Another One Bans the Box: San Francisco’s Fair Chance Ordinance Prohibits Criminal History Inquiries on Employment and Affordable Housing Applications and Imposes Restrictions on the Use of Criminal Background Checks

BY BOB KRISTOFF & GINA GUARIENTI COOK

Overview
In February 2014, San Francisco became the latest jurisdiction to “ban the box” on private employers’ employment applications.1 Not only does San Francisco’s Fair Chance Ordinance prohibit employers2 from inquiring into an applicant’s criminal history in an employment application, but—in what may prove to be a new trend—it also imposes new posting, notice, disclosure, and recordkeeping requirements, provides new guidance about the factors that an employer must consider when assessing a candidate’s criminal history, and specifies new requirements with which employers must comply if they are considering taking action based on an applicant’s criminal history. The Ordinance will become effective on August 13, 2014.

To Whom Does the Ordinance Apply?
The ordinance applies to employers who have 20 or more employees, regardless of where those employees work. However, the ordinance’s requirements and restrictions apply only to employees whose duties are performed in whole or in substantial part in San Francisco. Notably, at the same time that it adopted the Fair Chance Ordinance with an expansive definition of an “employer,” San Francisco modified the Family Friendly Workplace Ordinance to make the Family Friendly Workplace

---

1 Currently, 24 states have cities or counties that prohibit employers from inquiring into an applicant’s criminal history on an employment application, and four states—Hawaii, Massachusetts, Minnesota, and Rhode Island—also ban such inquiries.

2 The Ordinance also applies to "Housing Providers" and applicants for affordable housing. A Housing Provider is an entity that owns, master leases or develops affordable housing and below-market-rate housing in the City and also includes their agents and management companies. Rules similar to those described herein for employers apply to affordable housing providers in San Francisco.
Ordinance’s definition of “employer” consistent with the broader definition adopted in the Fair Chance Ordinance.

**Key Terms**

The Fair Chance Ordinance prohibits employers from inquiring into an applicant’s criminal history—i.e., criminal convictions and pending charges—on the employment application or until the completion of the first live interview (whether conducted in person, by phone, videoconference, or with some other form of technology). Employers can inquire about criminal history after the first live interview or after making a conditional offer of employment, but, even then, they cannot inquire about or consider the following categories of information:

- Arrests that did not lead to conviction (although employers may obtain information about and consider pending arrests);
- Participation in or completion of a diversion or a referral of judgment program;
- Convictions that have been judicially dismissed, expunged, voided, or invalidated;
- Juvenile convictions;
- Convictions that are more than seven years old (measured from the date of sentencing);
- Information pertaining to an offense other than a felony or misdemeanor—such as an infraction.

If a job posting is reasonably likely to reach a person seeking employment in San Francisco, the job posting must state that the employer will consider qualified applicants with criminal histories in a manner consistent with the requirements of the ordinance. Job postings cannot state that any person with an arrest or conviction will not be considered or may not apply for employment.

The ordinance requires the San Francisco Office of Labor Standards Enforcement (OLSE) to publish a notice informing applicants and employees of their rights under the ordinance. Employers must post that notice in a conspicuous place at every workplace, job site, or other location in San Francisco that is under the employer’s control and that is frequently visited by employees or applicants. Additionally, employers must send a copy of the notice to each labor union or worker representative with which they have a collective bargaining agreement.

Before conducting any criminal history inquiry—including running a background check—an employer must provide the applicant or employee with a copy of the OLSE notice. In other words, affected employers must now ensure that the disclosure and authorization forms that they provide to candidates before running a background check contain the OLSE notice as well as the disclosures required by the federal Fair Credit Reporting Act (FCRA) and its state law counterparts.

**Substantive and Procedural Safeguards Related to Consideration of Criminal Histories**

The Fair Chance Ordinance requires that, when making an employment decision based on an applicant or employee’s conviction history, employers conduct an individualized assessment that:

1. considers only directly related convictions;
(2) takes into account the time that has elapsed since the conviction or unresolved arrest; and
(3) considers any evidence of inaccuracy or evidence of rehabilitation or other mitigating factors.

The ordinance defines a “directly related conviction” as any criminal history information that has a “direct and specific bearing on that person’s ability to perform the duties or responsibilities necessarily related to the employment position.” The ordinance specifies that when determining whether a conviction or unresolved arrest is “directly related to the employment position,” the employer should consider “whether the employment 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 that is the subject of the Unresolved Arrest will recur in the employment position.”

If an employer intends to base an adverse action (defined as, among other things, a refusal to hire, a discharge, or a failure to promote) on a candidate’s conviction history, the employer must—prior to taking an adverse action—do the following:

(1) provide the candidate with a copy of any background check report that was run;
(2) notify the candidate of the prospective adverse action; and
(3) notify the candidate of the criminal history items forming the basis for the prospective adverse action.

Although the first two requirements are similar to those imposed by the FCRA, the third requirement goes far beyond the requirements imposed by the FCRA for a pre-adverse action letter insofar as it requires the employer to specify the basis for the potential adverse action rather than simply requiring the employer to inform the candidate of the possibility of an adverse action.

Under the San Francisco ordinance, once the employer provides the pre-adverse action letter, the candidate has seven days to notify the employer—either orally or in writing—of (1) the inaccuracy of the candidate’s conviction history; or (2) evidence of rehabilitation or other mitigating factors. If the candidate provides such information, the employer must delay the adverse action for a reasonable period of time (a concept not defined in the ordinance) in order to reconsider the prospective adverse action in light of the information. This differs from the FCRA insofar as it permits the candidate to present the challenge to the employer—not merely the credit reporting agency.

If the employer takes an adverse action based on criminal history information (no matter how that information was obtained—i.e., by interview, background check, etc.), the employer must notify the candidate of the final adverse action.

**Anti-Retaliation Provision**

San Francisco’s Fair Chance Ordinance also contains a robust anti-retaliation provision. The ordinance makes it unlawful for an employer to “refuse to hire an applicant, or to discharge, threaten to discharge, demote, suspend, or otherwise take adverse action against an employee for exercising rights protected by [the ordinance]” and creates a rebuttable presumption of retaliation if an adverse action is taken within 90 days of an employee or candidate exercising a protected right. Among other things, the ordinance protects employees who file a complaint or inform anyone about an alleged violation of the ordinance; cooperate with the OLSE or anyone in the investigation or prosecution of an
alleged violation; oppose a policy, practice, or act that is prohibited by the ordinance; or inform anyone of their rights under the ordinance.

**Remedies for Violations**

The ordinance authorizes the OLSE to “take appropriate steps” to enforce the ordinance and to coordinate enforcement, including the investigation of possible violations. If the OLSE has reason to believe that a violation has occurred, it can order “any appropriate temporary or interim relief to mitigate the violation or maintain the status quo pending completion of a full investigation or hearing.” Notably, the OLSE cannot find a violation based on an employer’s decision that a candidate’s conviction history is directly related to the job at issue. However, the OLSE can find that the employer violated the ordinance by failing to conduct the required individualized assessment.

First time violations and violations that occur during the first year that the ordinance is in effect will result in warnings and notices to correct. Second violations will result in a $50 administrative penalty for each employee or applicant. The penalty may increase to no more than $100 per employee or applicant for subsequent violations. If multiple employees or applicants are impacted by the same procedural violation at the same time (i.e., all applicants for a particular job opening are asked for their conviction history on the application), the violation will be treated as a single violation rather than as multiple violations.

The ordinance does not include a private right of action, but the OLSE may refer violations to the City Attorney for civil action. Remedies may include injunction, reinstatement, back pay, payment of benefits or salary unlawfully withheld, and additional liquidated damages of $50 per employee whose rights were violated.

**What Should Employers Do?**

To comply with San Francisco’s Fair Chance Ordinance, employers will have to carefully review and possibly revise their employment applications, their employment application processes and procedures, their background check disclosure and consent documents, and their recordkeeping practices.

- After the OLSE publishes the poster required by the ordinance, display that poster in a conspicuous place at every workplace, job site, or other location in San Francisco that is under your control and frequently visited by employees or applicants.
- Remove any questions about criminal history from your employment application.
- Modify job postings and advertisements to include language informing applicants that the employer will consider qualified applicants with criminal histories in a manner consistent with the requirements of the ordinance.
- Modify hiring procedures to ensure that if any inquiry is made regarding a candidate’s criminal history, that inquiry occurs only after the first live interview.
- Ensure that when employees are asked to sign a background check consent/disclosure and authorization form, they are given a copy of the OLSE notice form.
- Ensure that applicants who might be removed from consideration based on criminal history receive a pre-adverse action notice that specifies the basis for the potential adverse action.
• Keep, for at least three years, all documents relevant to the ordinance including job postings, job applications, and files and documents related to jobs that were filled and the candidate consideration process related to those positions.³

³ The ordinance provides that if an employer does not maintain or retain adequate records documenting compliance with the ordinance, it will be presumed—absent clear and convincing evidence to the contrary—that the employer did not comply with the ordinance.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following San Francisco Paul Hastings lawyers:

Bob Kristoff
1.415.856.7073
bobkristoff@paulhastings.com

Gina Guarienti Cook
1.415.856.7070
ginacook@paulhastings.com