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EMPLOYER'S GUIDE TO THE SAN FRANCISCO "BAN THE BOX" ORDINANCE

In 2014, the City of San Francisco enacted an ordinance that imposes the most stringent requirements in the country for employers' inquiries and use of criminal histories of applicants and employees. The ordinance restricts (1) what inquiries an employer may make about an applicant or employee's criminal history; (2) when such inquiries may be made; and (3) how employers may use information that is obtained in making employment decisions. The ordinance also includes burdensome record keeping requirements and provides for significant penalties for violations. Below is a summary of the ordinance, including interpretations of the ordinance published in August 2014 by the San Francisco Office of Labor Standards Enforcement ("OLSE") as responses to "Frequently Asked Questions".

◆ WHO IS COVERED BY THE EMPLOYMENT PROVISIONS OF THE ORDINANCE?

- ❖ The ordinance applies to any employer that is located in or does business in San Francisco and that employs 20 or more employees anywhere. The City of San Francisco and other governmental units are exempted.
- ❖ The requirements of the ordinance apply to positions with covered employers where the employment will be in whole or substantial part in San Francisco.
- ❖ According the OLSE's 2014 "FAQ's," "employee" for purposes of the ordinance includes anyone performing at least 8 hours of work in San Francisco per week for an employer located anywhere including independent contractors, trainees, workers employed through temporary staffing agencies and employees telecommuting from their San Francisco residences for out-of-town employers.

◆ WHEN CAN AN EMPLOYER OBTAIN INFORMATION ABOUT AN APPLICANT'S CRIMINAL HISTORY?

- ❖ An employer may not ask applicants or potential applicants to disclose on an employment application any information about convictions or arrests. **This means that employers should remove from application forms used for employment in San Francisco any questions about convictions or criminal records**, unless the inquiry on applications is specifically required by state or federal law.
  - ◆ While the OLSE encourages removal of questions concerning criminal history from applications used by large employers for positions both within and outside San Francisco, it has indicated that it would be acceptable to include a clear and conspicuous disclaimer next to the questions instructing applicants for San Francisco positions not to answer that question.
- ❖ An employer may only inquire about any criminal history information after the first live interview with a candidate (by telephone, videoconferencing, use of other

technology or in person) or, at the employer's discretion, after a conditional offer of employment.

- **WHAT LIMITATIONS ARE THERE ON THE INFORMATION AN EMPLOYER MAY OBTAIN?**
  - An employer may not at any time (a) make an inquiry by any means concerning the following types of information or (b) base an adverse action in whole or part on such information:
    - a conviction for which sentencing occurred more than seven years ago;
    - an arrest not leading to a conviction except an "unresolved arrest" (i.e., an arrest for which an active criminal investigation or trial is still pending);
    - participation in or completion of a diversion or a deferral of judgment program;
    - a conviction that has been judicially dismissed, expunged, invalidated, voided or otherwise rendered inoperative;
    - convictions through the juvenile justice system; or
    - information pertaining to an offense other than a felony or misdemeanor, such as an infraction.
  - If an employer inquires about an applicant's criminal history when allowed by the ordinance, the employer should advise the applicant not to provide the above information.
- **WHAT STEPS DOES AN EMPLOYER HAVE TO TAKE BEFORE ASKING FOR CRIMINAL HISTORY INFORMATION OR CONDUCTING A CRIMINAL BACKGROUND CHECK?**
  - Before obtaining a criminal background check or even asking an applicant or employee about his or her criminal history, the employer must provide the applicant a notice published by the OLSE (available here) that describes rights under the ordinance; and
  - Before obtaining a background check report, the employer must also provide the notices required by the federal Fair Credit Reporting Act and the California Consumer Investigative Act.
- **WHAT ARE THE LIMITS ON USE OF CRIMINAL HISTORY INFORMATION EVEN WHEN OBTAINED IN ACCORDANCE WITH THE ORDINANCE?**
  - The employer may only consider "directly related" convictions.
    - "Directly related conviction" means a conviction or unresolved arrest that has a direct and specific negative bearing on the person's ability to perform the duties or responsibilities necessarily related to the employment position in question.
    - In making this determination whether a conviction is "directly related," an employer must consider:
      - whether the position offers the opportunity for the same or similar offense to occur; and

- ✧ whether circumstances leading to the conduct for which the person was convicted or arrested will recur in that employment position.

- ❖ **Remember**: A conviction that is more than seven years old can never be considered "directly related" under the ordinance, nor can any of the other categories of criminal history that may not be the subject of inquiry under the ordinance (e.g., juvenile convictions, those that have been expunged, etc.).
- ❖ Even where an applicant has one or more "directly related convictions," an employer must conduct an individualized assessment before taking an adverse action, considering the following factors:
  - ◆ the time that has elapsed since the conviction or unresolved arrest;
  - ◆ any evidence or inaccuracy in the conviction information; and
  - ◆ any evidence of rehabilitation or other mitigating factors.
- ❖ Rehabilitation includes:
  - ◆ an applicant's satisfactory compliance with all terms and conditions of parole and probation although inability to pay fines, fees and restitution due to indigence shall not be considered noncompliance;
  - ◆ employer recommendations, especially following the conviction;
  - ◆ an applicant's educational attainment or vocational or professional training since the conviction;
  - ◆ an applicant's completion of, or active participation in, rehabilitation programs—such as alcohol or drug treatment;
  - ◆ letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or parole/probation officers who have observed the person since his or her conviction; and
  - ◆ the age of the person at the time of the conviction.
- ❖ Mitigating factors that may be offered voluntarily by the candidate include (but are not limited to):
  - ◆ Explanation of the precedent coercive conditions,
  - ◆ intimate physical or emotional abuse; and
  - ◆ untreated substance abuse or mental illness that contributed to the conviction.
- ❖ Employers should document the individualized assessment and may wish to provide applicants a form to identify evidence of rehabilitation and mitigating factors.

- **AFTER ENGAGING IN THE INDIVIDUALIZED ASSESSMENT, WHAT STEPS MUST AN EMPLOYER TAKE BEFORE BASING AN ADVERSE ACTION ON AN APPLICANT'S CONVICTION HISTORY?**

  - Before taking any adverse action against an employee or applicant (including refusal to hire or promote, termination or any negative action toward an employee), an employer must provide the applicant or employee with a copy of the background report (if any) and notify the applicant/employee of the prospective adverse action, giving the applicant/employee at least seven days to respond.
  - If, within seven days, the applicant gives the employer notice (orally or in writing) of evidence of the inaccuracy of the conviction history or provides evidence of rehabilitation or other mitigating factors, the employer must delay the adverse action for a reasonable period while holding the position open and reconsider the prospective adverse action in light of the information provided.
  - If the employer takes an adverse action based on conviction history, the employer must notify the applicant of the final adverse action. While the ordinance does not indicate that the notice must be in writing, employers should provide the notice in writing to show compliance with the ordinance.

- **WHAT ARE THE NOTICE AND POSTING REQUIREMENTS?**

  - In all solicitations or advertisements for employees (including online job postings) that are "reasonably likely" to reach persons who are "reasonably likely" to seek employment in San Francisco, the employer must state that the employer will consider for employment qualified applicants with criminal histories in a manner required by the ordinance. The OLSE recommends the following language: "Pursuant to the San Francisco Fair Chance Ordinance, we will consider for employment qualified applicants with arrest and conviction records."

    Be Careful: This requirement applies not just to advertising for positions actually within San Francisco, but advertising for other employment positions that may reach someone who may apply for a different position in San Francisco.
  - The OLSE states in its FAQs that this requirement prohibits even disclosing in an application, ad or job solicitation that "a background check must be passed."
  - Employers must post on employee bulletin boards a notice published by the OLSE which is available on the OLSE website. (Note: there is a separate notice for city contractors, also available on the website.) The notice must also be posted in Spanish, Chinese and Tagalog if necessary for the employer's workforce.
  - The notice must be posted in every employer location in San Francisco visited by employees or applicants and must be sent to every union with which the employer has a collective bargaining agreement applicable to San Francisco employees.

- **WHAT ARE THE ENFORCEMENT PROCEDURES?**

  - The ordinance provides administrative and civil enforcement procedures and includes substantial penalties for violation of the ordinance, including reinstatement, lost wages and benefits, penalties of $50 to $100 for each employee or applicant whose rights have been violated, attorneys' fees and interest.

- There is a **grace period for penalties**: For violations that occurred during the first twelve months after the ordinance's effective date, the OLSE may only issue warnings and notices to correct and provide technical assistance.
- Although the OLSE may find a violation based on an employer's failure to conduct an individualized assessment, the OLSE may not find a violation based on an employer's decision that an applicant or employee's conviction history is directly related to a position.

WHAT RECORDS DOES AN EMPLOYER HAVE TO MAINTAIN?

- For three years, the employer must maintain "all records of employment," application forms and "other pertinent data and records required under the ordinance" and shall allow the OLSE access to those records. **NOTE:** This means that employers should keep copies of employment applications longer than the one or two year retention periods required by various state and federal agencies such as the EEOC.
- The OLSE provides the following list of "examples" of records that should be retained for three years:
  - documentation showing that the OLSE FCO Notices were posted as required
  - any background check reports obtained *(note, in some cases, such as Livescan checks, retaining these records may violate state law* which *supersedes the FCO requirements*)
  - copies of job ads and postings
  - job application forms distributed
  - job applications submitted by applicants
  - documentation of employment interviews including forms, notes, and interview questions
  - any information provided to applicant regarding potential adverse action
  - any information received from an applicant or employee in response to a background check
  - documentation of all individualized assessments conducted
  - any documentation of rehabilitation or mitigating factors submitted by applicants or employees
  - documentation of adverse actions based on unresolved arrest or conviction records
  - documentation of hiring or promoting individuals after considering unresolved arrest or conviction records

- ❖ Failure to maintain records required by the ordinance will be presumed to mean that the employer was not in compliance with the ordinance.
- ❖ In addition to maintaining records, employers are required to provide information to the OLSE on an annual basis on a form available on the Health Care Security Ordinance section of the OLSE website.

◆ **HOW DOES THE ORDINANCE APPLY TO EMPLOYERS REQUIRED BY LAW TO CONDUCT CRIMINAL BACKGROUND CHECKS SUCH AS SCHOOLS AND CERTAIN FINANCIAL INSTITUTIONS?**

- ❖ In general, if requirements of state or federal law are in **conflict** with provisions of the ordinance, the state or federal requirements will control over the conflicting provisions of the ordinance, and the conflicting provisions of the ordinance will be preempted.
- ❖ The OLSE has interpreted the preemption provision to mean that "If federal or state law requires a criminal background check for a particular position in your company that conflicts with the FCO, then the FCO, including the notice and posting requirements, do not apply to that particular position and its applicants. However, if the company has other positions that are not governed by superseding federal or state law—and which are therefore subject to the FCO—then the company must comply with the FCO notice and posting requirements with respect to those positions and those applicants."
- ❖ Employers required by state or federal law to do background checks or disqualify applicants based on certain criminal convictions should be cautious in evaluating which provisions of the ordinance are preempted by state or federal law and which, if any, provisions still apply to them.
- ❖ Questions of preemption are complex, and the answers will vary depending on the terms of the particular state or federal law involved. Employers required to conduct criminal background checks under state or federal law should seek legal counsel concerning preemption.

WHAT SHOULD COVERED EMPLOYERS DO TO COMPLY WITH THE ORDINANCE?

- **Review job applications** and remove any inquiries concerning criminal history.
- **Revise hiring procedures** to delay inquiries concerning criminal history until after the first live interview and to conduct the individualized assessment required by the ordinance.
- Distribute the "Know Your Rights" notice before conducting criminal background checks.
- **Create a form to request criminal history information** that limits the inquiry as permitted by the ordinance, provides the required legal notice and allows employees to offer evidence of rehabilitation and mitigating factors.
- **Develop procedures for providing advance notice of adverse actions** including a seven-day waiting period before taking action and additional time to consider evidence of mitigating factors or rehabilitation.
- **Establish procedures to document compliance** with the ordinance, including retaining required records for at least three years.
- **Train managers and personnel conducting job interviews** on the requirements of the ordinance.
- **Post the required notice**, available on the OLSE website.
- By April 30 of each year, covered employers must submit the annual reporting form to the OLSE. (The form is combined with the Health Care Security Ordinance Annual Reporting Form available here.)

Please remember that the above update provides general information and is not intended to provide legal advice as to any specific factual situation. If you have questions about the application of the ordinance to a particular situation, you should consult with legal counsel. The attorneys in our ***Labor and Employment Law Group*** *would be happy to assist you.*

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