disclosures and consents as to same.

⁴ These factors are known as the "Green factors" and were included in the EEOC's Enforcement Guidance which was issued in 2012.

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- What is the nature and gravity of the offense? (The harm caused by the criminal conduct should be considered)
- How much time has passed since the offense? (Convictions remote in time are less significant than similar more recent ones)
- What is the nature of the job duties and responsibilities? (Consider the job's essential functions and the circumstances under and the environment in which the job is performed)
- Are you looking at ONLY convictions? (Arrests cannot be considered in employment decisions)

[FCIHO Implementing Regulation #2(B)(2)(a)(emphasis original.)]

Step 2: If after completing the written assessment in Step 1, an employer determines that a prospective employee poses an unreasonable risk and the employer wishes to rescind or cancel its conditional offer of employment, the employer must:

- Provide the applicant with a written notice that it is considering rescinding or cancelling the conditional offer of employment;
- Provide the applicant with a copy of the written assessment performed in Step 1, as well as any other information or documentation supporting the employer's potential rescission or cancellation of the offer; and
- Wait at least five (5) business day after the applicant is provided with the information above before rescinding or cancelling the offer and hold the position open. This five (5) business day waiting period is designed to allow the applicant to engage in the "Fair Chance Process." To ensure compliance with FCIHO, it is critical for employers to document the date the applicant was notified and provided with the above information.

[L.A. Municipal Code § 189.03(B); FCIHO Implementing Regulation #2(B)(3).]

Step 3: The employer must receive and review any information or documentation provided by the Applicant regarding the accuracy of his/her criminal history or criminal history report. L.A. Municipal Code § 189.03(B). This is known as the "Fair Chance Process." L.A. Municipal Code §§ 189.03(B), 189.01(L) (definition of Fair

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Chance Process). The rules and regulations implementing the FCIHO provide the following examples of evidence applicants may elect to submit as part of the Fair Chance Process:

- Facts or circumstances surrounding the offense or conduct;
- The number of offenses for which the individual was convicted;
- Older age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;

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- Rehabilitation efforts, including but not limited to certificates or proof of education/training; letters of recommendation from community leaders; and certificates of rehabilitation granted by a court;
- Employment or character references; and
- Whether the individual is bonded under a federal, state or local bonding program. [FCIHO Implementing Regulation #2(C)(2).]

Step 4: If the applicant does not provide any information pursuant to the Fair Chance Process within five (5) business days, the employer may rescind or cancel the offer of employment without any additional requirements. FCIHO Implementing Regulation #2(C)(3). However, if the applicant timely provides the employer with information as part of the Fair Chance Process, the employer must complete a written reassessment of its proposed rescission or cancellation of the conditional employment offer. L.A. Municipal Code § 189.03(B). The same factors articulated above in Step 2 should be considered, but this time the Fair Chance Process information must also be considered. FCIHO Implementing Regulation #2(C)(4).

Step 5 (applicable only if Fair Chance Process information is provided and the employer completes a written reassessment): The employer should communicate its final decision to the applicant and provide the applicant with a copy of its written reassessment. FCIHO Implementing Regulation #2(C)(4).

Record Keeping

The FCIHO requires employers to “retain all records and documents related to Applicants’ Employment applications and the written assessment and reassessment

performed...for a period of [at least] three years...” L.A. Municipal Code § 189.06. The Department of Public Works, Bureau of Contract Administration (“BCA”), which is responsible for implementing and enforcing the FCIHO, may request that an employer provide these records to the BCA

“... employers must affirmatively state ‘in all solicitations or advertisements’ seeking applicants for employment that the employer will consider qualified applicants with criminal histories for employment pursuant to the requirements of the FCIHO.”

if it initiates an investigation. FCIHO Implementing Regulation #2(F)(1). Additionally, if an employer relies on oral information in recommending that a conditional offer of employment be rescinded or cancelled, the employer should document this information in a memorandum and maintain the memorandum with their employment records.

FCIHO Implementing Regulation #2(F)(2). By way of example, the BCA recommends that “a verbal reference check with a former employer...be documented.” *Id.*

Notification Requirements

The FCIHO imposes three important notice requirements on employers. See L.A. Municipal Code § 189.04.

First, employers must affirmatively state “in all solicitations or advertisements” seeking

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applicants for employment that the employer will consider qualified applicants with criminal histories for employment pursuant to the requirements of the FCIHO. L.A. Municipal Code § 189.04(A). The BCA has published the following statement for employers to reference and use: "We will consider for employment all qualified Applicants, including those with Criminal Histories, in a manner consistent with the requirements of applicable state and local laws, including the City of Los Angeles' Fair Chance Initiative for Hiring Ordinance." City of Los Angeles FCIHO Frequent Asked Questions, No. 9.

Second, employers must post a notice informing applicants of the provisions of the FCIHO in a conspicuous place at every workplace, job site or other location in the City under the employer's control and which applicants visit. L.A. Municipal Code § 189.04(B).

Third, to the extent an employer has a collective bargaining agreement in place with employees or an agreement of understanding applicable to employees in the City of Los Angeles, the employer must send a copy of the notice informing applicants of the provisions of the FCIHO to each labor union or designated workers' representative the employer has an agreement with. L.A. Municipal Code § 189.04(B).

An exemplar notice prepared by the BCA for private employers to use in the workplace can be accessed at:

<http://kpcne.ws/2peh7no>

Prohibition Against Retaliation

The FCIHO prohibits an employer from discharging, reducing the compensation of, or

otherwise taking any adverse employment action against any employee who raises a complaint to the City of Los Angeles regarding the employer's compliance with the FCIHO. L.A. Municipal Code § 189.05. The FCIHO also prohibits retaliation against employees who participate in proceedings regarding the FCIHO or seek to enforce or assert their rights under the Ordinance. *Id.*

“An applicant or employee may bring a private cause of action against an employer which does not comply with the FCIHO and recover penalties.”

Enforcement of the Ordinance and Potential Civil Penalties

An applicant or employee may bring a private cause of action against an employer which does not comply with the FCIHO and recover penalties. L.A. Municipal Code § 189.08. Before bringing a claim, the applicant or employee must exhaust administrative remedies by filing a complaint with the BCA. L.A. Municipal Code §§ 189.08, 189.09. The statute of limitations for making a complaint to the BCA is one (1) year from the date of the alleged violation. L.A. Municipal Code § 189.09(A).

After receiving a complaint, the BCA will investigate the complaint and may require an employer to produce records and documents for inspection pursuant to a subpoena issued by the Board of Public Works. L.A. Municipal Code § 189.09(A). If the BCA determines that an employer has

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violated the FCIHO, it must issue a written notice to the employer of the violation and require the employer to cure the violation. *Id.* The BCA may also impose an administrative fine or penalty for an employer's violation. *Id.*

The FCIHO's provisions regarding administrative fines and penalties do not take effect until July 1, 2017. L.A. Municipal Code § 189.10(A). Prior to July 1, 2017, an employer who has violated the FCIHO will only receive a written warning. *Id.*

However, as of July 1, 2017, the BCA may impose a penalty of up to \$500 for each violation of the FCIHO's notice or record-keeping requirements. L.A. Municipal Code § 189.10(A). For any other violation of the FCIHO, the BCA may impose a penalty of up to \$500 for the first violation, up to \$1,000 for the second violation, and up to \$2,000 for the third and subsequent violations. *Id.* "The amount of the penalty or administrative fine may be based on the willfulness of the Employer's action(s) and other material factors as determined by" the BCA. L.A. Municipal Code § 189.10(B). The BCA may also elect to award a portion of an administrative fine or penalty it collects to an applicant or employee up to \$500 per violation. L.A. Municipal Code § 189.10(F)⁵.

Compare and Contrast With San Francisco's Fair Chance Ordinance and California's Pending AB1008

Los Angeles is not the first city to enact a Fair Chance Ordinance. The City of San Francisco enacted its own Fair Chance Ordinance applicable to employers located or doing business in San Francisco and it became effective on August 13, 2014. San Francisco's Fair Chance Ordinance is similar to the FCIHO in many ways – it generally prohibits inquiries into applicants' criminal histories on job applications and early on in the hiring process and requires employers to allow applicants to provide information about their criminal histories during a "Fair Chance Process." However, compliance with the FCIHO does not ensure compliance with San Francisco's Ordinance and visa versa. For example,

- San Francisco allows employers to inquire into an applicant's criminal history after completing a "first live interview" with the applicant, whereas the FCIHO does not permit such an inquiry until after a conditional offer of employment is extended to the applicant. Compare S.F. Police Code § 4904(b) with L.A. Municipal Code § 189.02(B).
- San Francisco's Fair Chance Ordinance requires employers to provide each applicant with written notice about the Ordinance's requirements and the applicant's rights before the employer conducts a criminal background check, whereas the FCIHO only requires employers to conspicuously post a notice regarding the FCIHO at the workplace or jobsite applicants will visit. Compare S.F. Police Code § 4904(d) with L.A. Municipal Code § 189.04(B).

⁵ The FCIHO does not provide that an aggrieved applicant may recover lost wages or attorneys' fees or seek reinstatement. See L.A. Municipal Code § 189.10 (setting forth penalties and fines available under the Ordinance). However, the Ordinance does provide that an aggrieved applicant who commences a civil action "shall be awarded the penalty set forth in the [FCIHO]... **and any other legal and/or equitable relief as may be appropriate to remedy the violation.**" L.A. Municipal Code § 189.08 (emphasis added). We anticipate that applicants that bring suit under the FCIHO will seek an award of reasonable attorneys' fees and costs under section 189.08, however, whether the courts will make such an award is an open question at this juncture.

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- San Francisco's Fair Chance Ordinance requires employers subject to the Ordinance to complete and submit annual reporting forms regarding their compliance to the San Francisco Office of Labor Standards Enforcement (S.F. Police Code § 4910(b),(e)) whereas the FCIHO currently has no reporting requirements.

The California State Legislature is also considering Assembly Bill 1008, which as proposed would make it unlawful for an employer to: (1) include on any application for employment any question that seeks the disclosure of an applicant's criminal history; and (2) inquire into or consider the conviction history of the applicant, including any inquiry about conviction history on any employment application, until after the applicant has received a conditional offer. Under the proposed law, employers would also be prohibited from rescinding or cancelling a conditional offer of employment based on an applicant's criminal history absent an individualized assessment "of 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" and provide the applicant with ten (10) business days to engage in a "fair chance process" and provide the employer with information mitigating a conviction and/or rehabilitation evidence.

In sum, the local regulations and proposed state law governing hiring and background checks are complex, overlapping, and in some cases, flat out conflicting. Before revising or implementing new hiring practices, please consult with our employment team so that we can ensure your practices are tailored to ensure your compliance with applicable local, state and federal regulations. It also is important that you immediately review your employment applications and notices in light of these rules and train employees involved in interviewing and hiring about these new restrictions.



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