

October 30, 2017

State Enhances “Ban The Box” Legislation

A new California bill, AB 1008, would bar employers with five or more employees from considering an applicant’s conviction¹ history except in specified circumstances. Under existing law (enacted as AB 218 in 2013), a similar ban applied only to state agencies, all cities and counties, including charter cities and charter counties, and special districts.

AB 1008 adds Section 12952 to the Government Code. It makes it unlawful for an employer with five or more employees (including government employees) to ask about or consider an applicant’s conviction history (including in a job application) before the employer makes a conditional offer of employment. An employer also may not “consider,

¹ “Conviction” has the same meaning as defined in paragraphs (1) and (3) of subdivision (a) of Section 432.7 of the Labor Code, namely, “a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court.” A conviction” does not include, and shall not be construed to include, any adjudication by a juvenile court or any other court order or action taken with respect to a person who is under the process and jurisdiction of the juvenile court law.” A conviction also includes an arrest for which an individual is out on bail or his or her own recognizance pending trial. Government Code Section 12952(f)(2)(b).

distribute, or disseminate” the following information about an applicant during a background check:

- an arrest not followed by conviction²
- a referral to or participation in a pre-trial or post-trial diversion program, or
- a conviction that has been sealed, dismissed, expunged, or statutorily eradicated.

The bill also prohibits any person from interfering with the exercise of any right provided in this bill.

Certain procedural standards apply if an employer intends to deny employment solely or in part because of an applicant’s conviction history. After reviewing a properly obtained conviction history report, the employer must individually assess whether such history “has a direct and adverse relationship with the specific duties of the job that justif[ies] denying the applicant the position.” Specifically, the employer must consider the nature and gravity of the offense or 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.

²There is an exception to the definition of conviction applicable to health facility employment described in Labor Code Section 432.7(f)(1).

To withdraw a conditional offer because of the conviction history, the employer must first provide the applicant with written notice that includes the disqualifying conviction(s), a copy of the conviction history report (if any), and an explanation of the applicant's right to respond before the decision becomes final. That time to respond may not be less than five business days. The applicant must be informed that he or she may offer evidence challenging the accuracy of the report and may include evidence of rehabilitation or mitigating circumstances.

If within the five days the applicant responds in writing disputing the accuracy of the report and that he or she is taking specific steps to obtain supporting evidence, then the applicant has five additional business days to respond to the notice. Then the employer is required to consider the new information before making a final decision.

If the decision is still no, the employer must provide a second written notice that contains all the following: (1) the final decision (with or without an explanation); (2) any existing procedure to challenge the decision or request reconsideration; and (3) the right to file a complaint with the Department of Fair Employment and Housing.³

AB 1008 recognizes a number of exceptions where the new state law would not apply. Importantly for banks, one exception is for any position where an

³ Presumably this refers to a person's ability to file a complaint under Government Code Section 12960(b).

employer or its agent "is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history." On the other hand while local jurisdictions, including San Francisco and Los Angeles have also adopted bank the box restrictions, the remedies available under AB 1008 apply in addition to such other rights that may apply concurrently.

AB 1008 becomes effective on January 1, 2018. Jason Lane is CBA's lead lobbyist on the bill.

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