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Employment Law Alert

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San Francisco's New Fair Chance Ordinance: Answers to Employers' Common Questions

On August 13, 2014, San Francisco's new Fair Chance Ordinance[1] (FCO), will take effect, with the goal of reducing recidivism by removing some of the initial hurdles that often prevent individuals with criminal records from being considered for jobs for which they are otherwise qualified. The FCO provides specific limitations on the timing, scope and use of inquiries into an applicant's or employee's criminal history, and imposes detailed notice, posting, recordkeeping and reporting obligations on covered employers, including affirmative obligations that are triggered even before an employer begins accepting applications. The FCO is enforced by San Francisco's Office of Labor Standards Enforcement (OLSE).

To assist employers with compliance under the FCO, we have compiled answers to the common questions employers have been asking about this new ordinance.

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QUESTIONS AND ANSWERS

When does the FCO take effect?

The Fair Chance Ordinance takes effect on August 13, 2014. Job postings and hiring processes that occurred before August 13, 2014 are not subject to FCO requirements.

What is an employer's basic requirement under the FCO?

An employer must limit its inquiries into the criminal background of applicants and employees and be cautious in its use of any information obtained as a result of such an inquiry.

Which employers are subject to the FCO?

The FCO covers private "employers" that are located in or do business in San Francisco and have 20 or more employees, whether or not those employees are located in San Francisco. "Employer" includes any individual, firm, corporation, partnership, labor

[1] Article 49 of the San Francisco Police Code and San Francisco Administrative Code section 12T; added by Ord. No. 17-14, File No. 131192, Approved 2/4/14, Enacted 2/14/14, Effective 3/14/14, Operative 8/13/14.

organization, association, or other organization however organized (such as non-profits), as well as job placement, referral agencies and other employment agencies. The ordinance only applies to an employer's jobs located in San Francisco.

The ordinance also covers contractors who do business with the City and County of San Francisco, regardless of where the work is being performed, but not if those contractors have a cumulative annual contract with the City for $5,000 or less.

To whom does the FCO apply?

The ordinance applies to any applicant or employee seeking employment in San Francisco with a covered employer. The ordinance applies to any type of employment, whether full-time or part-time, temporary or seasonal, contracted or contingent work, work on commission, work through a temporary agency, or any form of vocational or educational training with or without pay.

It also applies to any applicant or employee who works for a company that contracts to work with the City and County of San Francisco, regardless of where the work is being performed.

Are there criminal history topics that an employer may never inquire about under the FCO?

Yes, the FCO specifies that there are certain topics that an employer is prohibited from inquiring about, requiring disclosure of, or considering, *at any time* with respect to applicants or employees.

Topics that an employer may never inquire into include: (1) an arrest not leading to a conviction (other than an arrest that is still under criminal investigation or in criminal proceedings); (2) participation in or completion of a diversion or deferral of judgment program; (3) a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative; (4) a conviction or other determination or adjudication in the juvenile justice system, or information regarding a matter that was considered in or processed through the juvenile justice system; (5) a conviction more than seven years old; or (6) information pertaining to an offense other than a felony or misdemeanor (such as an infraction). Similarly, if the employer receives this information, it may not use it in any manner for purposes of making an adverse action decision.

It is important to keep in mind, however, that the FCO states that it does not supersede any federal or state law that otherwise requires an employer to make an inquiry that would be prohibited by the FCO. Also, employers should be aware of their obligations under California Labor Code § 432.7, which prohibits asking applicants, or using information in making employment decisions, about certain arrests and convictions.[2]

How does the FCO define "inquire" for purposes of the law?

"Inquire" means any direct or indirect employer conduct that is intended to gather information from or about an applicant, candidate, potential applicant or candidate, or employee, using any mode of communication. This includes, for example, application forms, interviews, and background check reports. Thus, an employer who gathers information directly or indirectly about an applicant's/employee's criminal background will have "inquired" about that person's criminal history under the FCO.

Can an employer ask about criminal history on the job application form?

No. The FCO states that employers may not inquire on the job application, or require applicants or potential applicants for employment or employees to disclose on the job application, the fact or details of any conviction history or unresolved arrests or any of the criminal record topics that are off-limits at any time (see above).

At what point can an employer inquire about an applicant's criminal history?

With the exception of the subjects that an employer is barred from inquiring about at any time (see above), an employer may inquire about an employee's or applicant's "conviction history" or "unresolved arrests" only after the employee or applicant has had a "live" interview or after the employer has extended a conditional offer of employment to the person.

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[2] Cal. Labor Code § 432.7 prohibits public and private employers from requesting job applicants to disclose, or considering as a factor in determining any condition of employment (including hiring, promotion, termination, apprentice training program or other training program leading to employment), information concerning: 1) an arrest or detention that did not result in conviction; 2) a referral to, and participation in, any pretrial or posttrial diversion program; or 3) a conviction that has been judicially dismissed or ordered sealed. The law states, however, that it does not prevent an employer from asking an employee or applicant about an arrest for which the employee or applicant is out on bail or on his or her own recognizance pending trial.

How is "conviction history" defined under the FCO?

"Conviction history" means information regarding *convictions or unresolved arrests*, whether that information is transmitted orally, in writing or by other means, and obtained from any source, such as from the applicant/employee or from a background check.

How is "unresolved arrest" defined under the FCO?

An "unresolved arrest" means an arrest that is undergoing an active and pending criminal investigation or trial. An arrest is considered resolved under the FCO if the individual was released and no accusatory pleading was filed charging him/her with an offense, or if the charges were dismissed or discharged.

What is a "live" interview under the FCO?

A "live" interview includes an interview conducted in person, over the phone, via videoconferencing, or through the use of other technology.

Are there steps an employer must take before making a conviction history inquiry?

Yes. Prior to making a conviction history inquiry, an employer must provide the applicant/employee with a notice of rights under the FCO. The notice is available on the OLSE's website.

Additionally, prior to obtaining a background check report, the employer must comply with all federal and state notice requirements that apply to such reports, including under the Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA).

Does the FCO place limits on how an employer may use an applicant/employee's conviction history (assuming the above steps have been followed) in making employment decisions?

Yes. In making an employment decision based on conviction history, the FCO directs employers to conduct an individualized assessment of the information. The employer may consider only "directly related convictions," and must consider the time elapsed since the conviction or unresolved arrest, as well as any evidence of inaccuracy, rehabilitation, or other mitigating factors.

Also, before basing an "adverse action" on anything in an applicant/employee's criminal history, the employer must follow certain notice requirements laid out in the FCO (see below).

What is a "directly related conviction" under the FCO?

A "directly related conviction" includes a conviction or unresolved arrest for which the conduct underlying the conviction/arrest has a direct and specific negative bearing on the individual's ability to perform the duties or responsibilities of the job.

How can an employer determine if a conviction or unresolved arrest is "directly related" to the job at issue?

The FCO specifies that an employer must consider these factors in determining whether a conviction or unresolved arrest is "directly related" to the job: 1) whether the job would provide the applicant/employee the opportunity to commit the same or a similar offense; and 2) whether the circumstances that led to the prior alleged conduct will recur in the job. Significantly, the FCO specifies that the OLSE may not find a violation of the ordinance based on an employer's decision that conviction history is directly related in a particular situation, although the agency may find a violation based on an employer's failure to conduct an individualized assessment.

If the employer determines that the conviction history is directly related to the job, what can the employer do with that information?

An employer may decide to take "adverse action" based on information in the applicant/employee's conviction history, after following notice requirements specified in the FCO (see below). An "adverse action" includes failing or refusing to hire, to discharge, or to not promote any individual, or to limit, segregate or classify employees so as to deprive them of employment opportunities, or any other action that would adversely affect his/her status as an employee.

What steps are required if the employer intends to base an adverse action on an employee's conviction history that is directly related to the job?

The FCO directs that prior to taking adverse action, the employer must provide the individual with a copy of the background check report, if any, and must notify the individual of the proposed adverse action and the reason(s) for it. Employers must also comply with federal FCRA and California ICRAA notice requirements.

What rights does an applicant or employee have once notified of a prospective adverse action?

Once an employer notifies the applicant or employee of a prospective adverse action, the individual has seven days to provide the employer with notice (in writing or orally) that the conviction history is inaccurate, or with evidence of rehabilitation or other mitigating factors. Upon receipt of such notice, the employer must delay the adverse action for a reasonable period of time and reconsider the adverse action in light of the information.

What are examples of evidence of rehabilitation or other mitigating factors?

This would include, for example: an individual's compliance with all the terms and conditions of their parole or probation (not including an inability to pay fines, fees or restitution due to indigence); employer recommendations from post-conviction employment; educational attainment or vocational or professional training since the conviction; letters of recommendation from community organizations, counselors, case managers, teachers, or parole officers; and the age of the individual at the time of the conviction.

Additionally, examples of mitigating factors could include an explanation of coercive conditions, physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.

What are an employer's obligations if the employee presents evidence of inaccuracy, rehabilitation or mitigating factors?

The employer must postpone the adverse action for a reasonable period of time, during which it must reconsider the decision based on the new information provided by the applicant/employee.

If the employer ultimately decides to take adverse action, what final steps must it take?

The FCO directs that upon taking any final adverse action, the employer must notify the applicant/employee of the final adverse decision. Additionally, employers must comply with adverse action notice requirements under the federal FCRA and California ICRAA.

Does the FCO impose any requirements on employers with respect to job advertisements?

Yes. All solicitations or ads that are "reasonably likely" to reach individuals who are "reasonably likely" to seek employment in San Francisco must affirmatively state that the employer will consider for employment qualified applicants with criminal histories consistent with the requirements of the FCO. Furthermore, it is unlawful under the FCO for any such job advertisement to express that persons with arrest or conviction records may not apply for or will not be considered for employment.

Does the employer have to post a workplace notice about the FCO?

Yes. Employers must post a notice informing applicants and employees of their rights and the employer's obligations under the ordinance. The notice must be posted in a conspicuous place at every workplace, job site, or other location in San Francisco under the employer's control that is frequently visited by employee or applicants. Employers must also send a copy of the poster to each labor union representing their workers in San Francisco.

The notice must be posted in English, Spanish and Chinese, as well as in any language spoken by at least 5% of the employees at the workplace, job site or other location where it is posted. The poster is available on the OLSE's website.

What records does the FCO require employers to keep?

The FCO requires covered employers to retain records of employment, application forms, and other "pertinent data and records" for a period of three years. The employer must make records available to the OLSE to monitor FCO compliance, upon appropriate notice and at a mutually agreeable time. Failure to retain adequate records documenting compliance with the FCO, or failing to provide the OLSE with access to records raises a presumption that the employer has failed to comply with the FCO, absent clear evidence otherwise. It is anticipated that the OLSE will publish procedures to specify records that must be maintained.

What are an employer's reporting obligations under the FCO?

The OLSE may require employers to provide information on an annual basis to verify compliance with the FCO. It is anticipated that the OLSE will publish annual reporting procedures.

What applicant/employee rights are protected under the FCO?

The FCO prohibits employers from interfering with applicant/employee rights under the FCO, and prohibits retaliation for the exercise of such rights. Specifically, the rights protected under the FCO include the right to: file complaints or inform any person about alleged FCO violations; cooperate with the OLSE in FCO investigations or prosecution; oppose any policy or practice that is unlawful under the FCO; and inform any person about their FCO rights. The FCO states that taking adverse action against someone within 90 days of their exercise of rights under the FCO creates a rebuttable presumption that the action was retaliatory.

The FCO does not preempt or limit any other law or regulation or provision of a collective bargaining agreement that provides greater rights or protections for applicants or employees.

Do the FCO's prohibitions or limitations apply if there is another law that requires the employer to consider certain criminal history?

The FCO specifies that it does not supersede state or federal laws that govern matters covered under the FCO. So, for example, an employer may inquire about criminal convictions outside the time periods specified in the FCO if the employer is required to do so by a state or federal law.

How is the FCO enforced and what are the penalties for violations?

The OLSE is responsible for enforcing the FCO's employment provisions. Anyone may report suspected violations to the OLSE within 60 days. The OLSE may investigate possible violations of the FCO, and if it determines that a violation has occurred, it may order any appropriate relief. For a first violation, or for a violation that occurs during the first 12 months that the ordinance is in effect (until August 13, 2015), the OLSE will only issue warnings and notices to correct. For second violations, the OLSE can impose a penalty of up to $50.00 per violation. Penalties for each subsequent violation cannot exceed $100.00 per violation. If multiple employees or applicants are impacted by the same procedural violation at the same time (for example, all applicants for a particular job opening are asked on the job application for criminal history), the OLSE will treat that as a single violation.

If an employer does not promptly comply despite the OLSE's enforcement efforts, the OLSE is authorized to refer the matter to the San Francisco City Attorney to consider initiating a civil action against the employer. Furthermore, the City may bring a civil action against an employer for violations, in which case remedies may include reinstatement, back pay and benefits, liquidated damages of $50 per day for each aggrieved applicant or employee, injunctive relief, and attorney's fees.

Where can employers find the FCO and pertinent materials?

The OLSE's website provides a link to the ordinance and related materials. Go to http://sfgsa.org/index.aspx?page=6599.

What are the recommended action steps for employers to comply with the FCO?

Recommended steps include:

- Revise internal policies and procedures as needed to prohibit inquiries about the specific topics identified in the FCO as being off-limits at any time (unless the employer is covered under a federal or state law that would require that inquiry).
- Review policies and procedures to ensure that criminal history inquiries (as permitted by the FCO) are made only after an applicant's first live interview or after a conditional offer of employment has been extended.
- Remove criminal history inquiries from job applications and interview forms that are used for jobs covered by the ordinance.
- Prior to conducting criminal background checks, provide the required FCO official notice and follow all procedures under the California and federal consumer report laws.
- When considering an applicant/employee's conviction history after a live interview or conditional job offer has been extended, be sure to make an individualized assessment of the information, and only make employment decisions based on criminal history that is directly related to the position in question.
- Follow FCO and consumer report law procedures regarding adverse action decisions, including providing pre- and post-adverse action notices and allowing the individual with an opportunity to present information regarding inaccuracy, rehabilitation or other mitigating factors.

- Ensure that all company personnel involved in hiring and/or promotion processes (from recruiters, to human resources personnel, to interviewers) are aware of the FCO's limitations on inquiring about criminal history during the application process, the limits on using any permissibly obtained information, the employee's right to present information to convince the employer to reconsider, and the employer's obligation to reconsider any adverse employment decision.
- Review job ads and solicitations to ensure that they contain the FCO-required statement that the company will consider applicants with criminal histories consistent with FCO requirements, and to ensure that these materials do not suggest that people with arrests or convictions should not apply.
- Post the required FCO notice at all San Francisco worksites, in English/Spanish/Chinese and any other language spoken by at least 5% of your San Francisco workforce. The poster is now available from the OLSE's website in English, and will soon be available in other languages.
- Maintain records regarding employment actions and decisions covered by the FCO for three years. Records should include copies of advertisements and solicitations, job postings, job applications, interview forms, records and notes, documentation regarding notices provided under the FCO, background check results (if obtained), documentation provided by applicants/employees in response to background check results, and documentation of adverse decisions.
- Periodically check the OLSE's FCO web page for updates.

Miller Law Group exclusively represents business in all aspects of California employment law, specializing in litigation, wage and hour class actions, trials, appeals, compliance advice and counseling. If you have questions about the Fair Chance Ordinance or other workplace obligations, please contact us at (415) 464-4300.

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