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California Employers Cannot Solicit or Use Pre-Offer Criminal Screening Information

On January 1, 2018, California Government Code 12952 will add criminal screening restrictions to the Fair Employment and Housing Act. This new law not only prohibits most employers from asking an applicant about their criminal history (or running a criminal background check) before a conditional job offer is made, it imposes a detailed process for any applications where the employer is withdrawing a job offer because of criminal conviction history.

If you are an employer of five or more employees, it will be illegal after December 31, 2017 to do any of the following prior to making a conditional offer of employment:

- 1) Inquiring into the criminal history of an applicant;
- 2) Including a criminal history question on an application form;
- 3) Considering criminal history information about the applicant.

After you have made a conditional offer of employment, you are allowed to give the applicant a form asking about criminal convictions, but not arrests, pretrial diversions, expunged, sealed, or dismissed charges.

If you decide to withdraw the conditional offer of employment because of criminal conviction history, the criminal conviction must be directly relevant to the job duties, and you must consider the following factors:

- 1) The nature and gravity of the offense;
- 2) The nature of the job sought;
- 3) The amount of time that has passed since the conviction and completion of the sentence.

You then must notify the applicant in writing that you, the employer, have arrived at a "preliminary decision" that the criminal history is disqualifying. You may, but are not required to, include your reasoning in this letter. Unless you have cleared it with a competent employment attorney, it is not advisable to include the reasoning. Your "preliminary decision" letter (or email) must include the following, and you must give the applicant five business days to respond:

- (A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
- (B) A copy of the conviction history report, if any;
- (C) An explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the



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deadline by which to respond. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

If the applicant responds to the employer in writing and disputes the criminal history while promising to provide additional information, the applicant gets an additional five business days to provide further evidence before the employer can make a final decision. "If, within the five business days, the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and that the applicant is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have five additional business days to respond to the notice."

The employer cannot make a final decision to withdraw the job offer until the ten days have run and the employer has made an individualized assessment of the job applicant's situation, including considering any rebuttal information the applicant submitted during the 5/10 day process above. If the employer makes a final decision to withdraw the job offer, the employer must inform the applicant in writing of:

- 1) The final denial or disqualification;
- 2) Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration;
- 3) His or her right to file a complaint with the California Department of Fair Employment and Housing.

There are narrow exceptions for employers who are required by law to conduct criminal background checks on their employees, such as security guards. There is also an exception for farm labor contractors and some health care employers.

Note that this new law is statewide, unlike some of the similar local laws which only affect employers in the City of Los Angeles or most Bay Area jurisdictions. Also note that this new law is part of the same Fair Employment and Housing Act that covers discrimination based on race, age, gender, cancer, genetic information, disability, and carries attorney's fees and punitive damages for a prevailing party. This financial exposure makes arbitration agreements and properly-trained hiring staff important components of an employer's human resources activity.

Also note that for employers who have at least ten employees, who each work two or more hours per week in the City of Los Angeles (compensable travel time included), the City's ordinance imposes some additional requirements, such as different factors, and requires a written analysis be provided to the employee.



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If you have any questions or comments regarding this article, please do not hesitate to contact Daniel Spurgeon at The Green Law Group, LLP.

Please note that this article is only intended to provide some general educational information. For your particular legal questions, be sure and consult with an attorney.

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