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CLIENT ALERT

New Amendments to California Proposed Regulation: Limiting Employer Use of Criminal History Information

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In September 2016, California's Department of Fair Employment & Housing (DFEH) published a second notice of modifications to a proposed regulation that would restrict how employers use criminal history information. The modifications support the proposal's employee-friendly function, including specific prohibitions on using particular types of criminal history, and a requirement that employers prove that their use of criminal history is job-related and consistent with business necessity. The proposed regulation entered the administrative pipeline when it was first noticed in February 2016. Now, after two rounds of modifications, California employers should prepare for enactment by re-evaluating the role that criminal history plays in their employment decision-making.

If Enacted, How Would the Regulation Work?

The proposed regulation targets policies and practices that base employment decisions on criminal records (e.g., a policy of not hiring or promoting someone because of a conviction). Under the proposal, if any such policy has an "adverse impact" on a member of a protected class (e.g., race, gender, national origin), the employer must justify the policy as both "job-related and consistent with business necessity."

The regulation would function in three burden-shifting steps. The burden starts with the affected employee or job applicant, who must prove that the policy had an "adverse impact." Next, the burden shifts to the employer, who must defend its policy as job-related and consistent with business needs. Third, the employee is provided a final opportunity to overcome the employer's defense by showing that a "less discriminatory alternative" exists.

Employees First Must Show "Adverse Impact"

The regulation defines "adverse impact" by reference to the EEOC definition of "disparate impact" as contained in the EEOC's Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964 (Apr 2012). It is the employee's burden to show that the employment decision (e.g., refusing to hire) had an "adverse impact" on a member of a protected class (e.g., race, gender, national origin). The regulation broadly lets employees use conviction statistics or "any other evidence" to meet that burden. Moreover, the

amended text presumes “adverse impact” wherever state- or national-level statistics show substantial disparities in conviction records of a protected class.

The Employer’s Defense: “Job-Related and Consistent with Business Necessity”

Once the employee or applicant shows “adverse impact,” the burden shifts to the employer to justify the policy as both “job-related and consistent with a business necessity.”

To satisfy that burden, employers must show that the policy bears a “demonstrable relationship to successful performance on the job.” It is not enough to prove that the policy abstractly evaluates a candidate—the policy must measure a candidate’s fitness for a specific position.

Employers must also prove “appropriate tailoring” to satisfy a job-relatedness/business-necessity defense. To prove that a policy that considers criminal convictions is “appropriately tailored to the job for which it is used,” employers must show that the policy, at minimum, takes into account three factors: (1) the nature and gravity of the offense, (2) the amount of time since the offense occurred, and (3) the nature of the job held or sought.

Consideration of whether a policy is “appropriately tailored” also depends on the type of policy—whether a bright-line disqualification or an *individualized* assessment.

Bright-line policies—those policies that immediately disqualify candidates based on criminal convictions—have two requirements. First, the policy must properly distinguish between employees or applicants who do and do not pose an unacceptable risk. Second, the disqualifying conviction must have a direct and specific negative bearing on the employee’s ability to do the job. In addition, for bright-line policies based on convictions over seven years old, there is a rebuttable presumption *against* “appropriate tailoring.”

Individualized assessment policies—those policies that screen out candidates based on an overall evaluation of circumstances and qualifications—have three requirements. Before screening out a candidate because of a conviction, the employer must: (1) give notice to the candidate, (2) give the candidate a chance to respond, and (3) fully consider any information provided.

Finally, under both bright-line and individual assessment policies, the employer must show that it gave the affected individual notice of the disqualifying conviction, as well as a chance to dispute its accuracy. The notice must be provided before the action that causes an adverse impact.

The Employee’s Last Shot: “Less Discriminatory Alternatives”

Even if an employer is able to defend the adverse impact of its policy by showing job-relatedness and business necessity, the employee may overcome the employer’s defense by showing that a less discriminatory alternative exists. For example, the employee could still prevail by showing that the employer’s business needs would be just as effectively met by an alternative more narrowly targeted policy, rather than the challenged policy.

What’s Next?

The proposed regulation will likely be approved before Spring 2017, based on the process remaining for administrative review. The DFEH has until February 19, 2017 to transmit the proposal to the Office of Administrative Law (OAL). Following transmittal, OAL has 30 working days to review before the regulation is adopted. Employers should consulate with counsel to consider whether current procedures and policies would be in compliance with the proposed regulation.

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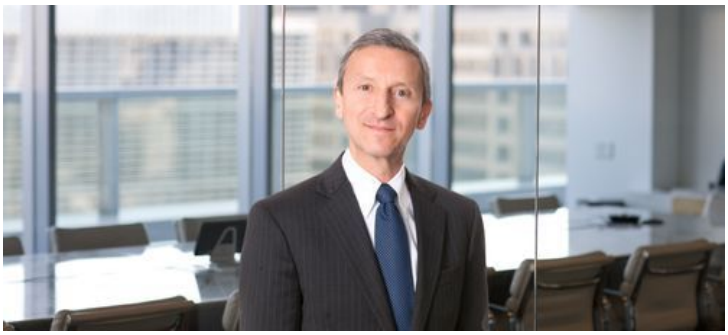

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