

# California Fair Employment & Housing Council (FEHC) Consideration of Criminal History in Employment Decisions Regulations



The California Fair Employment & Housing Council (FEHC) – the agency that puts into effect regulations that implement the state’s employment and housing anti-discrimination laws – has approved the “[Fair Employment & Housing Council’s Consideration of Criminal History in Employment Decisions Regulations](#)” that identify ways in which employers can face liability when using the criminal history of candidates (job applicants or employees) in hiring and other employment decisions. The new FEHC regulations will take **effect July 1, 2017**. Any policy or practice of a California employer that has an “adverse” (negative) impact on the employment opportunities of individuals is unlawful unless “job-related and consistent with a business necessity.” The FEHC has adopted the guidelines promoted by federal agencies including the U.S. Equal Employment Opportunity Commission (EEOC) which issued updated “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” in April 2012.

## What Limitations Do Employers Have with Criminal Records?



Except if otherwise specifically permitted by law, employers are prohibited from considering the following types of criminal history – or seeking such history from the employee, applicant, or a third party – when making employment decisions such as hiring, promotion, training, discipline, lay-off, and termination:

An arrest or detention that did not result in conviction.

Referral to or participation in a pretrial or post-trial diversion program.



A conviction that has been judicially dismissed or ordered sealed, expunged, or statutorily eradicated pursuant to law.



An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law.

A non-felony conviction for possession of marijuana that is two or more years old.

## Additional criminal history limitations include:

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- 01** State or local agency employers are prohibited from asking job applicants to disclose information concerning their conviction history – including on an employment application – until the employer has determined the applicant meets the minimum qualifications as stated in the notice for the position.
  - 02** Employers may also be subject to local laws or city ordinances that provide additional limitations; and
  - 03** Employers that obtain an Investigative Consumer Report (ICR) such as background checks are also subject to the requirements of the federal Fair Credit Reporting Act (FCRA) and the California Investigative Consumer Reporting Agencies Act (ICRAA).

Consideration of other forms of criminal convictions not mentioned above may have an adverse impact on individuals on a basis protected by the Act, including – but not limited to – gender, race, and national origin.

## Applicants & Employees Bear Burden of Showing “Adverse Impact”



An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis mentioned in the Act.

An adverse impact may be established through the use of conviction statistics or by offering any other evidence that establishes an adverse impact.



State- or national-level statistics showing substantial disparities in the conviction records of one or more categories mentioned in the Act are presumed sufficient to establish an adverse impact.

These statistics may be rebutted by showing there is a reason to expect different results due to circumstances such as geographic area of applicant or employee pool, particular types of convictions being considered, or particular jobs at issue.



# Employers Must Establish “Job-Related and Consistent with Business Necessity”



If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis mentioned in 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 relationship to successful performance on the job and in the workplace and measure the person's fitness for the specific position.



In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice takes into account at least the following factors:

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



Demonstrating that a policy or practice of considering conviction history in employment decisions is tailored to the job for which it is used as an evaluation factor requires that an employer either:

- ✓ Demonstrate that any “bright-line” conviction disqualification (one that does not consider individualized circumstances) can distinguish between applicants or employees that do and do not pose an unacceptable level of risk and that convictions used to adversely impact employees or applicants have a direct and specific negative bearing on their ability to perform the job.

OR

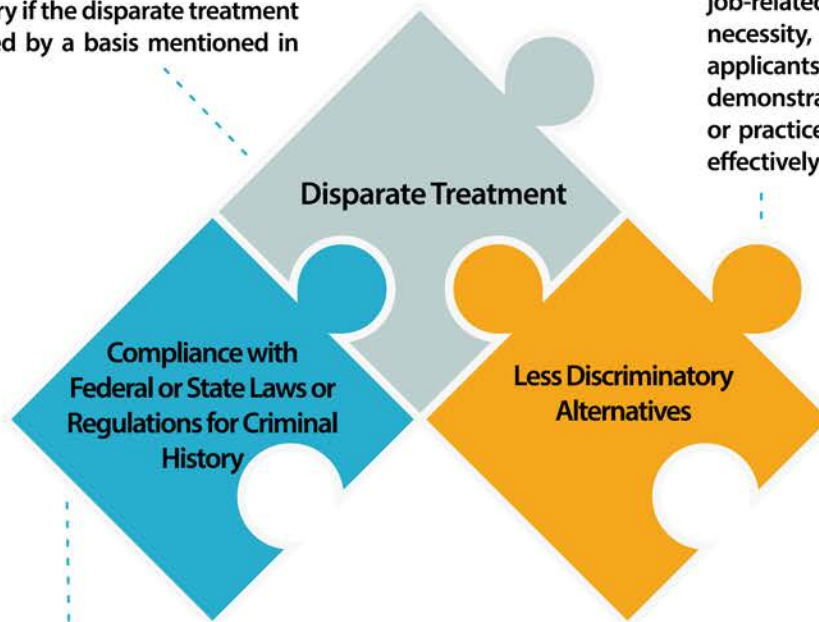
- ✓ Conduct an “individualized assessment” of the circumstances and qualifications of applicants or employees that involves notice to the adversely impacted individuals before any adverse action is taken that they have been screened out because of a criminal conviction, an opportunity for individuals to demonstrate the exclusion should not be applied, and consideration by employers whether any additional information provided to employers warrants an exception to the exclusion and shows the policy is not job-related and consistent with business necessity.



Whether utilizing a bright line policy or conducting individualized assessments, employers must give the impacted individuals notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate before taking an adverse action. If applicants or employees establish the record is factually inaccurate, that record cannot be considered in the decision.



The Act prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history if the disparate treatment is substantially motivated by a basis mentioned in the Act.



If an employer demonstrates its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail if they can demonstrate there is a less discriminatory policy or practice that serves the employer's goals as effectively.

Some employers are subject to federal or state laws and regulations that prohibit individuals with certain criminal records from holding particular positions or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions. 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.
- ☑ Employers employing individuals at health facilities or pharmacies where they will have access to medication or controlled substances.

Some federal and state laws and regulations that make criminal history a determining factor in eligibility for occupational licenses and mandate particular criminal history screening processes or require an employee or applicant to possess required occupational licenses constitute rebuttable defenses to an adverse impact claims.



The final text of the "Fair Employment & Housing Council's Consideration of Criminal History in Employment Decisions Regulations" is available at [www.esrcheck.com/file/FEHC-Consideration-of-Criminal-History-in-Employment-Decisions-Regulations.pdf](http://www.esrcheck.com/file/FEHC-Consideration-of-Criminal-History-in-Employment-Decisions-Regulations.pdf).

**CA EMPLOYERS MUST BE CAREFUL WITH CRIMINAL RECORDS**