



IN-DEPTH DISCUSSION

California Statewide Ban-the-Box Law Signed By Governor

BY ROD FLIEGEL AND ALLEN LOHSE ON OCTOBER 16, 2017

On October 14, 2017, Governor Jerry Brown signed Assembly Bill 1008, which will add a section to the California Fair Employment and Housing Act (FEHA) containing new state-wide restrictions on an employer's ability to make pre-hire and personnel decisions based on an individual's criminal history, including a significant and far reaching "ban-the-box" component.¹ AB 1008 is effective on **January 1, 2018**.

The bill continues the recent flurry of criminal background legislation activity in California, including new statewide regulations on the consideration of criminal records in employment decisions and the City of Los Angeles's recent ban-the-box law, which also mandates an individualized assessment of an applicant's criminal history prior to any employment decision based on a criminal record.²

Existing law prohibits state and local agencies from asking an applicant to disclose conviction information until the applicant is determined qualified for the position. AB 1008 extends this prohibition to **all employers in California with five or more employees**. The bill will make it unlawful for California employers with at least five employees to:

- Include on any application for employment any question that seeks the disclosure of an applicant's conviction history;
- Inquire into or consider the conviction history of an applicant before the applicant receives a conditional offer of employment; and
- Consider, distribute, or disseminate information about any of the following while conducting a criminal history background check in connection with any application for employment: (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; and (3) convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law.

Under AB 1008, consideration of an applicant's criminal history will be permissible only after the employer has made a conditional offer of employment. Once that offer has been made and the criminal history obtained, AB 1008 further provides that the employer cannot deny an applicant a position **solely or in part because of**

conviction history until the employer performs an individualized assessment. This assessment must justify denying the applicant the position by linking relevant conviction history with specific job duties of the position sought. In particular, the assessment would have to consider:

- The nature and gravity of the offense and conduct;
- The time that has passed since the offense or conduct and completion of the sentence; and
- The nature of the job held or sought.

AB 1008 provides that the employer “may, but is not required to, commit the results of this individualized assessment to writing.”

Once the employer makes a preliminary decision that the applicant’s conviction history is disqualifying, the employer **must** notify the applicant of this preliminary decision **in writing**. However, the employer is not required to justify or explain to the applicant its reasoning for making the preliminary decision. But, the employer must:

- Provide the written notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer;
- Include a copy of the conviction history report, if any;
- Provide an explanation that the applicant has the right to respond to the notice **within at least five (5) business days**, and that the response may include submission of evidence challenging the accuracy of the conviction record, or evidence of rehabilitation or mitigating circumstances or both.

The employer cannot make any final determination based on conviction history during this five (5) business day period. If the applicant timely notifies the employer in writing that he or she is disputing the conviction history and is taking steps to obtain evidence to support this, the employer must provide five (5) additional business days to respond to the notice. The employer must also consider any additional evidence or documents the applicant provides in response to the notice before making a final decision.

And if the employer ultimately decides to deny an applicant based on the conviction history, the employer must notify the applicant of this in writing, and include notification of any existing procedure the employer has to challenge the decision, as well as notification of the applicant’s right to file a complaint with the Department of Fair Employment and Housing.

In light of AB 1008 and similar ban the box laws, California employers that use criminal records to screen applicants or employees should consider a privileged review of all of the various policies, procedures, and other documents related to the screening process (e.g., job applications, offer letters, guidelines for recruiters, etc.). Relatedly, if not done already, employers in California should consider updating all documents related to federal and California fair credit reporting act compliance, including background check authorization and disclosure forms and “adverse action” notifications.³

¹ See California Lawmakers Introduce Statewide Ban-the-Box Law, Littler ASAP (Mar. 12, 2017).

² See Rod Fliegel and Christina Cila, City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law, Littler Insight (Dec. 9, 2016); California Employers Are Subject to New Requirements When Using Criminal History, Littler Insight (Feb. 21, 2017); Rod Fliegel San Francisco's OLSE Issues "FAQs" On Fair Chance Ordinance, Littler Insight (Dec. 17, 2014).

³ See Rod Fliegel, California Court Certifies FCRA Class of Over 40,000 Applicants (Jul. 17, 2017); Rod Fliegel, Ninth Circuit is the First Appellate Court to Rule on "Extraneous Text" in a FCRA Background Check Disclosure, Littler Insight (Jan. 25, 2017); Rod Fliegel, Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014, Littler Insight (Jan. 6, 2014); Rod Fliegel and William Simmons, The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers, Littler Report (Aug. 1, 2014).

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