

Glenn County Screening Panel

Guidelines for the Hiring Interview

- All persons who come in contact with candidates should be trained to deal with those candidates in a polite and evenhanded way.
- The person or persons conducting the hiring interview should be familiar with the questions to be asked and relied upon to give an objective assessment of the candidates interviewed.
- Do not use any numerical scoring or ranking of candidates during the hiring interview process. (It is appropriate to make notes during the interview.)
- All questions and comments should be of a business nature, whether before, during, or after a hiring interview. Innocent conversation or “small talk” can be misconstrued; it is always best to steer clear of any personal comments or conversation.
- Ask exactly the same questions of each interviewee. If a candidate’s response requires questioning of that candidate further, be sure to record the additional question(s) for record keeping purposes. The interviewers may ask follow-up or clarifying questions; all follow-up questions should be of a business nature.
- It is acceptable to ask each candidate to demonstrate the ability to perform certain tasks, such as conducting a written exercise, and/or performance exercise of a specific task, with or without an accommodation.
- All hiring interview notes and records can be subpoenaed. All interview notes are provided to Personnel after the interviews are completed. Personnel is required to make and retain records of each hiring interview. It is a requirement to retain these records for two years.
- The Department Head/designee must be able to show appropriate justification for all hiring decisions. Be certain that the candidate selected is objectively the most qualified, or at least equally qualified according to the criteria set down.

GETTING TO KNOW YOU: The Law of Pre-Employment Inquiries

How well an employer gets to know a job applicant before deciding to offer employment often depends on the nature of the position to be filled and the time and money that the employer has to spend on the screening process.

For many, if not most, employers, the process consists merely of a completed application form, one or more interviews and some degree of reference-checking. For some employers, particularly those looking to fill high-level positions, the process may start with extensive screening by a placement agency and include several days of interviewing, careful review of the candidate's written work-product, and his or her submission to psychological or other kinds of testing.

Common to all these approaches, however, are the limitations placed by federal and state law on what an employer may and may not ask an applicant during the selection process. These restrictions, which govern employment applications and pre-employment interviews, are designed to prevent the employer from relying on improper considerations in making the hiring decision. They also serve to avoid the appearance that the employer is discriminating based on race, gender, age, physical disability, or other protected characteristics.

Other laws prohibit or regulate the use of polygraph examinations or so-called "honesty testing" of job applicants (as well as current employees). Drug testing of job applicants also presents important legal issues. In addition, employees are beginning to challenge other kinds of pre-employment inquiries, such as psychological testing, as invasions of their privacy.

Finally, employers should also be aware of the law governing the giving of employment references. Although any liability for an erroneous employment reference belongs to the employer giving the reference, and not the employer receiving it, all employers should be aware of the pertinent legal issues since they will affect the usefulness of such references as well as the risk in giving them.

In this guide, we consider what employers may - and may not - ask of job applications. Besides describing the applicable law, we provide numerous examples of permissible and impermissible inquiries. We also discuss the law governing employment references.

Employers may find it useful to review this article with their recruiters and human resource professionals to make sure that the law governing pre-employment inquiries is being followed and that there is neither the reality or the appearance of discrimination, or other invalid criteria, in the selection process.

LAWFUL AND FUNLAWFUL PRE-EMPLOYMENT INQUIRES

The key to lawful employment inquiries is to ask only questions that will provide information about the candidate's ability to do the job, with or without reasonable accommodation.

DISCRIMINATION ISSUES

Federal and state law prohibit employment discrimination. Employers may not refuse to hire because of race, gender, age, national origin, religion, marital status, or (subject to certain qualifications) disability.

Since employers may not take these protected characteristics into account in making hiring decisions, they also may not ask job applicant questions designed to elicit information about these protected characteristics. These restrictions on pre-employment inquiries are found in *Uniform Guidelines on Employee Selection Procedures*, 29 C.F.R. § 1607 (1978); and 2 Cal. Code Regs. § 7287.4 (1990).

Under these regulations, there are acceptable and unacceptable questions that an employer may ask. We summarize many of them below:

Race or Color

Do not inquire about candidate's race or color; ask questions regarding complexion, color of skin, or make any other inquiries directly or indirectly indicating race or color.

YOU MAY ASK:

[There are not acceptable questions in this area.]

YOU MAY NOT ASK:

"What is your race?"

"What color is your skin, eyes, and hair?"

National Origin

Do not inquire about candidate's national origin or ancestry.

YOU MAY ASK:

"What languages do you speak, write, read, or understand?"
[This is so only if use of a language other than English is relevant to the job for which the applicant is applying.]

YOU MAY NOT ASK:

"What is your lineage, ancestry, national origin or descent?"
"What is that of your parents or spouse?"
"What is your mother tongue?"
"What language do you commonly speak?"
"How and why did you learn to speak any foreign language?"

Citizenship status

Do not inquire about candidate's citizenship, if they or their families are naturalized or native born United States citizens, or dates when they may have acquired citizenship.

The only question regarding citizenship that is acceptable to ask is if an applicant or candidate can, after being hired, verify their legal right to work in the United States, or make a statement that, if hired, the candidate would be required to submit proof of citizenship status or legal right to work in the United States.

Religion

Do not inquire about candidate's religious beliefs.

YOU MAY ASK:

[There are no acceptable questions in this area. However, the employer may state the regular days, hours and shifts to be worked as well as the religious days on which operations are closed.]

YOU MAY NOT ASK:

"What is your religion?"
"Does your religion prevent you from working weekends or holidays?"

Age

Do not ask candidates their age or any age-related questions. If such information is needed for legitimate business reasons, it may only be obtained after a conditional offer of employment has been made.

YOU MAY ASK:

"If hired can you show proof of age?" [In general, the employer may state that hire is subject to verification that applicants meet the legal age requirements.]
"If under eighteen, can you, after employment, submit a work permit?"

YOU MAY NOT ASK:

"How old are you?"
"What is your birth date?"
"When did you attend elementary or high school?"
[In general an employer may not ask any questions which tend to identify applicants over the age of forty.]

Gender (Sex)

Do not inquire about candidate's gender or sex unless there is a bona fide occupational qualification.

YOU MAY ASK:

[There are no acceptable questions in this area.]

YOU MAY NOT ASK:

"What is your sex?"

Sexual Orientation

Do not inquire about candidate's sexual orientation, preference, or perceived preference (Lesbian, Gay, Heterosexual, Bisexual, Transgender, or gender expression).

Genetic Information

Do not inquire about or require candidate's genetic information or genetic information of members of their family. Genetic information includes an individual's family medical history, the results of genetic tests, the requests for genetic services, or the results of those services.

Marital Status and Family

Do not inquire about candidate's marital status. Do not inquire about candidate's pregnancy or future childbearing plans. Do not inquire about candidate's childcare arrangements.

YOU MAY ASK:

"What is the name and address of your parent or guardian?"
 [This is so only if the applicant is a minor.] [Employers may state any company policy regarding work assignment of employees who are related.]

YOU MAY NOT ASK:

"Are you married, divorced or single?"
 "Do you have children? What are their ages?"
 "Do you have provisions for child care?"
 "Are you pregnant?"
 "Do you use birth control?"
 "With whom do you reside?"
 "Do you live with your parents?"

Physical Condition and Disability

Discrimination based on disability is currently prohibited by the federal Rehabilitation Act of 1973 and the California Fair Employment and Housing Act. Effective July 26, 1992, the Americans with Disabilities Act, which also bans disability discrimination, will apply to employers with 25 or more employees.

Under these laws, most physical and mental conditions are deemed protected disabilities which the employer must reasonably accommodate so long as, with such reasonable accommodation, the individual can still perform the essential functions of the job.

Consequently, employers are prohibited from using qualification standards or other selection criteria that would tend to "screen out" individuals with a disability unless the criteria, as used, "is shown to be job-related for the position in question and is consistent with business necessity." See 29 C.F.R. § 1630.10 (a)(1991) (proposed).

Employers should therefore refrain from any pre-employment inquiries that ask about the applicant's physical condition or disabilities without relation to the requirements of the job. The applicant may be asked, however, if he or she is physically or mentally able to perform the job.

Employers should also note that any inquiries about an applicant's capacity and ability to perform essential job functions should relate to existing qualifications as opposed to problems which might arise in the future.

Under the ADA, in a departure from existing state anti-discrimination law, employers may not conduct a medical examination prior to hiring an applicant. However, the employer may require an exam after an employment offer and may condition the offer on the successful outcome of the examination so long as that outcome is related to the essential functions of the job and all applicants are subject to the same exam regardless of disability.

Do not inquire if candidate has a disability or medical condition. Do not ask the nature or severity of a disability or medical condition. Do not inquire if candidate has ever been treated for a mental illness or has been hospitalized for any reason. Do not ask if candidate has ever filed a Workers' Compensation claim or suffered a disabling injury in a previous job. **It is unlawful to decide not to hire an applicant or candidate based on knowledge of a disability or medical condition.**

It is lawful to inquire whether applicants or candidates with or without disabilities can perform the duties of the job with or without accommodation, if they have the necessary licenses, diploma, training or other qualifications, if they can describe or demonstrate how they will perform specific job functions, and if they can meet the employer's requirements for work hours, overtime, and attendance policies. **These inquiries may only be made if they are consistently asked of every applicant or candidate, regardless of disability or medical condition.**

YOU MAY ASK:

"Are you able to perform the functions of this job?"
 [If the applicant unilaterally discloses a disability, the employer may ask if the applicant can still perform the functions of the job notwithstanding the disability or with reasonable accommodation. The employer may also ask what kind of accommodation would be required.]

YOU MAY NOT ASK:

"Do you have any disabilities? If you do, what are their nature and severity?"
 "Do you receive, or have you received, workers' compensation?"
 [In general, employers may not ask questions regarding an applicant's general medical condition, state of health, or illness.]

Although the preceding areas of inquiry involved the most obvious danger of impropriety, more innocuous questions may be equally problematic. Employers must remember to avoid the appearance of impropriety as well as actual discrimination. As a result, employers must avoid inquiries that appear innocent at first glance but might suggest an applicant's membership in a protected classification.

For example, all employers would agree that some information, such as the applicant's name and address, is absolutely necessary to the application process. Most of these questions are allowable so long as they are not phrased in such a way as to inquire into prohibited areas.

Name

YOU MAY ASK:

"Have you ever used another name, which is necessary for us to know in order for us to check your work and education record? If you have, please explain."

YOU MAY NOT ASK:

"What was your maiden name?"

Emergency Information

YOU MAY ASK:

"What is the name, address and phone number of the person to be notified in case of an accident or emergency?"

YOU MAY NOT ASK:

"What is the name and address of a relative to be notified in case of an accident or emergency?"

Relatives

YOU MAY ASK:

"Do you have any relatives employed by this company? If you do, what are their names? What is their relationship to you?"
"Do you have any relatives employed by a competitor of this company? If you do, what are their names? What is their relationship to you?"

YOU MAY NOT ASK:

"What are the names and addresses of your relatives who are employed by this company or by a competitor?"

Physical Description and Photographs

YOU MAY ASK:

[There are no acceptable questions in this area. However, the employer may state that a photograph may be required after hire.]

YOU MAY NOT ASK:

"What is your height and weight?"

YOU MAY NOT:

Require the applicant to affix a photograph to his or her application.
Request the applicant, at his or her option, to submit a photograph.
Request a photograph after interview but before employment.

[Employers should also note that they cannot request documents which reveal protected information (such as birth certificates, naturalization papers and medical histories) until after the employer has decided to hire, and has so informed the applicant. Even after hire, the employer can request such documents only when the documents are required for legitimate business purposes.]

Height/Weight

Do not inquire about candidate's height or weight unless the employer can show that the standards used are job related and a business necessity. Any height or weight requirement or restriction may screen out a disproportionate number of candidates from a protected group.

References

YOU MAY ASK:

"By whom were you referred for a position here?"
[Employers may also request the names of persons willing to provide professional and/or character references for applicant. See "Employment References" below for additional information about employment references.]

YOU MAY NOT ASK:

[Any questions of the applicant's former employers or acquaintances that elicit information specifying the applicant's race, color, religious creed, national origin, ancestry, physical handicap, medical condition, marital status, age or sex.]

Prior Employment

YOU MAY ASK:

"Would you tell me about your last or present job?"
"What were your major responsibilities?"
"Of all your responsibilities, which presented the most difficulty for you?"
"What were some of the more challenging aspects of your last or present job?"
"What position did your immediate supervisor hold?"
"What were his or her major responsibilities?"
"Do you feel you were treated fairly at your last place of employment?"
"What were your advancement options? Where they realized?"

"In what ways do you feel your previous employment will help you in performing the job we have open?"
"Describe a typical day on your last job."
"What were some of the problems you encountered in performing your last job?"
"How did you overcome problems you faced there?"
"Which problems frustrated you most?"

YOU MAY NOT ASK:

"How did your husband/wife/parents/children feel about your prior employment?"

Education

YOU MAY ASK:

"In what subjects did you excel at school?"
"Did you participate in extra-curricular activities?"
"What was your major, and why did you choose it?"
"Did you work at an outside job while at school? Doing what? What did you like/dislike about your job during school?"
"Are you interested in continuing your education? Why? When? Where?"

"Did your education prepare you for the job you are seeking with us? In what ways?"

YOU MAY NOT ASK:

"Who paid for your educational expenses while you were in school?"
"Do you still owe on loans taken out during school?"

Communication Skills – Verbal

Do not inquire or comment about candidate's accent. Evaluate a candidate's ability to speak and be understood when it is a requirement of the position.

Experience, Skills and Activities

YOU MAY ASK:

"Do you have any special knowledge or skill?"
"Are your skills recent?"
"When did you last use a calculator (or other machine or skills)?"
"Do you enjoy being active in community affairs?"
"Are there any activities which have provided you with experience, training or skills which you feel would be helpful to a position with us?"
"How will your involvement in these activities affect your work here?"

"Please list job-related organizations, clubs, professional societies, or other associations to which you belong - you may omit those that indicate your race, religion, color, national origin, ancestry, sex, or age."
"What skills did you acquire while in military service, if applicable?"

YOU MAY NOT ASK:

"List all organizations, clubs, societies and lodges to which you belong."
"What were the dates of your military service?"
"Have you served in a foreign military?"

General Information

YOU MAY ASK:

"What work would you like to do?"
"What do you consider your strong points?"
"What do you consider your weak points?"
"What is your strongest personal quality or qualification?"
"What is your weakest area?"
"Are there certain activities you feel more confident of performing than others? What are they and why do you feel that way?"
"What are your specific goals in a job?"
"What specific job factors are important to you? Why?"
"What do you want from your next job that you are not getting from your present job?"
"What is your real career objective? What have you done or do you intend to do outside your job to help you reach this objective?"

ARREST RECORDS AND CONVICTIONS

Employers are specifically forbidden by California statute from inquiring about any arrest or detention that did not result in a conviction. Employers are also forbidden to inquire about any referral to or participation in any pretrial or post-trial diversion program. Any employer is permitted to ask an applicant for information concerning an arrest for which the applicant is out on bail or on his or her own recognizance pending trial.

These restrictions **do not** apply to applicants for positions as peace officers, positions in the Department of Justice or other criminal justice agencies, or for positions in any law enforcement agency with access to criminal offender record information. Applicants for positions in a health facility with regular access to patients or drugs and medicines are also excepted.

Employers are given substantially greater freedom as to inquires regarding convictions. Specifically, an employer may ask an applicant, "Have you ever been convicted of a felony?" However, this question must be accompanied by a statement that a conviction will not necessarily disqualify an applicant from employment.

Inquires about specific convictions are generally allowed so long as they reasonably relate to the applicant's fitness to perform the particular job applied for. However, California law does forbid an employer from inquiring about convictions for the possession, sale, transport, or import of marijuana two years after the conviction. Cal. Labor Code § 432.8.

An employer is also forbidden from asking about convictions that are two or more years old for possession of controlled substance paraphernalia, or for presence in a room or place where designated controlled substances were being unlawfully smoked or used.

Inquiry about criminal history may only be made after the hiring manager has made a conditional offer of employment. Use of candidate's arrest record alone as a bar to employment is illegal; however, candidates may be asked questions regarding the conduct underlying current criminal charges. Contact County Counsel if this situation arises. Also, conduct that indicates unsuitability for a particular position, such as a peace officer, is a basis for excluding candidate. Personnel will determine the job nexus.

CREDIT-RELATED INFORMATION

The Federal Fair Credit Reporting Act of 1970 allows an employer to obtain an "investigative consumer report" on applicants so long as the employer discloses in writing to the applicant that such a report may be made. The employer may deny the applicant employment either wholly or partly because of the information contained in the consumer report so long as the employer advised the applicant of the action taken and supplies the name and address of the consumer reporting agency making the report.

However, this entitlement to consumer credit information does not entitle an employer to unlimited inquiry as to an applicant's economic status. Under the California Fair Employment and Housing Act, an employer must restrict questions in this area or risk the improper inquiry. In general, employers must avoid questions regarding the applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment.

Do not inquire about candidate's credit history. This should only be asked if a business necessity could be shown.

Employers must also be careful to avoid inquiries which appear innocent but tend to reveal prohibited economic information. For example:

YOU MAY ASK:

"Where do you live?"

YOU MAY NOT ASK:

"Do you own your own home or rent?"

Appropriate and inappropriate responses/comments regarding selection

All responses indicated on hiring interview notes or a referred list must be appropriate and job related, whether an individual was selected for a position or not. One way to help ensure the questions asked are job related is to review the knowledge and abilities listed on the job specification for the classification. The following are examples of both appropriate and inappropriate comments:

Appropriate responses

- "Had good computer skills and experience working in a similar medical setting but said did not want to work in contact with emotionally disturbed clients."
- "Had good public contact and knowledge of medical terminology, but based on reference checks, has an inability to work as a team member. This skill is critical in this unit."
- "Qualifications were good, but did not have direct experience in a medical setting, while other candidates did."
- "Was a medical clerk for one year, but in a small office, and that experience was less recent (about three years ago) than that of the candidate selected."
- "Was not willing to work the occasional overtime and weekends the job required, and other candidates were."
- "Worked recently as a unit clerk in a hospital with psychiatric patients (six months). Has a good grasp of duties and responsibilities of job and good interpersonal/communication skills."

Inappropriate responses

- “Not as qualified as candidate selected.” (Which qualifications were not as good as the selected candidate?)
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- “Had a good grasp of the job, but seems like there might be problems in getting along with others.” (This is speculative and should be verified with previous employers through reference checking.)
- “Had a feeling they would not work out.” (What job related factors was the feeling based on?)
- “Said they missed two months of work within the first year at previous job, so it does not appear that they are physically fit to do the job.” (Only the County Physician makes the determination of whether a candidate is able to work. If there is a question of attendance, it should be verified with previous employers through reference checking. Additionally, any missed work may be based on a protected leave by law, i.e., Family and Medical Leave Act, Worker’s Compensation, Pregnancy Disability, etc. If leave was protected, the candidate cannot be disqualified on that basis.)
- “Most experience was working on alcohol budgets, and had minimal experience working on mental health budgets. (Not valid unless all other candidates have experience working with mental health budgets.)
- “Did not have a certificate in statistics.” (Not valid unless it is a requirement of the classification, or all other candidates had a certificate in statistics.)
- “Had childcare issues.” (Not job related. If there is a question of attendance, it should be verified with previous employers through reference checking.)
- “Was the best candidate.” (There must be specific job related reasons.)

POLYGRAPH EXAMINATION AND "HONESTY TESTING"

California law prevents a private employer from requiring an employee to submit to a polygraph test as a condition of employment. The employer may, however, request that an employee take such a test so long as the employer informs the employee of his or her right to refuse the examination.

The Federal Employee Polygraph Protection Act of 1988 prevents private employers, with certain exceptions, from requiring a job applicant or employee to submit to a polygraph test. Employers who provide security services and those who manufacture, distribute or dispense controlled substances may test job applicants. However, employers in California should remember that they cannot require testing for employment even in these areas.

In contrast to polygraph testing, the Federal Employee Polygraph Protection Act permits the use of "honest tests" in the employment selection process. An honesty test is a written examination which seeks to determine the applicant's self-perception of honesty through a series of questions relating to theft and other related issues.

Honesty testing may be long on credibility as an employment selection tool. At least one state, New York, is considering a ban on the tests as a condition of employment. Although federal law specifically allows honesty testing, California law is less clear. As noted above, California law prevents employers from requiring polygraph tests or similar tests as a condition of employment. Although California courts have yet to include honesty tests within this prohibition, employers should consider merely requesting employees to submit to such a test after full disclosure of their right to refuse.

PSYCHOLOGICAL TESTING

In part as a reaction to the new limitations on polygraph examinations and "honesty testing", some employers are using psychological testing as part of the applicant screening process. Some employees affected by such testing are challenging it as an infringement on their right to privacy.

For example in *Soroka v. Target Stores*, Alameda Superior Court No. H143579-3, the plaintiff sued over a psychological test used by the employer to determine his fitness to work as a security guard. The test reported included questions like, "I am very strongly attracted by members of my own sex"; "I believe in the Second Coming of Christ"; and "Maybe some minority groups do get rough treatment, but it's no business of mine". Because there are so few cases dealing with psychological testing of employees, it is difficult to set out the appropriate guidelines for employers to follow in this area. At this time, it is perhaps best to say only that employers should avoid, if they can, tests that contain inflammatory or controversial subjects an use only testing that has been reasonably validated as job-related.

DRUG TESTING

Article I, section 1 of the California Constitution provides, among other rights, the right to privacy. Several California appellate courts have now held, with differing results, that drug testing of employees by private employers implicates the right to privacy. However, the California Supreme Court has not yet ruled on these issues and, as a result, the law remains somewhat unclear.

One appellate court has determined, however, that within specific guidelines, drug testing of job applicants may be allowed so long as the employee's right to privacy is not substantially burdened or affected and the employer's means of testing is reasonable. In *Wilkinson v. Times Mirror Corp.*, 215 Cal. App. 3d 1034, 264 Cal. Rptr. 194 (1989), the California Court of Appeal upheld an employer's policy of conditioning employment offers on the applicants' submission to a medical examination that would test for, among other things, drugs and alcohol. The drug test, which involved the taking of a urine sample, was conducted by an independent

laboratory. If the applicant were found unacceptable for some medical or physical reason, including testing positive for drugs or alcohol, a numerical rating would be assigned to the applicant indicating he or she should not be hired. The employer would be told only the unacceptable numerical rating, not the reason for the rating.

In upholding the constitutionality of this testing, the *Wilkinson* court determined that a private employer has a legitimate interest in a drug-and-alcohol-free workplace. The court also noted that the employer has considerable discretion in setting job-related hiring standards and in excluding individuals whose drug and alcohol use would affect their performance or threaten to harm themselves.

As a result, employers who wish to include drug testing in their application process should consider patterning their testing procedures after those in *Wilkinson*, i.e., drug testing should be apart of an overall medical examination as opposed to an isolated exam; employers should specifically advise job applicants that an offer of employment will be conditioned on their consenting to drug testing; and the employer should minimize the intrusion into the employee's privacy as much as possible by preserving the applicant's confidentiality.

EMPLOYMENT REFERENCES

An unfortunate result of increased litigation by former employees is that employers are becoming increasingly reluctant to provide references. This is because, when the reference is negative, a claim may be made for defamation or violation of Labor Code section 1050-1054 (prohibiting misrepresentations designed to prevent employees from obtaining new employment).

Although truth is, of course, a defense to a defamation action, as well as an action under the Labor Code (see Cal. Labor Code § 1053), establishing the truth of an employment reference can be problematic and still may not avoid litigation. Similarly, although a job reference given to a prospective employer should be a privileged communication that is not actionable as defamation, see Cal. Civil Code § 47(c), the privilege is not absolute and establishing it may entail prolonged litigation. For these reasons, many employers adhere to the "Name, Rank and Serial Number" rule and refuse to give out any information about a former employee other than the employee's dates of employment and positions held. For an employer considering to hire an applicant, this kind of reference has little value.

One way around this problem might be to ask the applicant to consent to the former employer's giving of a narrative job reference. The employee's consent to the reference might serve as a defense against a defamation claim, *Royer v. Steinberg*, 90 Cal. App. 3d 490, 153 Cal. Rptr. 499 (1979), although not necessarily a complete defense. Nevertheless, with the employee's consent, the former employer might be willing to be more forthcoming about the reasons for the applicant's departure from the prior employment and about the applicant's strengths and weaknesses.

CONCLUSION

Employers are limited, by law and practice, in what information they can obtain in a pre-employment inquiry. They should accordingly decide what information about an applicant is truly important, rather than just interesting, and make sure that their pre-employment inquiries comply with the law.

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Fair Chance Act: Criminal History and Employment

1. What is the Fair Chance Act?

The Fair Chance Act, which went into effect on January 1, 2018, is a California law that generally prohibits employers with five or more employees from asking about your conviction history before making you a job offer. This type of law is also known as a “Ban the Box” law. California enacted the Fair Chance Act to reduce barriers to employment for individuals with conviction histories because gainful employment is essential to these individuals supporting themselves and their families and to improving their community ties and mental health – all of which reduce recidivism. The Fair Chance Act is part of California’s employment antidiscrimination statute called the Fair Employment and Housing Act (FEHA), which is enforced by the Department of Fair Employment and Housing (DFEH). The Fair Chance Act is codified at Government Code section 12952.

2. How does the law work?

The law generally prohibits employers from:

- Including on a job application any questions about conviction history before a conditional job offer has been made
- Asking about or considering your criminal history before a conditional job offer has been made
- Considering information about arrests not followed by conviction, participation in pretrial or posttrial diversion programs that have been completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated

After offering you a job, employers are allowed to conduct a criminal history check, but the law requires an individualized assessment about your conviction history. 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 you are seeking. If the employer decides to take back the job offer based on your criminal history, they must tell you so in writing, provide a copy of any conviction history report they relied on, and give you at least five business days to respond.

3. Which employers are covered by the law?

Public and private employers with five or more employees are covered by the law. This includes union hiring halls, labor contractors, temporary employment agencies, and client employers. The law does not apply to certain positions at health care facilities, farm labor contractors, or positions with state criminal justice agencies. It also does not apply to any position where an employer is required by another law to conduct background checks or restrict employment based on criminal history. However, while employers do not have to comply with the requirements of the Fair Chance Act when hiring for such positions, their use of criminal history may still be challenged as discriminatory if it has an adverse impact on individuals in a protected basis (such as race). In such cases, the employer must show that the consideration of criminal history is job-related and consistent with business necessity. Even if the consideration of criminal history is job-related and consistent with business necessity, it will be unlawful if there is a less discriminatory way to meet the business necessity.

4. After a conditional offer of employment, what can an employer ask me about my criminal history?

After a conditional offer, an employer may ask you if you have any history of convictions. But employers may not ask about or consider information about (1) an arrest that did not result in a conviction (subject to the exceptions in Labor Code § 432.7(a)(1) and (f)); (2) referral to or participation in a pretrial or posttrial diversion program; or (3) convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law. The following is an example of a permissible question after a conditional offer:

Have you ever been convicted of a misdemeanor or felony? Answer “NO” if: (1) you have never been convicted of a misdemeanor or felony; (2) the misdemeanor or felony was sealed, dismissed, expunged, or reversed on appeal; (3) you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

5. What happens if an employer learns about my conviction history and wants to take back the job offer?

The law provides you with important rights if the employer wants to take back (rescind) your conditional job offer because of your criminal history.

- Individualized assessment: The employer must make an individualized assessment about your conviction history. That means that an employer has to consider the nature and gravity of your criminal history (the harm caused by the criminal conduct), the amount of time that has passed since the conviction, and the nature of the job you are seeking (the essential functions and the job environment). The employer cannot simply say that they won’t hire anyone convicted of a certain crime.
- Notification in writing: The employer must notify you in writing of the preliminary decision that your conviction history disqualifies you from employment.
- Notice of disqualifying conviction: The employer must provide you a notice of the convictions that disqualify you from employment.
- Copy of conviction history report: If the employer obtained a copy of your conviction history report, they must provide you with a copy of the report.
- Chance to respond: The employer has to give you at least five business days to respond to the preliminary decision to take back your job offer (and has to tell you that you can respond). If you dispute the conviction history report, and you tell the employer within five days, then you get an additional five days to respond.¹ The employer has to tell you

that your response can include any evidence challenging the accuracy of the conviction history report, plus any evidence of your rehabilitation or circumstances that you believe are important for the employer to consider about your life or the crime. Examples of this type of evidence include your employment history, an explanation of circumstances about your involvement in the crime, and rehabilitation efforts such as education or training.

- Consideration of your response: The employer must consider any information you submit in response.
- Final notification in writing: After considering any information you submit, the employer must notify you in writing of any final disqualification from the job, any procedure the employer has to challenge that final disqualification, and your right to file a complaint with the Department of Fair Housing and Employment.

6. What happens if I'm applying for a job and the employer's application asks me about my criminal history and I do not disclose my criminal history because the application would violate the Fair Chance Act? Can the employer use my non-disclosure on the application of my criminal history as the sole reason to deny me the job?

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 failure to disclose criminal history information on the unlawful application as a factor in subsequent employment decisions, including denial of the position conditionally offered.

7. What should I do if I think an employer has violated the law?

Within three years of an employer's violation of the law, you may file a complaint with DFEH. You may do so by filling out a complaint form online in our Cal Civil Rights System, downloading an intake form from our website and mailing it in, visiting a DFEH office, or calling our Communication Center below.

Fair Chance Act: Criminal History and Employment

If you think you have been a victim of employment discrimination, please contact DFEH.

TO FILE A COMPLAINT

Department of Fair Employment and Housing

dfeh.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320

If you have a disability that requires a reasonable accommodation, DFEH can assist you with your complaint. Contact us through any method above or, for individuals who are deaf or hard of hearing or have speech disabilities, through the California Relay Service (711).

Panel Member Name

Panel Member Signature

Date

Calendar Year

Department