

Civil Rights Council
Modifications to Text of Proposed Modifications to Employment
Regulations Regarding Criminal History

CALIFORNIA CODE OF REGULATIONS

Title 2. Administration

Div. 4.1. Department of Fair Employment & Housing

Chapter 5. Fair Employment & Housing Council

Subchapter 2. Discrimination in Employment

Article 2. Particular Employment Practices

TEXT

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Article 2. Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Introduction. With limited exceptions, employers and other covered entities (“employers” for purposes of this section) have no legal obligation to check the criminal history of an applicant or current employee, and, if they choose to do so, they must abide by the legal limitations described in this section. Employers and other covered entities (“employers” for purposes of this section) are explicitly prohibited under the Act and other state laws from inquiring into or considering certain enumerated criminal records and information in hiring, promotion, training, discipline, layoff, termination, and other employment decisions as outlined below. Unless an exception applies, the Act also prohibits employers from rescinding a conditional offer of employment because of an applicant’s conviction history unless and until, following an individualized assessment, the employer can demonstrate that the conviction has a direct and adverse relationship with the particular position specific duties of the job for which the employer is hiring. Further, employers are prohibited under the Act from using any conviction history in employment decisions if doing so would constitute disparate treatment of, or have an unjustified adverse impact on, individuals on a basis protected by the Act.

Claims under the Fair Chance Act, codified at Government Code section 12952, are subject to the procedures set forth in Article 1 of Chapter 7 of the Act, including Government Code section 12965, and the Department’s procedural regulations. An individual may file a complaint for investigation by the Department or may obtain an immediate right to sue notice.

(a) Prohibition of Consideration of Criminal History Prior to a Conditional Offer of Employment. Except in the circumstances addressed in subsection (a)(4) paragraph (4) subdivisions (a)(1)–(4) below, employers and other covered entities (“employers” for purposes of this section) are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant. ~~Employers are prohibited from inquiring about criminal history on employment applications or from seeking such information~~

~~through other means, such as a background check or internet searches directed at discovering criminal history, until after a conditional employment offer has been made to the applicant. Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's pre conditional offer failure to disclose criminal history information as a factor in subsequent employment decisions, including denial of the position conditionally offered. The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subdivisions (c) and (e) (i) of this regulation):~~

~~(1) Prohibited consideration under this subsection includes, but is not limited to, inquiring about criminal history through an employment application, background check, or internet searches.~~

~~(2) Employers are prohibited from including statements in job advertisements, postings, applications, or other materials that no persons with criminal history will be considered for hire, such as "No Felons" or "Must Have Clean Record."~~

~~(3) Employers who violate the prohibition on inquiring into criminal history prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an applicant's failure to disclose criminal history prior to the conditional offer as a factor in subsequent employment decisions, including denial of the position conditionally offered.~~

~~(4) The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subsections (b) and (d) ~~through (g) of this regulation~~):~~

~~(1)(A) If the position is one for which ~~a state or local agency~~ an employer is otherwise required by law to conduct a conviction history background check ~~where the employer is a state or local agency~~;~~

~~(2)(B) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;~~

~~(3)(C) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or~~

~~(4)(D) If the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the ~~Security~~ Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).~~

~~(5) For the exemptions set forth in subsection (a)(4) ~~(A) and (a)(4)(D)~~ to apply, the employer or the employer's agent must be required by law to conduct the criminal background check. A state, federal, or local law requiring another entity, such as an occupational licensing board, to conduct a criminal background check will not exempt an employer from the prohibitions set forth in this subsection and other requirements of this section.~~

~~(6) If an applicant raises their criminal history voluntarily prior to receiving a conditional offer, the employer must not consider ~~either~~:~~

~~(4) Any information the employer is prohibited from considering under subsection (b), ~~or~~~~

~~(B) In addition, an employer is prohibited from considering any other conviction history information until after making deciding whether or not to make a conditional offer of employment, unless subsection (a)(4) applies.~~

~~(b) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.~~

~~(1) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of~~

~~the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.~~

~~(2) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subdivision (e) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.~~

~~(3) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subdivisions (a) through (d), unless the specific position is exempted pursuant to subdivisions (a)(1) (4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subdivisions (a)(1) (4).~~

~~(4) For purposes of section 11017.1 of these regulations only:~~

~~(A) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment during the period of time the employer undertakes a post conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post conditional offer review of the individual's criminal history.~~

~~(B) "Employer" includes a labor contractor and a client employer.~~

~~(C) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.~~

~~(D) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.~~

~~(E) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.~~

~~(F) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.~~

(eb) Consideration of Criminal History after a Conditional Offer of Employment Has Been Made. Prohibition of Consideration of Certain Types of Criminal History. Employers in California are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history prior to making a conditional offer, ~~both~~ after a conditional offer has been made, and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on ~~his or her~~ their own recognizance pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 ~~(for hiring decisions)~~);

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) In addition to the limitations provided in subdivisions (e)(1)-(5) ~~paragraphs (1) – (5) of this~~ subsections ~~(e)(b)(1)-(5)~~, employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative Consumer Reporting Agencies Act (Civil Code section 1786 et seq.).

(7) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(d) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) Initial Individualized Assessment. If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first ~~conduct~~ make an individualized assessment – a reasoned, evidence-based determination 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.

(A) The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in ~~subdivision (g) of this section that is used to determine whether the criminal conviction history is job related and consistent with business necessity~~ subsection (f)(4).

(i) An applicant's possession of a benefit, privilege, or right required for the performance of a job by a licensing, regulatory, or government agency or board is probative of the applicant's conviction history not being directly and adversely related to the specific duties of that job.

(B) The employer may, but is not required to, use the sample individual assessment form available on the Department's website. The individualized assessment ~~needs to~~ must include, at a minimum, consideration of the following factors:

(A*i*) The nature and gravity of the offense or conduct; Consideration of this factor may include but is not limited to:

(i) The specific personal conduct of the applicant that resulted in the conviction;

(ii) Whether the harm was to property or people;

(iii) The degree of the harm (e.g., amount of loss in theft);

(iv) The permanence of the harm;

(eV) The context in which the offense occurred;

(fVI) Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to the offense or conduct, and if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation, or whether the disability has been mitigated or eliminated by treatment or otherwise; and/or

(gVII) Whether youth, childhood trauma, sexual or domestic or dating violence, sexual assault, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct; and/or

(VIII) The age of the applicant when the conduct occurred.

(Bii) The time that has passed since the offense or conduct and/or completion of the sentence; and. Consideration of this factor may include but is not limited to:

(aI) The amount of time that has passed since the conduct underlying the conviction, which may significantly predate the conviction itself; and/or

(bII) When the conviction led to incarceration, the amount of time that has passed since the applicant's release from incarceration.

(Ciii) The nature of the job held or sought. Consideration of this factor may include but is not limited to:

(aI) The specific duties of the job;

(bII) Whether the context in which the conviction occurred is likely to arise in the workplace; and/or

(cIII) Whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.

(C) To the extent that any evidence of rehabilitation or mitigating circumstances, as described in sub~~paragraph~~sections (c)(2)(D)(i)-(ii), is voluntarily provided by the applicant, or by another party at the applicant's request, before or during the initial individualized assessment, that evidence must be considered as part of the initial individualized assessment. In doing so, an employer may consider, but is not limited to considering, the factors set forth in sub~~section~~paragraph (c)(1)(B) and ~~paragraph subsection~~ (c)(3) as they relate to the evidence of rehabilitation or mitigating circumstances.

(2) Notice of Preliminary Decision and Opportunity for Applicant Response. If, after conducting an initial individualized assessment, the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include 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 utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer); ~~and.~~

(C) ~~Notice of An explanation~~ of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final, ~~and the deadline by which to respond (which can be no less than five business days from the date of receipt of the notice).~~ If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed

received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States. The

(D) ~~An explanation shall~~ informing the applicant that, ~~should if the applicant chooses to respond,~~ the response may include submission of either or both of the following types of evidence: evidence challenging ~~either~~ the accuracy of the conviction history report that is the basis for the preliminary decision to rescinding the offer, or evidence of rehabilitation or mitigating circumstances, ~~or both.~~

(i) ~~The types of~~ Evidence of that may demonstrate rehabilitation or mitigating circumstances may include, but are is not limited to:

~~(I) The length and consistency of employment history before and after the offense or conduct;~~

~~(II) The facts or circumstances surrounding the offense or conduct;~~

~~(III) The applicant's current or former participation in self-improvement efforts, including but not limited to school, job training, counseling, community service, and/or a rehabilitation program, including in-custody programs;~~

~~(IV) Whether the conduct arose from the applicant's status as a survivor of trauma, domestic or dating violence, sexual assault, dating violence, stalking, human trafficking, duress, or other similar factors contributed to the offense or conduct or comparable offenses against the individual;~~

~~(V) The age of the applicant when the conduct occurred;~~

~~(VI) Whether the conduct arose from the applicant's disability or disabilities, including but not limited to a past drug addiction or mental impairment, contributed to the offense or conduct, and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation for the applicant's disability or disabilities, or whether the disability has been mitigated or eliminated by treatment or otherwise;~~

~~(VII) The likelihood that similar conduct will recur;~~

~~(VIII) Whether the individual the applicant is bonded under a federal, state, or local bonding program;~~

~~(IX) The fact that the applicant is seeking employment; and/or~~

~~(X) Successful completion, or compliance with the terms and conditions, of probation or parole;~~

Any such evidence of rehabilitation or mitigating circumstances is optional and may only be voluntarily provided by the applicant or by another party at the applicant's request.

(ii) Documentary evidence may include, but is not limited to:

~~(I) Certificates or other documentation of participation in, enrollment in, or completion of an and rehabilitation efforts such as educational, vocational, or training, counseling, community service, or rehabilitation program, including in-custody programs;~~

~~(II) Letters from current or former teachers, counselors, supervisors, co-workers, parole or probation officers, or others who know the applicant;~~

~~(III) Police reports, protective orders, and/or documentation from healthcare providers, counselors, case managers, or victim advocates who can attest to the applicant's status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable offenses; and/or~~

~~(IV) Documentation confirming the existence of a disability or disabilities; and/or~~

~~(V) Any other document demonstrating rehabilitation or mitigating circumstances.~~

Any such documentary evidence is optional and may only be voluntarily provided by the applicant or by another party at the applicant's request.

(iii) An employer is prohibited from the following actions:

~~(I) Refusing to accept additional evidence voluntarily provided by an applicant, or by another party at the applicant's request, at any stage of the hiring process (including prior to making a preliminary decision to rescind the applicant's job offer);~~

~~(2II) Requiring an applicant to submit any of the additional evidence described in this paragraph subsection at any time in the hiring process;~~

~~(3III) Requiring an applicant to provide a specific type of documentary evidence (e.g., a police report as evidence of domestic or dating violence), or disqualifying an applicant from the employment conditionally offered for failing to provide any specific type of documents or other evidence; and~~

~~(4IV) Requiring an applicant to disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses; and/or~~

~~(V) Requiring an applicant to produce medical records and/or disclose or of the existence of a disability or disabilities diagnosis.~~

~~(E) Notice of the deadline by which for the applicant must to respond, if the applicant chooses to do so, (which must be at least five business days from the date of receipt of the notice);~~

(i) The deadline for providing a response must be at least five business days from the date of receipt of the notice. An employer may offer an applicant more than five business days to respond to the notice regarding its preliminary decision.

(ii) If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States.

(iii) If notice is transmitted through email, the notice shall be deemed received two business days after it is sent.

~~(ii) An employer may offer an applicant more than five business days to respond to the notice regarding its preliminary decision.~~

(F) If, within five business days of receipt of the notice (or any later deadline set by the employer), the applicant timely notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no-less fewer than five additional business days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

(3) Reassessment. ~~Final Decision.~~ The employer shall consider any information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment. The employer may, but is not required to, use the sample individual reassessment form available on the Department's website. When considering evidence of rehabilitation or mitigating circumstances provided by the applicant, or by another party at the applicant's request, the employer may consider, but is not limited to, the following factors, in addition to the factors set forth in subsection (c)(1)(B), as applicable:

(A) When the conviction led to incarceration, the applicant's conduct during incarceration, including participation in work and educational or rehabilitative programming and other prosocial conduct;

(B) The applicant's employment history since the conviction or completion of sentence;

(C) The applicant's community service and engagement since the conviction or completion of sentence, including but not limited to volunteer work for a community organization, engagement with a religious group or organization, participation in a support or recovery group, and other types of civic participation; and/or

(D) The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured in the above subfactors.

(4) Final Decision. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in ~~a~~ writing. The employer may, but is not required to, use the sample final notice form available on the Department's website. However, any notice to the applicant must ~~that~~ include the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department ~~of Fair Employment and Housing.~~

(d) Labor contractors, union hiring halls, and client employers.

(1) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(2) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(3) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(4) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) – (c), unless the specific position is exempted pursuant to ~~paragraph~~subsection (a)(4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by ~~paragraph~~subsection (a)(4).

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis ~~enumerated in~~ protected by the Act.

~~(f) Consideration of Other Criminal Convictions and the Potential Adverse Impact.~~ In addition to the types of criminal history addressed in ~~subdivision (e)~~ subsection (b) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on ~~individuals~~ applicants or employees on a basis protected by the Act, including, but not limited to, gender, race, and national origin.

(1) An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis ~~enumerated in~~ protected by the Act.

(2) For purposes of such a determination, adverse impact is defined as ~~Consistent with Sections 11017 and 11010 of these regulations and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. part 1607 (1978)) incorporated by reference in Sections 11017(a) and (e),~~ adverse impact includes a substantial disparity in the rate of selection in hiring, promotion, or other employment decisions which works to the disadvantage of groups of individuals on the basis of any characteristics protected by the Act. ~~The applicant(s) or employee(s) bears the burden of proving an adverse impact.~~

(3) An adverse impact may be established through the use of ~~conviction~~ statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics ~~showing substantial disparities in the~~ on conviction records that show a substantial disparity based on any characteristic protected by ~~of one or more categories enumerated in~~ the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

~~(g)(4) Establishing “Job-Related and Consistent with Business Necessity.”~~

~~(4)(A)~~ (A) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis ~~enumerated in~~ protected by the Act, the burden shifts to the employer to establish that the policy is nonetheless justifiable because it is job-related and consistent with business necessity. The ~~criminal conviction consideration~~ policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace and measure the person’s fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

~~(A)(i)~~ (i) The nature and gravity of the offense or conduct;

~~(B)(ii)~~ (ii) The time that has passed since the offense or conduct and/or completion of the sentence; and

~~(C)(iii)~~ (iii) The nature of the job held or sought.

~~(2)(B)~~ (B) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant’s or

employee's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant or employee the position.

(C) Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by ~~subdivision (h)~~subsection (g) below).

(D) An individualized assessment must involve notice to the adversely impacted applicant or employee (before any adverse action is taken) that they have been screened out or otherwise denied an employment opportunity because of a criminal conviction; if more than one conviction appeared on the background report, which conviction(s) were found disqualifying; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the applicant or employee is not job-related and consistent with business necessity. An employer may, but is not required to, use the sample individual assessment form available on the Department's website.

(3)(E) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that ~~record~~ information cannot be considered in the employment decision.

(5) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

~~(h)(g)~~ Compliance with Federal or State Laws, Regulations, or Licensing Requirements ~~Permitting or~~ Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7). Examples include, but are not limited to, government agencies employing individuals as peace officers, employers employing individuals at health facilities where they will have regular access to patients, and employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances. Some federal and state laws and regulations make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

~~(i) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.~~

(h) Claims under the Fair Chance Act, codified at Government Code section 12952, are subject to the procedures set forth in Article I of Chapter 7 of the Act, including Government Code section 12965, and the Department's procedural regulations. An individual may file a complaint for investigation by the Department or may obtain an immediate right-to-sue notice.

(#) Employers Seeking the Work Opportunity Tax Credit. An employer who wishes to claim the Work Opportunity Tax Credit ("WOTC") provided for under federal law is not exempt from this section or Section 12952 of the Act.

(1) An employer may require an applicant to complete IRS form 8850 ("Pre-Screening Notice and Certification Request for the Work Opportunity Credit"), as revised March 2016, or its equivalent, before a conditional offer is made, so long as the information gathered is used solely for the purpose of applying for the WOTC. In particular, no applicant may be asked the basis of their qualification for the WOTC other than in the form of questions that do not encourage or force an applicant to identify themselves as a person who has been convicted of a felony or released from prison following a felony conviction rather than as a person who qualifies for the WOTC under one of the several bases listed in Question 2 on form 8850. Information regarding an applicant's criminal history obtained from the applicant's form 8850 may only be considered as otherwise provided by law.

(2) An employer may require an applicant to complete U.S. Department of Labor Employment and Training Administration form 9061 ("Individual Characteristics Form (ICF) Work Opportunity Tax Credit"), as revised November 2016, or its equivalent, only after a conditional offer has been made. Information regarding an applicant's criminal history obtained from the applicant's form 9061 may only be considered as otherwise provided by law.

(3) An employer must maintain any forms, documents, or information used to complete the forms described in this subsection in confidential files separate from the applicant's general personnel file and shall not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC.

(#) Definitions. For purposes of section 11017.1 of these regulations only:

(1) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment when the employer undertakes a post-conditional offer review and consideration of criminal history; and existing employees who have applied or indicated a specific desire to be considered for a different position with their current employer; and an existing employee who is subjected to a review and consideration of criminal history because of a change in ownership, management, policy, or practice. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post-conditional offer review of the individual's criminal history.

(2) "Employer" includes a labor contractor and a client employer; any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list.

(3) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(4) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.

(5) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local

employment service, to provide and place employees for specific jobs.

(6) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, 12946, and 12952, Government Code.