

# Fair Employment & Housing Council

## Consideration of Criminal History in Employment Decisions Regulations

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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#### § 11017. Employee Selection.

(a) Selection and Testing. Any policy or practice of an employer or other covered entity that has an adverse impact on employment opportunities of individuals on a basis enumerated in the Act is unlawful unless the policy or practice is job-related, as defined in section 11017(e). The Council herein adopts the *Uniform Guidelines on Employee Selection Procedures* promulgated by various federal agencies, including the EEOC and Department of Labor. [29 C.F.R. 1607 (1978)].

(b) Placement. Placements that are less desirable in terms of location, hours or other working conditions are unlawful where such assignments segregate, or otherwise discriminate against individuals on a basis enumerated in the Act, unless otherwise made pursuant to a permissible defense to employment discrimination. An assignment labeled or otherwise deemed to be “protective” of a category of persons on a basis enumerated in the Act is unlawful unless made pursuant to a permissible defense. (See also section 11041 regarding permissible transfers on account of pregnancy by employees not covered under Title VII of the federal Civil Rights Act of 1964.)

(c) Promotion and Transfer. An employer or other covered entity shall not restrict information on promotion and transfer opportunities to certain employees or classes of employees when the restriction has the effect of discriminating on a basis enumerated in the Act.

(1) Requests for Transfer or Promotion. An employer or other covered entity who considers bids or other requests for promotion or transfer shall do so in a manner that does not discriminate against individuals on a basis enumerated in the Act, unless pursuant to a permissible defense.

(2) Training. Where training that may make an employee eligible for promotion and/or transfer is made available, it shall be made available in a manner that does not discriminate against individuals on a basis enumerated in the Act.

(3) No-Transfer Policies. Where an employment practice has operated in the past to segregate employees on a basis enumerated in the Act, a no-transfer policy or other practice that has the effect of maintaining a continued segregated pattern is unlawful.

(d) Specific Practices.

(1) Criminal Records. ~~See Section 11017.1~~ Except as otherwise provided by law (e.g., 12 U.S.C. § 1829; Labor Code section 432.7), it is unlawful for an employer or other covered entity to inquire or seek information regarding any applicant concerning:

~~(A) Any arrest or detention that did not result in conviction;~~

~~(B) Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45); any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed pursuant to Penal Code section 1203.4; or~~

~~(C) Any arrest for which a pretrial diversion program has been successfully completed pursuant to Penal Code sections 1000.5 and 1001.5.~~

(2) Height Standards. Height standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(3) Weight Standards. Weight standards that discriminate on a basis enumerated in the Act shall not be used by an employer or other covered entity to deny an individual an employment benefit, unless pursuant to a permissible defense.

(e) Permissible Selection Devices. A testing device or other means of selection that is facially neutral, but that has an adverse impact (as described in the Uniform Guidelines on Employee Selection Procedures (29 C.F.R. 1607 (1978)) upon persons on a basis enumerated in the Act, is permissible only upon a showing that the selection practice is sufficiently related to an essential function of the job in question to warrant its use. (See section 11017(a).)

Note: Authority cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, 12940, and 12941, Government Code.

§ 11017.1. Consideration of Criminal History in Employment Decisions

(a) Introduction. Employers in California are explicitly prohibited under separate state laws from utilizing certain enumerated criminal records in hiring, promotion, training, discipline, termination and other employment conditions decisions as outlined in subsection (b) below. Employers are prohibited under the Act from utilizing other forms of criminal records in employment decisions if doing so would have an adverse disparate impact on individuals on a basis protected by the Act and the employer cannot demonstrate that the consideration of criminal records are job-related and consistent with business necessity (sufficiently related to an essential function of the job) or if there is a less discriminatory alternative mean of achieving the specific business necessity as effectively.

(b) Criminal History Information Employers Are Prohibited from Considering, Irrespective of Disparate Impact. Except if otherwise provided by law, employers are prohibited from considering the following types of criminal history records, or seeking such records from the employee or a third party, when making employment decisions such as hiring, promotion, training, discipline and termination:

- (1) An arrest or detention that did not result in conviction (Labor Code section 432.7);
- (2) Referral to or participation in a pretrial or post-trial diversion program (Id.);
- (3) A conviction that has been judicially dismissed or ordered sealed pursuant to law (Id.); and
- (4) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(c) Additional Criminal History Consideration Limitations, Irrespective of Disparate Impact.

- (1) State or local agency employers are prohibited from asking an applicant for employment to disclose information concerning her or his conviction history, including through an employment application, until the employer has determined that the applicant meets the minimum employment qualifications as stated in the notice for the position (Labor Code section 432.9).
- (2) Employers may also be subject to local laws or city ordinances that provide additional limitations. For example, in addition to the criminal history records outlined in subsection (b), San Francisco employers are prohibited from considering: convictions in the juvenile justice system; offenses other than a felony or misdemeanor, such as an infraction; and convictions that are more than 7 years old (unless the position being considered supervises minors or dependent adults) (Article 49, San Francisco Police Code).

(d) Consideration of Other Criminal Convictions and the Potential of Disparate Impact. Depending on factors such as the type of convictions considered, the job position, and the geographic bounds of the applicant pool, consideration of other forms of criminal convictions, not enumerated above, may have an adverse disparate impact on individuals on a basis protected by the Act, including but not limited to gender, race, and national origin. An adversely affected applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse disparate impact on a basis protected by the Act. For purposes of such a determination, adverse disparate impact is defined at Section 11017 and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. 1607 (1978)) incorporated by reference in Section 11017(a) and (e).

(e) Establishing Job Relatedness and Business Necessity. If the policy or practice of considering criminal convictions creates an adverse disparate impact for applicants or employees on a basis 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 job, not merely an evaluation of 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:

- (1) The nature and gravity of the offense or conduct;
- (2) The time that has passed since the offense or conduct and/or completion of the sentence; and
- (3) The nature of the job held or sought.

Demonstrating that a policy or practice of considering conviction history is appropriately tailored to the jobs it is used as an evaluation factor for requires that an employer either: undergo an individualized assessment of the circumstances or qualifications of the applicants or employees excluded by the conviction screen; or be able to demonstrate that any bright-line, across the board, conviction disqualification can appropriately distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that the convictions being used to disqualify have a direct and specific negative bearing on the person's ability to perform the duties or responsibilities necessarily related to the employment position. Bright-line conviction disqualification policies or practices that do not incorporate an individualized assessment and include conviction related information that is seven or more years old (measured from the date of disposition, release or parole) 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 subsection (f) below). Before an employer may take an adverse action such as declining to hire, discharging, or declining to promote an adversely impacted individual based on conviction history obtained 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 inaccurate.

(f) Compliance with Federal or State Laws or Regulations 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. 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. Compliance with such federal or state laws or regulations is a form of job-relatedness, is consistent with business necessity, and constitutes a defense to a disparate impact claim under the Act (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code §§ 432.7, 432.9).

(g) Less Discriminatory Alternatives. If an employer demonstrates that its conviction history consideration policy or practice is job-related and consistent with business necessity, adversely impacted employees 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.

Note: Authority Cited: Section 12935(a), Government Code. Reference: Sections 12920, 12921, and 12940, Government Code; Title 12, Section 1829, United States Code; Title 21, Section 830, United States Code; *Griggs v. Duke Power Co.* (1971) 401 U.S. 424; *Watson v. Fort Worth Bank and Trust* (1988) 487 U.S. 977; *Green v. Missouri Pac. R.R. Co.* (8th Cir. 1975) 523 F.2d 1290; *El v. SEPTA* (3d Cir. 2007) 479 F.3d 232; *Guerrero v. California Department of Corrections and Rehabilitation* (N.D. Cal. July 21, 2015) 2015 WL 4463537; *Rankin v. Longs Drug Stores California, Inc.* (2009) 196 Cal.App.4th 1246; Equal Emp't Opportunity Comm'n, *Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (Apr. 2012).