

September 30, 2018

SB 1412 -- Criminal Background Checks

Existing law (California Labor Code Section 432.7) prohibits an employer, whether a public agency, private individual, or corporation, from asking an applicant for employment to disclose, or from seeking from any source, or from utilizing as a factor in determining any condition of employment, information concerning participating in a pretrial or post trial diversion program or concerning a conviction that has been judicially dismissed or ordered sealed.¹

Section 432.7 further provides that an employer is not prohibited from asking an applicant about a criminal conviction of, seeking from any source information regarding a criminal conviction of, utilizing as a factor in determining any condition of employment of, or entry into a pretrial diversion or similar program by the applicant if, pursuant to state or federal law, the employer is required to obtain information regarding a conviction, or if the employer is prohibited by law from hiring an applicant who has been convicted of a crime.²

SB 1412, which was chaptered September 30, 2018, amends Section 432.7. As introduced, SB 1412 would arguably have prohibited financial institutions from

using background checks to comply with the restrictions of Section 19 of the Federal Deposit Insurance Act.³ Section 19 of the FDIA prohibits the employment of individuals convicted of crimes involving dishonesty or a breach of trust or money laundering, including individuals that have entered into a pretrial diversion or similar program in connection with a prosecution for any such offense, without the prior consent of the Federal Deposit Insurance Corporation.

CBA was able to secure amendments to the bill that provided some help to employers governed by Section 19 of the FDIA. The negotiated provision reads, in pertinent part, as follows:

(m) (1) Paragraph (1) of subdivision (a) does not prohibit an employer, whether a public agency or private individual or corporation, from asking an applicant about, or seeking from any source information regarding, a particular conviction of the applicant if, pursuant to Section 1829 of Title 12 of the United States Code or any other federal law, federal regulation, or state law, any of the following apply:

¹ Cal. Lab. Code §432.7(a)(1)

² Cal. Lab. Code §432.7(a)(2)

³ 12 U.S.C. §1829

(A) The employer is required by law to obtain information regarding the particular conviction of the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

....

(C) An individual with that particular conviction is prohibited by law from holding the position sought by the applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

(D) The employer is prohibited by law from hiring an applicant who has that particular conviction, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.

(Emphasis added)

However, when ordering a criminal background check, financial institution employers do not have the ability to instruct law enforcement agencies to limit their reports to only certain types of convictions. Thus, the statute's repeated use of the restrictive term "that particular conviction" puts an employer ordering a criminal background check at risk of liability to job applicants if the background check reveals crimes that are not related to dishonesty, breach of trust or money laundering.

CBA negotiated a letter to the Senate Journal from the author of the bill, stating that the bill is "not intended to nor does it prevent or impact the important and sensitive screening work needed to be conducted by financial institutions in their hiring processes".

Nonetheless, financial institutions that conduct criminal background checks on applicants for employment should be careful to restrict their use of those reports to identifying crimes involving dishonesty, breach of trust or money laundering.

Christina Spagnoli was CBA's lead lobbyist on SB 1412.

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