



## Effective July 2017 **California Employers** should audit their Onboarding Processes to ensure compliance with FEHC new regulations

The California Fair Employment and Housing Council (FEHC) has finalized two new regulations that will be effective July 1, 2017. California employers should pay close attention to these new rules touching on ***criminal history use during the pre-employment/background screening phase and transgender discrimination***. McCloskey Partners is recommending that California employers review their policies and handbooks now to ensure compliance.

### Regulation On the Use Of ***Criminal History during the Pre-employment phase***

In January 2017, the FEHC approved the proposed regulations in regards to the employer use of criminal history information. These regulations have many different advantages and disadvantages to them. For instance, the regulations restate various provisions of the existing state law that prohibits employers from using specific criminal history information in everyday employment decisions (i.e. hiring, promotion, termination). The way it differs from previous provisions is that these regulations restrict you from considering any non-felony misdemeanor conviction related to marijuana possession that is more than two years old. Whereas previously you the regulations only restricted you from the current list of only specified misdemeanors. Another difference in these regulations are that these regulations also add significant new language restricting you from using criminal history information that has an “*adverse impact*” on employees based on protected class (such as gender, race and national origin), unless use of such information is job-related and consistent with business functionality.

The regulations provide new guidelines and a detailed process, that must be followed when taking in to consideration criminal convictions when hiring, with most of the emphasis falling on employers to complete certain requirements of the law.

### Definition of “Adverse Impact”

The regulations mirror an informal guideline by federal Equal Employment Opportunity Commission (EEOC) in 2012, that states that use of criminal history may have a “disparate impact” on individuals in protected class. The FEHC regulations use of “adverse impact,” is synonymous with the EEOC’s use of “disparate impact.”

### Applicant/Employee’s Proof

The regulations state that, while this is the applicant/employee’s duty to prove, they may achieve proof by the use of prior conviction information or other evidence to support this. The regulations also state that the proof of adverse impact may be obtained through showing a drastic discrepancy in state or national-level data. As there has been numerous counts and numerous cases where there is a direct relation to criminal history, employment, and protected categories, it would be relatively easy for an applicant/employee to provide proof.

As a counter offer or rebuttal, employers could counter by showing there can be a different outcome based on geographical location, the specific crime committed, or the specific job it pertains to.

### **Employer Rebuttal: Job-Related and Business Necessity**

After the employee proves that an adverse impact is present, then it is the responsibility of the employer to counter and prove that the use of the criminal history information is admissible on grounds that it is job-related and consistent with a business necessity. The best way for employers to show why the use of the criminal history information should be admissible, would be to focus on the following points:

- The nature and weight of the offense or conduct;
- The length of time between present and to which this crime or sentence was completed
- The job descriptions and environment to which is being applied for

When the employers are looking to prove it based on the job functionality, the regulations require employers to:

- Show that any “bright-line” conviction disqualification policy has “a direct and specific negative bearing on” an individual’s fitness for the specific position.
- Conduct an individualized assessment of the applicant/employee, at which time notice would be provided that the person has been screened out because of a criminal conviction. The individual then must be provided enough time to validate that the exclusion should not apply in that specific case. It is then the employer’s digression to consider whether this additional information is admissible.

In addition, the regulations state that regardless of whether the employer follows these two requirements, if the employer attains the criminal history information from a source other than the applicant, the employer must inform the applicant/employee of the disqualifying conviction and provide them an acceptable amount of time to prove the information is incorrect. If the applicant/employee is able to prove this, that information cannot be considered in the employment decision.

### **Employee/ Applicant’s Counter to The Employer’s Counter**

After all of the requirements are met by the employer, the employee/applicant can still make an FEHA claim if he or she can prove that there is a less discriminatory alternative, such as a smaller list of disqualifying convictions, that serves the employer’s legitimate goals as effectively as the current policy or practice.

## **New Regulations On Transgender Identity And Expression**

Effective July 1, 2017, the FEHC put in to place regulations related to transgender identity and expression. The proposed regulations cover equal access to restrooms and other similar facilities (i.e. locker rooms, dressing rooms and dormitories) and stresses that an employee has the right under the FEHA to use a restroom or locker room that corresponds to the employee’s gender identity or expression — regardless of the employee’s assigned sex at birth.

The regulations also include the following amendments:

- Employers are prohibited from requesting proof of an individual's sex, gender, gender identity or expression.
- Employer must honor an employee's request to be identified by a preferred gender, name or pronoun, including gender-neutral pronouns.
- Employers must accept and prohibit discrimination against the word "transitioning", as an expansion of existing gender expression, gender identity and transgender definitions.
- Employers must use gender-neutral language throughout the company, whether it be verbally or through documents, to prevent discrimination/harassment regardless of a person's sex.

Currently, the FEHA already has regulations in place to prohibit harassment and discrimination based on protected classes. Along with this California specifically has a law that protects people who identify as transgender, providing protections on the basis of both gender identity and gender expression — regardless of the person's assigned sex at birth. A branch off of this law, California has a law that protects an employee's right to appear or dress consistently with his/her gender identity or gender expression.

Another more recent law has been passed effective March 1, 2017, requires all single-user toilet facilities in any business establishment, place of public accommodation or government agency to be addressed as "all-gender" toilet facilities.

## **Conclusion**

The above noted regulations will come into effect on July 1, 2017. If your business is in California, McCloskey Partners, LLC recommends that you review your policies and onboarding procedures as well as the Employment Application. Contact McCloskey Partners, LLC today to discuss review of your employee handbook / updated employment application.

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