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California Bans Criminal Background Checks Until 'After' Job Offer

How to conduct criminal background checks without facing liability

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In California, an employer with more than five employees cannot ask a potential employee about their conviction history. On January 1, 2018, the California "Fair Chance Act" went into effect. [Government Code 12952](#). The law prohibits employers from:

1. Asking a job applicant about their conviction history until a conditional job offer is made;
2. Considering the job applicant's criminal history before a conditional job offer is made; or
3. Considering arrests that were not followed by a conviction, participation in diversion programs, or convictions that have been sealed, dismissed, or expunged.

In order to run a criminal background check or ask about an applicant's conviction history, an employer needs to first make a conditional job offer. However, if the employer then learns that the person they just offered a job to is a convicted felon, it cannot simply revoke the job offer. The employer must first conduct "an individualized assessment of" the applicant's conviction history.

As stated by the California Department of Fair Employment and Housing (DFEH), that "means that an employer can't take back the job offer without considering the nature and gravity of the criminal history, the time that has passed since the conviction, and the nature of the job." [DFEH FAQ Page](#). Or as stated in the law:

An employer that intends to deny an applicant a position of employment solely or in part because of the applicant's conviction history shall make 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. In making the assessment described in this paragraph, the employer shall consider all of the following:

- (i) The nature and gravity of the offense or conduct.
- (ii) The time that has passed since the offense or conduct and completion of the sentence.
- (iii) The nature of the job held or sought.

[Government Code 12952\(c\)\(1\)\(A\)](#)

If, after conducting an individual assessment, the employer "makes a preliminary decision that the applicant's conviction history disqualifies the applicant from employment, the employer shall notify the applicant of this preliminary decision in writing." Id.

The notification "is not required to[] justify or explain the employer's reasoning for making the preliminary decision." However, the notification must contain all of the following:

- (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 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.

[Government Code 12952\(c\)\(2\)](#)

After receiving the notice, the applicant has five business days to respond to the notice "before the employer may make a final decision."

[Government Code 12952\(c\)\(3\)](#)

Moreover, if the applicant asks for more time within five business days, the applicant "shall have five additional business days to respond to the notice." Id. And if the applicant submits information, the employer must consider the information "before making a final decision."

[Government Code 12952\(c\)\(4\)](#)

Finally, if "an employer makes a final decision to deny an application solely or in part because of the applicant's conviction history, the employer shall notify the applicant in writing of all the following:

The final denial or disqualification. The employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification.

Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration.

The right to file a complaint with the department.

[Government Code 12952\(c\)\(5\)](#)

Unfortunately, we have already begun to see lawsuits against employers that deny employment based on background checks that are not done in strict compliance with the law. California employers must make sure to follow this procedure or face significant liability and legal costs.

Author Bio



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