Background Checks in the Hiring Process: A Guide for California Nonprofits and Small Businesses

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This Guide does not constitute legal advice and is intended as an informational bulletin only. Legal requirements discussed herein are not comprehensive and will not be periodically updated. Please consult a qualified attorney to receive advice for your business or organization.

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Overview

In the hiring process, an employer typically seeks a candidate who is the best "fit" for a position, evaluating a candidate's skills, abilities, and personal characteristics in light of the job requirements. Employers often try to confirm the veracity of the information contained in the candidate's application materials and learned through the interview process. Beyond an assessment of a potential employee's qualifications and truthfulness, an employer should also attempt to ensure that the candidate does not pose a risk to other employees or to third parties. The challenge for the employer in addressing these important hiring goals is to make sure that any background check process accurately measures these qualities without unfairly discriminating against any applicant or otherwise breaching the law.

Employers are generally permitted to conduct some form of a background check on any potential employee, independent contractor, or volunteer.[1] The term "background check" does not have a technical legal definition, and its scope can range from a simple reference check to a credit review to a full blown criminal records investigation. What should be included will be different for each employer, and the process to obtain and review background information will need to be tailored to address the specific job description and any overriding contractual or specific legal requirements related to the particular position. For example, an insurer may contractually require history record checks as a condition of an employer's coverage for certain types of liability insurance. And for certain employment sectors, especially those in which employees must obtain a state license in order to practice, a background check including an individual's criminal records may be required by law.

Background checks are subject to a wide-ranging and frequently changing set of regulations that will be discussed throughout this Guide. An employer must ensure that a background check does not unfairly discriminate against any protected class under Title VII of the Civil Rights Act of 1964 and, if an outside agency is used to conduct the check, make sure that certain requirements are met both by the employer itself and the outside agency. In the state of California, outsourced background checks are governed by the Federal Credit Reporting Act, the California Investigative Consumer Reporting Agencies Act, the Fair Employment and Housing Act, and the California Consumer Reporting Agencies Act. In addition to the anti-discrimination provisions of Title VII, the employer should stay abreast of Equal Employment Opportunity Commission guidelines while ensuring compliance with the more stringent state regulation from the California Civil Rights Department, as well as all relevant Labor and Penal Code sections. Employers should also familiarize themselves with state and local "ban the box" legislation that has taken effect in recent years. Under these new laws, many employers are now prohibited from conducting background checks or making inquiries into conviction history until an applicant has received a conditional offer of employment. Clearly, there are many legal considerations to evaluate before determining whether to conduct a background check. A background check should not be conducted as a regular part of the hiring process until the employer is certain that all legal and regulatory requirements are (and will continue to be) satisfied**.**

Why Might an Employer Perform a Background Check?

Depending upon the particular background check process implemented by the employer, the check *may*:

- corroborate that potential employees with access to confidential information or in a position of power over other individuals (such as senior managers and/or personnel in the finance; human resources, and information technology) are trustworthy;

- identify whether potential employees harmed third parties while under previous employment and therefore could be said to have a "propensity for violence;"
- reduce the risk of a violent or unsafe workplace;
- provide the employer with reassurance that the individual can be trusted around vulnerable clients or other vulnerable third parties;
- corroborate that potential employees were truthful in their application materials and during interviews.

Many employers not required by law to conduct background checks decide to implement such procedures anyway in order to avoid potential legal liability related to "negligent hiring," discussed below.

Performing a background check may also have some drawbacks, however, in that it may:

- discourage individuals well suited to a particular position from applying because of an offense committed in the past;
- give "false positives" due to incorrect information or clerical errors; either through duplicate names or through unearthing of expunged records;
- give employers a false sense of security with regards to workplace safety;
- have a disparate impact on populations that have higher rates of involvement with the criminal justice system.

Timing of a Background Check

On occasion, background checks do take longer than expected. Since the background check process is often designed to ensure a potential employee does not pose a significant risk to the workplace, it is best to conduct any check **well before** the employee's start date so that both the employer and the employee have a meaningful opportunity to assess the result of the check. Allowing an employee to commence work before the employer has a full understanding of his or her background may put third parties in danger, and may put the employer at risk for negligent hiring. There can be other repercussions. If an employer decides to terminate the employment relationship after receipt of concerning information in a delayed background check report, an employee who may have left a prior position to start the new job may attempt to recover lost wages and any other costs associated with loss of the previous secure employment.[2]

A well-designed and well-executed background check process can eliminate some of these drawbacks. That being said, any employer that is not required by California law to perform a background check on potential employees should ensure that the advantages of implementing a background check process outweigh the disadvantages.

Negligent Hiring

In California, if an employer "…knows, or should know, facts which would warn a reasonable person that the employee presents an undue risk of harm to third persons in light of the particular work to be performed," then the employer is potentially liable for *negligence in the hiring or retention of an employee* if the acts of the employee result in harm to a third party while he or she is on the job or performing a job-related function.[3] A well-performed and well-tailored background check helps an employer understand

whether a potential employee could reasonably be considered to pose a threat to its other employees or third parties while engaged in a particular position. An employer's analysis of risk in light of the "particular work" is key. For example, unsupervised access to vulnerable populations, sensitive information, or valuable property potentially can present "undue risk of harm… *in light of the particular work to be performed*."[4] When the employee does not have such an unsupervised access, however, the risk of negligent hiring is minimized.

An employer may be liable for negligent hiring if the scope of its background investigation is not commensurate to the risks of harm. For example, in *Evan F. v. Hughson United Methodist Church*, a church was held liable for hiring a minister who subsequently molested children while on the job because of what the church should have known, based on information it could have accessed about the experiences of other parishes and employers that fired the minister because of suspicion of child molestation.[5] An employer should conduct a thorough reference check on job candidates to elicit additional information that may not be found by a background check administered by an outside agency. See *Request for References* for more information.

The federal Fourth Circuit Court of Appeals has held that an employer under a contractual obligation to perform a background check may be held liable under a negligent hiring cause of action when such a check is not performed and the employee subsequently harms third parties.[6] The federal Ninth Circuit Court of Appeals and the California courts have yet to hold a California employer liable under a negligent hiring cause of action based specifically on failing to perform a criminal background check, however a California court has found a duty to require and conduct criminal background checks on its employees and volunteers in specific situations, and there are potential claims for negligence when such background checks are not conducted.[7]

Sectors that Require Background Checks

Employers in service sectors that require a professional or occupational license, that contract with government entities, or whose employees may come into contact with vulnerable populations are often required to make their prospective and current employees available for a specific background check process—usually conducted via an electronic fingerprinting ("Live Scan") through the California Department of Justice.[8] It is rare that such employers would also be required to perform a separate background check in addition to the one performed by the licensing agency or the government entity. An example of such an exception is for positions in an FDIC-insured depository institution, such as a bank.[9]

In California, there are over forty licensing agencies regulating more than 100 occupational licenses, each with a separate set of requirements. Many of the regulations governing these licenses are found in the Business and Professions Code. Under the Code, the denial of a license based on a background check typically must be grounded on a finding that the crime or act that was the reason for the denial "is substantially related to the qualifications, functions, or duties of the business or profession which application is made."[10] However, the type of act or crime that is substantially related to a job function varies significantly by profession. For example, information obtained in a credit check may be cause for denial of a license in the financial services sector, but it could be illegal to even perform a credit check for applicants in other sectors.

See **Appendix A** for regulations applicable to many of the sectors requiring background checks encountered by clients of Public Counsel. The list is not exhaustive. Employers in health and human services fields or that provide services to children or the elderly should be especially vigilant, and should check these and other state and federal regulations for background check requirements. All employers should stay abreast of the regulations for the sector in which they operate, and should check with an employment attorney to make sure that they are in compliance.

Background Checks Required by Contract

In addition to legally required background checks, some employers may be contractually obligated to perform background checks. For example, an insurer may require criminal history record checks as a condition of coverage for sexual molestation liability insurance. If an employer fails to conduct the record checks, the insurer would be able to deny molestation claims because the organization failed in its contractual obligations. Another contractual requirement may be in the usage agreement for certain kinds of facilities. For example, a sports program using a municipal park may be required by the municipality to conduct background checks of the coaches as a condition of use for the park.

Design and Implementation of Background Checks

Whether an employer contracts with an outside agency to conduct a background check or conducts the process in-house, the employer should be aware of the regulatory landscape.

Background Checks through an Outside Agency

Many employers choose to outsource the background check process to independent agencies. In California, a company or agency engaged in performing background or credit checks for employers must comply with the Federal Credit Reporting Act ("FCRA"), the California Consumer Credit Reporting Agencies Act ("CCRAA"), and the California Investigative Consumer Reporting Agencies Act ("ICRAA"). The statutes refer to these companies as "consumer reporting agencies,"[11] consumer credit reporting agencies,"[12] and "investigative consumer reporting agencies."[13] For simplicity, this Guide will refer to a company engaged in these activities as a "consumer reporting agency."

For employers not well versed in conducting background investigations, it is often cost-effective to employ a consumer reporting agency when evaluating new employees for hire. But employers should not assume that all consumer reporting agencies are in compliance with all relevant laws or regulations. An employer must be very careful in selecting a consumer reporting agency; low-cost agencies may cut corners or insufficiently filter results. Be wary if a consumer reporting agency claims it can provide background check information immediately, or if the check is free or at a bargain rate. Also, carefully examine the procedure involved in any "adjudication" services offered by consumer reporting agencies that promise to screen applicants for the employer. Such an adjudication has been held to be an "adverse action" that triggers the statutory duty to provide a pre-adverse action notice to the prospective employee, thereby allowing the employee time to respond to any negative information collected in the screening process before an employment decision is made. Failure to properly notify the prospective employee can result in a claim for damages.[14] Finally, be aware of the cost-cutting industry practice that relies disproportionately on outdated

databases. A good consumer reporting agency always confirms a database "hit" with an in-person check at the source.

If an employer chooses to use an outside agency, it is best to thoroughly investigate the agency and to solicit recommendations from trusted sources before engaging its services.

Discriminatory Practices

In designing a background check, an employer should make certain that information solicited in a background check does not raise red flags under state and federal anti-discrimination law. The Equal Employment Opportunity Commission ("EEOC") is responsible for enforcing federal law that makes it illegal to discriminate against a candidate (or employee) based on race, color, religion, sex, national origin, age, disability, or genetic information.[23] Title VII of the Civil Rights Act of 1964 prohibits failing, refusing to hire, or otherwise discriminating against any individual because of race, color, religion, sex, or national origin, and the Americans with Disabilities Act ("ADA") covers discrimination based on disability.[24] Under *Griggs v. Duke Power Co.,* hiring requirements must "bear a demonstrable relationship to successful performance of the job[]."[25] This is often referred to as the "business necessity test" under federal and state law. Pre-employment inquiries, including background checks, that go beyond seeking information related to the candidate's ability to perform job and job-related functions may expose the employer to liability (included when such activities are conducted through an automated decision system or AI). While simple knowledge of a candidate's protected characteristics does not trigger liability, if the employer solicits information on these characteristics, an employer may expose itself to a lawsuit from a candidate who believes that these characteristics were used to make a hiring decision.[26]

In California, under the Fair Employment and Housing Act ("FEHA") [27] and implementing regulations, an employer may demonstrate that a policy passes the business necessity test if there is "an overriding legitimate business purpose such that the practice is necessary to the safe and efficient operation of the business and . . . effectively fulfills the business purpose it is supposed to serve" and if there is no "alternative practice that would accomplish the business purpose equally well with a lesser discriminatory impact."[28]

Unless an employer is specifically required to collect the following information by law, if a report from a consumer reporting agency contains any of the following information, an employer should not use the data as the basis for an employment decision:

- Bankruptcies more than ten years old;[15]
- Lawsuits and judgments more than seven years old;[16]
- Unsatisfied judgments more than seven years old;[17]
- Unlawful detainer actions where the defendant was the prevailing party or the action was resolved by settlement;[18]
- Paid tax liens more than seven years old;[19]
- Accounts placed for collection or charged to profit and loss that are more than seven years old;[20]
- Any conviction records more than seven years old from the date of last release from incarceration or, if the person was not incarcerated, from the date of conviction. (These items should not be reported at all if a pardon is subsequently granted or the conviction was later dismissed or "expunged);[21] or
- Any other adverse item of information that antedates the report by more than seven years.[22]

Under both California and federal law, *anti-discrimination* regulations apply only to candidates for employment, and not to independent contractors or volunteers. (Though not the subject of this Guide, note that *anti-harassment* regulations specifically apply to independent contractors and volunteer interns as well as employees.) Unlike federal regulations which generally limit the EEOC's reach to employers with fifteen or more employees, [29] in California, the Civil Rights Department ("CRD") may generally prosecute employers with five or more employees[30] In addition, California expands upon the federal regulation in several substantive areas and prohibits employment discrimination based on:

TIP: As a general rule, avoid inquiries into an individual's race, religion, national origin, sex, age, disability status, medical condition, veteran status, financial situation, status as a rehabilitated drug or alcohol user, family status, sexual orientation, or other protected characteristics. In addition, avoid adopting policies that disproportionately disadvantage a candidate based on any of those or other protected characteristics.

Sexual Orientation. An employer may not discriminate against an individual on the basis of actual or perceived sexual orientation,[31] where sexual orientation is defined as: "heterosexuality, homosexuality and bisexuality."[32]

Financial Circumstances. While an individual's financial status does not automatically trigger anti-discrimination laws, discrimination based on financial circumstances may have an adverse impact on a protected group. In *Johnson v. Pike Corporation of America.*, for example, the court found that discharging an employee solely because his wages had been garnished was illegal discrimination since wage garnishment affects minorities substantially more than others and the policy was not justified as a business necessity.[33]

Rehabilitated Drug and Alcohol Users. An employer may not discriminate against applicants who are:

- participating in a supervised rehabilitation program and no longer engage in drug or alcohol use;
- successfully rehabilitated from past drug use and no longer engage in such use; or
- erroneously regarded as someone who is engaged in illegal drug use.[34]

An employer may, however, refuse to hire an applicant who currently uses drugs or alcohol in such a way that makes the candidate unable to perform job duties, or would endanger his or her health or safety or the health or safety of other employees or third parties.[35]

Medical Condition and Disability. The federal ADA prohibits an employer from discriminating against a candidate based on disability.[36] In California, FEHA expands upon the ADA and prohibits discrimination based on disability as well as medical condition or genetic characteristics.[37] FEHA prevents an employer from requiring job applicants to submit to a medical or psychological examination and from investigating whether a candidate has any mental or physical disability.[38] After an employer extends an offer, the employer may ask the applicant to submit to a medical exam or laboratory test (which may include drug testing) only if the test specifically relates to job requirements and all employees entering in similar positions are subject to the same type of examination.[39] A test to detect the illegal use of drugs is not considered a "medical examination" and therefore does not violate the prohibition against pre-employment medical exams or inquiries.[40]

Additionally, the ICRAA prohibits a consumer reporting agency from furnishing a report to an employer that contains any medical information on the candidate unless it first obtains the candidate's consent.[41]

Marital Status. In California, an employer may not inquire about the marital status of an applicant unless the inquiry concerns:

- a bona fide occupational qualification;
- business necessity (for example, in order to investigate past work history, asking a candidate if he or she has ever used a different name);
- job relatedness;
- conformance to applicable security regulations; or
- conformance to a nondiscrimination or affirmative action plan.[42]

Pregnancy. In California, discrimination related to a person's sex, including discrimination based on pregnancy, childbirth, and/or medical conditions related to pregnancy or childbirth, is also covered under FEHA.[43] In general, an employer may not refuse to hire a female applicant who is or may become pregnant.[44] Only if the employer can demonstrate that an individual who is or may become pregnant would be unable to safely and efficiently perform job duties can this be the basis of a legal refusal.[45]

In-House Background Checks

As a result of the extensive and complex regulatory environment surrounding background checks, many employers choose not to attempt to perform a background check in-house. Those who do should be aware that certain global provisions of ICRAA apply if an employer conducts a background check in-house through employees, managers, or human resources professionals. Under the ICRAA, the term "investigative consumer report" covers any report by which an employer learns information related to an individual's "character, general reputation, personal characteristics, or mode of living . . . obtained *through any means*."[46] Cal. Civ. Code section 1786.53(b) specifically addresses in-house checks and mandates that an employer must:

- provide a copy of any public record, in written or oral form, documenting an arrest, indictment, conviction, civil action, tax lien, or outstanding judgment obtained during the search to the potential employee within seven days of receipt of the information if the candidate did not waive his/her rights;

- provide the opportunity for the job candidate to check a box waiving his/her rights to receive a copy of a public record described above obtained during the search; and

- provide a copy of the public record to the candidate, regardless of whether the candidate waived his/her rights, if the employer takes any adverse action as a result of information learned during the search.

If any applicable provisions are not followed, an employer conducting an in-house background search faces the same penalties as an outside consumer reporting agency, or an employer that uses an outside agency.[47] An employer that conducts background checks in-house should assume that the regulations relating to outside agencies as discussed in this Guide are applicable to it unless otherwise specified, and should pay particular attention to anti-discrimination statutes and case law. Employers conducting in-house background checks should also take note of new requirements regarding use of conviction history during the hiring process (*see* "Ban the Box" and "Adverse Action" sections below.)

Social Media

An individual's social media activity can expose character flaws and/or bad judgment that may make the candidate less suitable for a given position. Many employers who employ a consumer reporting agency to investigate a job candidate's background consider conducting a background check on a candidate's social media presence in-house. However, as with other in-house background check investigations, an employer runs a significant risk of uncovering protected information about a candidate, such as race, religion, or national origin that is not present on other parts of the candidate's employment application. As a result, an employer may be liable for discrimination if a court finds that protected information uncovered in a social media search influenced the employment decision.[48]

In addition to anti-discrimination regulations in Title VII and in the California Labor Code, an employer should be aware that Section 7 of the National Labor Relations Act ("NLRA")[49] prohibits discrimination based on certain types of activities related to an individual's working conditions. Under the NLRA, discussions of wages, hours, or other working conditions, even in an online forum, may constitute "protected concerted activity."[50] An employer may not discriminate against a current or future employee based upon this activity.

Though state and federal law have not yet caught up with cyber-search practice, this is a burgeoning area of legislation, and employers should exercise caution in conducting social media searches.[51] California, for example, has enacted a measure that prohibits an employer from asking an employee to provide log-in information for his or her social media account and from requiring an applicant to access a personal social media account in the presence of the employer.[52] One employment law practitioner has developed a set of best practices to help an employer design and implement a background check performed through social media:

- ***Search only the content available to the public about the candidate on the Internet.*** A search of social media should only include information available through public searches. If another employee is linked to the candidate through a social media account, the employer should not attempt to view the candidate's profile or postings through a more private "friend" status.

- ***Separate the social media researcher from the decision-maker or hiring manager.*** The employer should designate a person, preferably in the human resources department, to perform social media searches and should edit out any content provided to the decision-maker or hiring manager that references a protected status or protected activity.

- ***Design a uniform searching policy.*** The employer should ensure that all social media content searches are done uniformly for all candidates, and include the same websites and searching parameters.

- ***Notify the candidate of the employer's intent to perform a background check through publicly available social media*** (which affords the candidate the opportunity to point out any inaccuracies or duplicate identities that may exist in social media).

- ***Restrict a social media search to after the initial interview.***

- ***Comply with the terms of service of each social media site, blog, or other Internet site.***

- ***Document the legitimate, nondiscriminatory reasons for the hiring decision*** (and provide training to hiring professionals – including recruiters, hiring managers, executives, and human resource professionals – in the company's social media research practices).

- ***Never ask the candidate to provide log-in credentials*.** "Behind the shoulder" log-ins, where an employer requires a candidate to log in to an account so that information can been seen during an interview, should not be permitted.[53]

Though they do not necessarily guarantee a safe harbor, these guidelines may provide a baseline of permissible social media background check activity that complies with existing law. To minimize risk of liability, an employer should follow the best practices listed above, stay abreast of the law, and consult with a qualified employment attorney.

Notice

An employer is generally required to notify a candidate prior to conducting a background check. Under the FCRA and ICRAA, notice is required whether the employer uses an outside agency to conduct the check or performs the check in-house (see In-House Background Checks for more information). The notices cannot be combined with other documents—or with each other.[54]

If an employer uses a consumer reporting agency to compile background information, the employer must provide the job candidate with notice at any time before the report is procured that:

- is made in a separate document that consists solely of disclosure of the background check consumer report. (It cannot appear as part of the job application form, and it cannot contain any other information, such as release of liability or other extraneous information about ADA or Title VII, except for a simple authorization to obtain a consumer report.);

- is clear, conspicuous, and made *in writing;*

- states that the report will be obtained for employment purposes;

- states the permissible purpose of the report (*i.e.,* "in connection with your application for employment");

- states that the disclosure may include information about the applicant's character, general reputation, personal characteristics, and mode of living;

- identifies and gives the name, address, telephone number, and web address of the screening company;

- states the nature and scope of the information requested; and

- includes a check box to indicate whether the candidate would like to receive a copy of the report. (If so, the report should be sent within three business days of completion of the report.)[55]

In addition to candidate notification, the employer must provide a certification to the consumer reporting agency verifying that it is in full legal compliance with all applicable regulations. All records should be preserved for one year after the records were made or from the date personnel action was taken, whichever is later. If an applicant files a complaint alleging employment discrimination, the employer must keep the record until the completion of the suit. The employer may dispose of the records after these time limits are up, but must do so securely.[56]

The CCRAA, the California law governing the use of credit checks, also contains notice requirements that apply when credit checks are used for employment purposes. Specifically, employers must:

- provide written notice to the candidate that a credit report is being used, and specify the basis under Labor Code section 1024.5 for which the report is being used;
- inform the candidate of the source of the report;
- provide the opportunity for the candidate to receive a copy of the credit report; and
- if the employer uses information in the credit report to take an adverse action against the candidate, the employer must provide the name, address, and telephone number of the outside agency making the report.[57]

Criminal Record Checks

Background checks concerning arrests and convictions are governed by Title VII, California labor laws, and state and local ban the box laws such as the California Fair Chance Act, requiring that background checks be performed only after a conditional offer to an applicant has been made.[58] Criminal history can be obtained from court records, law enforcement and corrections agency records, registries or watch lists, state criminal record repositories, and the interstate identification index, which is the database maintained by the Federal Bureau of Investigation ("FBI") that includes a record of crimes committed nationally.[59] The FBI database may be accessed by employers that are regulated by the federal government, including the banking, nursing home, securities, nuclear, private security, and transportation sectors, and by certain industries that the state typically seeks to regulate.[60] However, in order to perform a search through the FBI database, an employer must meet certain requirements, discussed below.

Specifically, in California, the California Department of Justice also processes State of California and FBI finger-based background checks through Live Scan, at a rate of approximately 2 million state-level and 1.2 million federal-level background checks annually.[61] The sheriff, police and probation departments, district attorney offices, and courts submit arrest and prosecution records for individuals, and this information is disseminated and used for law enforcement and regulatory (employment and licensing) purposes. Since it is based on fingerprint submissions, the person's unique identity can be confirmed, and the records are thus more accurate.[62]

Title VII Considerations

In using information obtained from a criminal background check to exclude a candidate from employment, an employer must be careful that its policies and practices are not discriminatory. Because arrest and incarceration rates for African American and Hispanic men are two to three times higher than for the general population,[63] even a policy that is neutral on its face may have a discriminatory impact. Note that Title VII

measures the prohibited discriminatory impact on the pool of all available workers, not on the existing workforce. It is no defense to say that the existing workforce is racially diverse if, absent the policy, the workforce would have contained even more members of a protected group.[64] As a result, any and all exclusions based on an individual's criminal history must be related to the individual's ability to perform job and job-related functions. Like other types of discrimination, discrimination based on criminal history must be "job related and consistent with business necessity."[65]

The EEOC publishes a set of best practices to aid employers in instituting policies that do not disproportionately discriminate against minorities through criminal record checks. See **Appendix D** for a list of best practices that will aid an employer in designing guidelines for criminal history background checks.

State and Local Fair Chance Laws

"Fair Chance Laws" prohibit employers from asking applicants about their conviction history until making a conditional employment offer. These laws, which are also known as "ban the box" laws," grew out of a desire to aid rehabilitated ex-offenders in finding suitable work. Many formerly incarcerated individuals face significant barriers to employment despite federal and state laws that prohibit unfair discrimination based on criminal convictions. The employer practice of inserting a checkbox that requires candidates to acknowledge any criminal past in an initial application often automatically screens out ex-offenders who otherwise may be qualified and rehabilitated. Pushing the check to later in the hiring process allows candidates the opportunity to prove their suitability for the job.

California Fair Chance Act

- When Does It Apply?

The California Fair Chance Act prohibits public or private employers with five or more employees from asking applicants in writing or orally about their conviction history until a conditional offer of employment has been made, unless the law requires criminal background checks for the position sought.[66] As of October 1, 2023, this prohibition applies both to prospective employees and current employees in decisions relating to promotion, training, discipline, layoff, or termination.[67] It also applies when existing employees are subject to a review of their criminal history in the case of a change of company ownership or policy.[68] Employers may not, *at any time*, consider or disseminate information about: (a) an arrest which did not result in conviction (with specific exceptions for certain health facility employers); (b) referral to or participation in a pretrial or post trial diversion program; or (c) convictions that were expunged or sealed.[69] After a conditional offer is made, an employer may inquire into conviction history and conduct a background check.[70]

The laws and regulations further prohibit most employers from including statements in job advertisements and announcements that individuals with criminal backgrounds will not be considered for hiring. Further, if an employer violates the prohibition on inquiring into criminal history, it may not use the applicant's failure to disclose criminal history prior to the conditional offer as a factor in subsequent employment decisions, including denial of the conditionally offered position.[71]

- Individualized Assessment

If a background check reveals a criminal conviction, and the employer intends to deny the applicant the position at least in part because of any conviction, the employer must complete an individualized assessment to determine whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that would justify denying the applicant the position.[72] Factors to be considered in determining whether the conviction justifies denial of employment include the nature and gravity of the conduct (including the personal conduct, the nature, degree, and permanence of harm, the context, whether disability, trauma, domestic violence, sexual assault, human trafficking, duress, or other factors contributed to the offense or conduct, and the age of the applicant when the conduct occurred)[73], the time passed since conviction, and the nature of the job position (including the duties of the job, whether the context in which the conviction occurred and the type or degree of harm is likely to arise in the workplace). The employer must consider any evidence of rehabilitation or mitigating circumstances voluntarily provided by the applicant or another at the applicant's request.[74] The assessment need not be in writing.[75]

- Preliminary Decision, Notification, Reassessment

The employer must notify the applicant in writing if it determines that the applicant's conviction history disqualifies them from the conditionally offered employment. The written notice may but is not required to justify or explain the decision. The notice must include: notice of the disqualifying conviction that is the basis for rescinding the offer; a copy of the conviction history report that was used; notice of the applicant's right to respond before the rescission is final; and an explanation that should the applicant choose to respond, they may submit evidence challenging the accuracy of the conviction history report and/or evidence of rehabilitation and mitigating circumstances.[76] The employer must give the applicant at least five days to respond. The employer must then conduct a reassessment based on the information submitted by the applicant. If the employer makes a final decision to rescind the conditional offer, the employer must notify the applicant in writing. The notice must include information on any procedure the employer has for challenging the decision and the right to contest the decision with the California Civil Rights Department.

<u>Local Fair Chance Laws</u>

In addition to state law, employers should note that local ban the box laws in Los Angeles and San Diego counties and in cities such as Los Angeles and San Francisco may impose additional requirements beyond those found in the California law. Since 2017, employers with ten or more private sector employees in the City of Los Angeles have been prohibited from asking about an applicant's criminal history before a conditional offer of employment is made. However, the Los Angeles city ordinance differs from the statewide law in that an employer is not permitted to withdraw the conditional offer or refuse to hire the potential employee unless the employer *performs a written assessment* that links the specific aspects of the applicant's criminal history with the risks inherent in the duties of the position. The employer must also provide the applicant with a "Fair Chance Process," i.e., an opportunity to provide information or documentation regarding the accuracy of the criminal history report relied upon or additional factors to be considered in the assessment, such as evidence of rehabilitation. Failure to comply with the ordinance may result in a monetary penalty. An employee or job applicant may also bring a lawsuit against an employer who violates the ordinance. Similar to the state law, the City of Los Angeles's prohibition on inquiring about conviction history prior to a conditional offer does not apply where the employer is legally required to obtain information regarding convictions, an individual convicted of a crime is legally prohibited from

holding the position (even if the conviction has been expunged or sealed), or the employer is legally prohibited from hiring someone convicted of a crime.[77] However, unlike the California ban the box law, the City of Los Angeles prohibition also expressly states that it does not apply to applicants who are required to possess or use a firearm in the course of his or her employment.[78] San Francisco's local private sector ordinance also applies additional restrictions in respect to the California ban the box law, including the requirement that employers shall post a notice of its compliance with the ordinance at every workplace, job site, or other location under the employers' control frequently visited by their employees or applicants.[79]

Similarly, Los Angeles and San Diego counties have also enacted their own local fair chance ordinances in addition to California's Fair Chance Act. Notably, both Los Angeles and San Diego counties mandate that employers conduct individualized *assessments in writing* of a potential employee's or current employees' criminal history before rescinding a job offer or taking adverse action.[80] San Diego county further imposes a restriction on filling an open position during the five-business-day response period following a job offer revocation.[81] In addition, the County of Los Angeles requires that employers post a notice informing applicants of the provisions of its ordinance in a conspicuous place at every workplace, job site or other location in the City under the employer's control and visited by applicants.[82]

Non-conviction records

Arrests are not proof of criminal conduct. In general, an employer may not use the mere fact of arrest to exclude a candidate from employment and is prohibited from making any inquiry about arrest records of an applicant or employee.[83] One exception is that the California Fair Chance Act does not consider "conviction history" to include "an arrest for which an individual is out on bail or his or her own recognizance pending trial."[84] Consumer reporting agencies generally may not report records of arrests that occurred more than seven years prior to the report, or records of arrest less than seven years old unless the criminal case following the arrest is still on-going in court.[85]

In some circumstances, an employer may be justified in excluding a candidate from employment based not on the arrest itself, but on the behavior that underlay the arrest. In this circumstance, a fact-based analysis must be conducted. As noted above, under Title VII, an employer will not be liable for discrimination against an excluded candidate if the concerning conduct that caused the arrest was job-related and consistent with business necessity.[86]

The California Labor Code prohibits employers from asking a candidate to disclose arrests or detentions that did not result in a conviction or a referral to or participation in a pretrial or post-trial diversion programs (a program for low-level offences that does not entail jail time). The Code also prohibits employers from asking candidates about criminal records that have been expunged, sealed, or dismissed.[87] Employers may make these inquiries only if they are otherwise required by law to ask and only for the offenses specifically described in the law.[88]

Convictions

Unlike an arrest, a conviction will serve as sufficient evidence that a person engaged in a particular course of conduct, and evidence of a conviction may be used to exclude a candidate for employment if the exclusion meets certain criteria. When an employer chooses to exclude a candidate from employment, the exclusion must still be evaluated through the business necessity test. In weighing whether a candidate with a conviction for a particular crime should be excluded from employment an employer should consider:

- the nature and gravity of the offense or conduct;
- the time that has passed since the offence or conduct and/or completion of the sentence; and
- the nature of the job held or sought.[89]

An employer policy to exclude job candidates who have received certain types of convictions should still provide for an individualized assessment of a candidate.[90] The individualized assessment must provide for notification to the candidate that he or she has been screened out because of a criminal conviction, allow the candidate an opportunity to demonstrate that the exclusion should not be applied, and entail consideration by the employer as to whether the additional information warrants an exception to the policy.[91] For certain convictions in California it may be possible for the candidate to get a court order called a Certificate of Rehabilitation.[92] The Certificate does not expunge the criminal record, but evinces a judicial finding of rehabilitation. Therefore, denying employment to an individual with the Certificate solely on the basis of his or her criminal history will likely be found not to be justified by business necessity. Some licensing agencies are prohibited from denying a license solely on the basis of convictions for which a person has obtained such a Certificate.[93]

Court-Ordered Volunteers

Alternative sentencing often allows an offender to perform community service in lieu of jail time. A nonprofit may accept these court-mandated volunteers, who can provide a valuable source of labor. However, this sort of labor may pose risks. In accepting court-ordered volunteers, the nonprofit should maintain a background check process consistent with the type of checks required for employees and other volunteers, particularly if the nonprofit works with vulnerable populations.[94]

California and Federal Criminal Convictions Records

Certain governmental and private organizations, including nonprofits, may conduct criminal offender record information background checks by requiring job candidates to submit fingerprints to the California Department of Justice. This is especially important for organizations that must determine the suitability of an individual for employment or volunteer position working with children, the elderly, or the disabled.[95]

To obtain authorization to submit requests for fingerprint background reports, an agency must:

- be designated by statute as an employer entitled to conduct a fingerprint-based criminal record check (see civil codes that regulate the sector of your organization to determine eligibility);
- submit appropriate authorization request forms;
- determine whether your organization should request notifications of any arrest subsequent to the candidate being hired; and
- wait for authorization to be approved.[96]

Once this process is complete, the employer may send job applicants to be fingerprinted in order to receive California criminal records.

To request a national criminal background check, the employer should obtain an "Identity History Summary" from the FBI.[97] Some sectors, especially those that require a license to operate or that deal with vulnerable populations, may be required to obtain criminal records from the FBI.

Sex Offenders

In California, registered sex offenders may be found through a search of the California Megan's Law website (http://www.meganslaw.ca.gov). However, an employer may only use information from the Megan's Law website to make employment decisions in order to "protect a person at risk."[98] Because consumer reporting agencies obtain information about an applicant's registration as a sex offender from the Megan's Law website, an employer who relies on a commercial background check report is also subject to the law and must be careful not to deny employment based on the registration status unless it can clearly identify "a person at risk" from the specific harm posed by the underlying criminal conduct.

Employment Protections for Cannabis Use
Beginning January 1, 2024, employers may not discriminate against a person in connection with hiring, termination, or another employment decision if the discrimination is based upon the person's use of cannabis off the job and away from the workplace or an employer-required drug screening that that has found the person to have nonpsychoactive cannabis metabolites in their hair, blood, urine, or other bodily fluids. This prohibition does not apply to the following: employees in the building and construction trades, positions that require a federal government background investigation or security clearance in accordance with Department of Defense regulations (or equivalent regulations applicable to other agencies), and individuals required to be tested under state and federal laws as a condition of an employer receiving federal funding or federal-licensing benefits or entering into a federal contract.[99]

Credit Checks

A credit check investigates a consumer's credit and financial history. Numerous agencies, such as Experian, TransUnion, or Equifax, provide credit check services. In California, credit background checks are governed by the CCRAA and California Labor Code. Generally, an employer may not perform a credit check on a potential employee in California. The Labor Code provides an exception for individuals whose positions would involve control of funds or managerial authority. These positions include:

- managerial positions;
- positions in the California Department of Justice;
- sworn peace officers or other law enforcement positions;
- positions for which information contained in the report is required by law to be disclosed or obtained;

- positions that involve regular access (for any purpose other than the routine solicitation and processing of credit card application in a retail establishment) to bank or credit card account information, social security numbers, or date of birth;

- positions in which the employee is a named signatory on the bank or credit card account of the employer;

- positions in which the employee is authorized to transfer money on behalf of the employer;

- positions in which the employee has authorization to enter into financial contracts on behalf of the employer;

- positions that involve access to confidential or proprietary information;

- positions that involve regular access to cash totaling ten thousand dollars ($10,000) or more of the employer, a customer, or a client during the workday.[100]

Negative credit information will appear on credit reports for seven years and bankruptcies will appear for ten years.[101] Information that exceeds these limitations should not appear on a background check.

Request for References

A request for references is standard business practice when evaluating a prospective employee. An employer may both request references for a candidate and provide references for former employees. However, employers should be careful in the type of information they request and/or provide.[102] It may be difficult to obtain meaningful references from former employers who are afraid of disgruntled job seeker defamation or other legal claims. In conducting a reference check, an employer should seek a potential employee's written permission to speak with former co-workers and maintain confidentiality in disseminating information obtained during a reference call.

In asking former employers to provide a reference for a potential employee, be aware that the former employer may not be totally candid if worried about potential legal liability arising from a negative reference. In California, employers enjoy a qualified privilege if they act without malice when providing a reference, and may provide information, even if negative, about job performance, qualifications, and eligibility for rehire.[103] **A former employer could, however, risk liability for not providing certain information**, if the negative reference would prevent the potential employer from engaging a potentially dangerous employee. An employer should seek to discover as much information as it can from a former employer and may remind the former employer that information about the candidate, even if negative, is privileged so long as the information is not malicious in nature.[104] (Note that the privilege does not extend to statements about an employee's constitutionally protected speech or activities, or statements about an employee's union or other concerted activities.).[105]

Workers' Compensation

Employers in California may not discriminate against employees who have been injured during the course of their employment; it can be argued that this also applies to job candidates (and of course, employers may not discriminate against candidates on the basis of disability).[106] Because workers' compensation records contain medical information, an employer should follow the guidelines for medical information discussed above under Discriminatory Practices. Under the FCRA, a consumer reporting agency may not provide an employer with any medical information (including information on the individual's physical, mental, or behavioral health or information on the provision of or payment for health care) unless the candidate provides consent and the information obtained is relevant to the job requirements.[107]

In California, as with other medically-related inquiries, employers may only ask for and access information about an individual's physical or mental conditions or health after a job offer has been made[108] and may not rescind the offer based on information in medical or psychological examination unless the candidate could not perform the essential functions of the job with or without reasonable accommodation.[109]

Adverse Action

If the results of a background check cause an employer to take an adverse action against an applicant, both state and federal law may require the employer to follow subsequent procedures. Under the FCRA, before an employer decides to deny employment or make a decision that can adversely affect the applicant based on information obtained from a company in the business of compiling background checks, the applicant must have a meaningful opportunity to contest the accuracy of the information.[110] Specifically, before taking an adverse action, the employer must provide:

- advance notice of the adverse action to the applicant;
- a copy of the consumer report on which the adverse action was based;
- a statement that the applicant has the right to dispute the accuracy of the report;
- a written description of the applicant's rights under the FCRA.[111]

The applicant must receive a copy of the report regardless of whether the applicant waived the right to the record. Note that the FCRA applies to *all* consumer reports obtained for purposes of a background check, and is not limited to those in which an applicant's conviction history is raised. Additionally, the courts have not identified a precise number of days the employer must wait before making the adverse decision, although one court, citing the legislative history, noted that a reasonable period for an employee to respond is not required to exceed five business days.[112]

See above for discussion of state and local fair chance laws.

As discussed earlier, state law also requires that an employer conducting an in-house background check to provide the job applicant a copy of the public record documenting an arrest, indictment, conviction, civil judicial action, tax lien, or outstanding judgment, if the employer takes an adverse action based on the public record. Because a background check may include inaccuracies, it is important to allow applicants

adequate opportunity to dispute or explain any findings. Moreover, even if the background check yields accurate information, regulations may require the employer to take individual facts and circumstances into account after making an initial adverse decision. See discussion of Title VII Considerations for more details.

Conclusion

If carefully planned and used as one of many tools in a comprehensive hiring practice, a background check aids an employer in maintaining a safe work environment and helps an employer mitigate liability. In some sectors, a background check may be required by law. However, in conducting a background check an employer must comply with wide-ranging and ever-changing regulation. This Guide is not exhaustive, nor can it be due to ongoing advocacy, new and proposed laws and regulations, and active litigation. An employer should be careful to comply with the regulations discussed here and should ensure that any other sector-specific requirements are met. It is generally best to employ a reputable and experienced outside agency to conduct the search, and it is often advisable to consult a qualified employment law attorney annually in order to design the parameters of a background screen that best meets the requirements for a particular position and to ensure that the existing policy and practice does not violate changing laws.

Appendix A: Sectors Requiring Background Checks

Sector	Governing Law	Key Provisions
Child Daycare or Family Child Care Home	Cal. Health & Safety Code § 1596.871 22 Cal. Code Regs. § 101216(g-i) 22 Cal. Code Regs. § 101170 22 Cal. Code Regs. § 102370 22 Cal. Code Regs. § 101217(a)(11-14)	• Criminal check required for applicants for licenses to operate and manage a facility, adults responsible for administration or direct supervision of staff, any person who provides care and supervision to the children, any staff person, employee or volunteer who has contact with the children, any person designated as responsible for the operation (whether or not part of a local educational agency), and/or officers on the board of the license applicant • Unless approved for an exemption, applicants for licenses, permits or certificates of approval who have been convicted of a crime other than a minor traffic violation will be denied • Health screening required for all personnel, licensees, administrators and volunteers • For exclusions from these requirements, see 22 Cal. Code Regs. §§ 102370(b) and 101170(b)
Residential Care Facilities for the Elderly	Cal. Health & Safety Code § 1569.17 22 Cal. Code Regs. § 87355 22 Cal. Code Regs. § 87356	• Fingerprints and criminal background checks required for any applicant for a license to operate or manage a facility, any person responsible for the administration or direct supervision of staff, any person other than a client residing in the facility, any person who provides assistance in dressing, grooming, bathing or personal hygiene, any staff person, volunteer or employee who has contact with clients, anyone in an executive position of an organization serving the elderly and anyone on the governing body of such an organization who has a financial interest in the license applicant • For exclusions, see Cal. Health & Safety Code § 1569.17(b)(2)

Entities providing services to a school district	Cal. Educ. Code § 45125.1	• Employees of any entity engaged in: janitorial; administrative; grounds & maintenance; pupil transportation; or food-related services who have contact with pupils are required to submit fingerprints for a criminal background check
Psychiatric Health Facilities	Cal. Welf. & Inst. Code § 5405	• Any administrator, manager, program director, or fiscal officer of the facility, any "direct care staff," (including employees, contractors, or volunteers who have contact with clients while providing services) and any direct service contractors must submit fingerprints for a criminal background check
Public Schools & Charter Schools	Cal. Educ. Code § 44830.1 Cal. Educ. Code § 45125 Cal. Educ. Code § 45125.01	• A school district may not hire any person requiring certification (including teaching and supervisory staff) convicted of a violent or serious felony • Non-certified personnel for full-time, part-time, or substitute employment and volunteers (paid and unpaid) must submit fingerprints for a criminal record check
Private Schools	Cal. Educ. Code § 44237 Cal. Educ. Code § 44020	• Each applicant for a position requiring contact with pupils in an organization offering or conducting private school instruction on the elementary or high school level must submit fingerprints for a criminal record check • An applicant convicted of a serious or violent crime or an applicant who would be prohibited from public school employment may not be employed by a private school • The school is required to notify parents in writing if an individual convicted of a sex offense is hired
Youth Service Organization	Cal. Bus. & Prof Code § 18975	• Administrator, employee, or regular volunteer of youth service organization shall undergo a background check to

		identify and exclude any persons with a history of child abuse • A youth service organization is an organization that employs or utilizes the services of persons who, due to their relationship with the organization, are mandated reporters.

Appendix B: Questions Related to Criminal History

Impermissible Subjects of Enquiry	• Arrests or detentions that did not result in convictions;[113] • Convictions for certain misdemeanor marijuana-related offenses if the convictions are more than 2 years old;[114] • The applicant's referral to, or participation in, a pretrial or post trial diversion program;[115] • Any conviction for which the record has been judicially ordered sealed, expunged, or statutorily eradicated;[116] • Any misdemeanor conviction for which probation has been successfully completed or otherwise discharged and the case has been judicially dismissed;[117] • Any arrest for which a pretrial diversion program has been successfully completed.[118]
Permissible Subjects of Enquiry	• Any criminal convictions, and whether the applicant was ever convicted of a felony or misdemeanor other than certain misdemeanor marijuana-related convictions more than 2 years old;[119] • Any criminal charges and arrests for which the applicant is out on bail or on his or her own recognizance pending trial.[120]

Appendix C: Permitted to Perform FBI Search

Sector	Authorizing Code	Provisions
Organizations serving youth, elderly, physically/mentally disabled; and other human resource departments	Cal. Penal Code § 11105.3	• Human resource agency or employer may request records of conviction or pending adjudication from DOJ for persons applying to positions of employment, a volunteer position, or for a license in which they would have a supervisory or disciplinary power over a minor or any person under his or her care • Nonprofit organizations do not have to pay a processing fee for background checks performed by the DOJ (state only; federal has a fee) • If a person is hired and has a conviction or attempted violation of a certain offense (including a sex offense), the agency or employer must notify the parent or guardian of any minor who will be supervised by the person

Appendix D: Criminal Record Check Best Practices[121]

General	Eliminate policies or practices that exclude people from employment based on any criminal record. Train managers, hiring officials, and decision-makers about Title VII and its prohibition on employment discrimination.
Developing a Policy	Develop a narrowly-tailored written policy and procedure for screening applicants and employees for criminal conduct. • Identify essential job requirements and the actual circumstances under which the jobs are performed. • Determine the specific offenses that may demonstrate unfitness for performing such jobs. • Identify the criminal offenses based on all available evidence. • Determine the duration of exclusions for criminal conduct based on all available evidence. • Include an individualized assessment. • Record the justification for the policy and procedures. • Note and keep a record of consultations and research considered in crafting the policy and procedures. Train managers, hiring officials, and decision-makers on how to implement the policy and procedures consistent with Title VII and California state law.
Questions about Criminal Records	Following a conditional offer, limit inquiries to conviction records for which exclusion would be job related for the position in question and consistent with business necessity.
Confidentiality	Keep information about applicants' and employees' criminal records confidential. Only use it for the purpose for which it was intended.

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[1] *See* Equal Emp't Opportunity Comm'n and the Fed.Trade Comm'n, *Background Checks, What Employers Need to Know,* at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm [hereinafter, EEOC: What Employers Need to Know] ("Except for certain restrictions related to medical and genetic information…it's not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check.").

[2] Christine Michelle Duffy, *Background Checks: An Overview and Considerations for New Jersey Nonprofits* 21 (2018), available at https://probonopartner.org/wp-content/uploads/2023/12/Background-Checks-for-YSOs-2018.pdf Though not in the context of a background check, a damages claim based on promissory estoppel for being induced to leave an existing job and then being fired from the second job has been upheld in California. *See, e.g.*, *Helmer v. Bingham Toyota Isuzu*, 129 Cal. App. 4th 1121, 1130 (Cal. App. 5th Dist. 2005).

[3] *Federico v. Superior Ct.*, 59 Cal. App. 4th 1207, 1215 (Cal. App. 3rd Dist. 1997); *see also Delfino v. Agilent Tech., Inc.*, 145 Cal. App. 4th 790, 815 (Cal. App. 6th Dist. 2006); *see generally* Nesheba Kittling, *Negligent Hiring and Negligent Retention: A State by State Analysis, American Bar Association* (Nov. 2010), available at http://www.americanbar.org/content/dam/aba/administrative/labor_law/meetings/2010/annualconference/087.authcheckdam.pdf

[4] *Federico v. Superior Ct*., *supra* note 3, 59 Cal. App. 4th, at 1214.

[5] 8 Cal. App. 4th 828, 843 (Cal. Ct. App. 1992).

[6] *See Blair v. Defender Services, Inc.*, 386 F.3d 623, 629 (4th Cir. 2004) (permitting a negligent hiring claim to survive summary judgment because jury may find the employer was negligent for failing to run a criminal background check of an employee); Joshua Kim, A New Way of Life Reentry Project, *Reentry Legal Clinic: Certified Volunteer Program* 11 (2011), available at http://www.reentrylegalclinic.org/uploads/7/8/5/9/7859920/certified_volunteer_program_training_handbook_version_0.3.pdf. [hereinafter, Reentry Legal Clinic].

[7] *See Doe v. United States Youth Soccer Ass'n, Inc.,* 8 Cal. App. 5th 1118, 1138 (2017) (finding a duty to require and conduct criminal background checks on Youth Soccer Association's employees and volunteers, and overruling demurrer as to negligence claim when such background check was not conducted and minor alleged sexual abuse by coach).

[8] State of California Department of Justice, Office of the Attorney General, *Background Checks: Applicant Agencies*, (last visited July 28, 2025), at https://oag.ca.gov/fingerprints/agencies.

[9] *See* 12 U.S.C. § 1829.

[10] Cal. Bus. & Prof. Code § 480.

[11] 15 U.S.C. § 1681a(f).

[12] Cal. Civ. Code § 1785.3(d).

[13] Cal. Civ. Code § 1786.2(d).

[14] *See, e.g., Goode v. LexisNexis Risk & Info. Analytics Group, Inc.,* 848 F. Supp. 2d 532, 543 (E.D. Pa 2012).

[15] 15 U.S.C § 1681c(a)(1); Cal. Civ. Code §§ 1785.13(a)(1), 1786.18(a)(1).

[16] 15 U.S.C § 1681c(a)(2); Cal. Civ. Code §§ 1785.13(a)(2), 1786.18(a)(2).

[17] Cal. Civ. Code § 1786.18(a)(3).

[18] Cal. Civ. Code §§ 1785.13(a)(3), 1786.18(a)(4).

[19] 15 U.S.C. §§ 1681c(a)(3); Cal. Civ. Code §§1785.13(a)(4), 1786.18(a)(5).

[20] 15 U.S.C. §§ 1681c(a)(4); Cal. Civ. Code §§ 1785.13(a)(5), 1786.18(a)(6).

[21] Cal. Civ. Code §§ 1785.13(a)(6), 1786.18(a)(7). "Expungement" in California usually refers to a post-conviction relief of set aside and dismissal pursuant to California Penal Code section 1203.4 and other similar laws. A careless consumer reporting agency can, and often does, report such expunged records because it is not aware that a section 1203.4 dismissal means expungement in California. Even worse, an agency may report an old conviction past the seven-year cutoff because the conviction was only recently expunged. In either case, the employer who sees the prohibited information and makes an adverse decision afterward is exposed to liability for statutory, actual, and punitive damages under California Labor Code section 432.7.

[22] 15 USC § 1681c(a)(5); Cal. Civ. Code §§ 1785.13(a)(7), 1786.18(a)(8).

[23] Equal Employment Opportunity Comm'n, *Overview* (last visited July 28, 2025), http://www.eeoc.gov/eeoc/index.cfm.

[24] 42 U.S.C. §§ 2000e et seq.; 42 U.S.C. § 12101, *et seq*.

[25] 401 U.S. 424, 431 (1971).

[26] *See generally* Deborah Kelly, *Employee Background Checks Webinar*, DC Bar Pro Bono Program, Community Economic Development Project (Oct. 2014) [hereinafter Background Check Webinar], http://www.lawhelp.org/dc/resource/2014-employee-background-checks-webinar?lang=EN&emc=lm&m=171939&l=9&v=61667628.

[27] Cal. Gov. Code §§ 12900 – 12996.

[28] 2 Cal. Code Regs. § 11010(b).

[29] 42 U.S.C. § 2000e(b); 42 U.S.C. § 12111(5); Equal Employment Opportunity Comm'n, *Coverage of Business/Private Employers* (last visited June 12, 2025), at https://www.eeoc.gov/employers/coverage-businessprivate-employers.

[30] Cal. Gov. Code § 12926(d).

[31] Cal. Gov. Code § 12940(a).

[32] Cal. Gov. Code § 12926(s).

[33] 332 F. Supp. 490, 494-496 (C.D. Cal. 1971).

[34] *See* 42 U.S.C. § 12114(b).

[35] 42 U.S.C. §12114(a), (c); 29 C.F.R. § 1630.16(b); Cal. Lab. Code § 1025.

[36] 42 U.S.C. § 12112.

[37] Cal Gov. Code §12940(a).

[38] 2 Cal. Code Regs. § 11071(a).

[39] 2 Cal. Code Regs. § 11071(b).

[40] 2 Cal. Code Regs. § 11071(a).

[41] Cal. Civ. Code § 1786.12(f).

[42] 2 Cal. Code Regs. §§ 11010; 11055; 11056(b).

[43] Cal. Gov. Code §§ 12926(r); 12940(a); 2 Cal. Code Regs. § 11039(a)(1)(A).

[44] 2 Cal. Code Regs. § 11039(a)(1)(A). *See Automobile Workers v Johnson Controls, Inc.*, 499 U.S. 187 (1991); *Johnson Controls, Inc. v FEHC*, 218 Cal. App. 3d 517 (Cal. App. 4th Dist. 1990).

[45] 2 Cal. Code Regs. §§ 11010(a); 11039(b).

[46] Cal. Civ. Code § 1786.2(c) (emphasis added).

[47] Cal. Civ. Code § 1786.50.

[48] EEOC: What Employers Need to Know, *supra* note 1; Background Check Webinar, *supra* note 26.

[49] Under NLRA Section 7, (29 U.S.C. § 157), all employees—regardless of whether they are affiliated with a union—enjoy the right to engage in concerted activities "for the purpose of . . . mutual aid or protection."

[50] In August 2011 (Memo OM 11-74), January 2012 (Memo OM 12-31), and May 2012 (Memo OM 12-59), the acting general counsel of the National Labor Relations Board (NLRB) issued reports concerning social media cases. These reports and the NLRB's recent enforcement actions indicate that the NLRB will generally find unlawful social media policies that (a) are not drafted narrowly to serve a well-defined, legitimate business need, and (b) contain broadly worded prohibitions that could reasonably be read to restrict workers' exercise of protected NLRA rights. More recently, the Second Circuit upheld the NLRB's ruling in *Three D, LLC v. NLRB*, 629 Fed. Appx. 33 (2nd Cir. 2015), that an employer's internet/blogging rule violated employees' NLRA rights.

[51] Philip Gordon, *Workplace Privacy 2014: What's New and What Employers May Expect* (Jan. 7, 2014), Littler Publications, at http://www.littler.com/publication-press/publication/workplace-privacy-2014-whats-new-and-what-employers-may-expect; Philip Gordon and Kwabena A. Appenteng, *NLRB Ruling in Social Media Case Provides Useful Guidance for Employers* (Aug. 29, 2016), Littler Publications, at http://www.littler.com/publication-press/publication/nlrb-ruling-social-media-case-provides-useful-guidance-employers.

[52] Cal. Lab. Code § 980(b).

[53] Michael Nader, *Top Ten Guidelines for Social Media Background Checks* (June 26, 2012, 2:54 AM), https://www.ere.net/articles/top-10-guidelines-for-social-media-background-checks.

[54] 15 U.S.C. §1681b(b)(2)(A); Cal. Civ. Code § 1786.16(a)(2)(B).

[55] 15 U.S.C. §§ 1681b(b)(2)(A) and 1681e(a); Cal. Civ. Code § 1786.16(a)(2)(B), (b)(1).

[56] EEOC: What Employers Need to Know, *supra* note 1.

[57] Cal. Civ. Code § 1785.20; Cal. Civ. Code § 1785.20.5.

[58] Cal. Gov. Code § 12952.

[59] *See EEOC Enforcement Guidance: Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII and the Civil Rights Act of 1964* (last visited July 28, 2025)], at https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions [hereinafter EEOC Arrest and Conviction Guidance].

[60] *Id.*

[61] State of California Department of Justice Office of the Attorney General, *Background Checks: Fingerprint Background Checks* (last visited July 10, 2025), https://oag.ca.gov/fingerprints.

[62] *Id.*

[63] EEOC Arrest and Conviction Guidance, *supra* note 59.

[64] *See Connecticut v. Teal*, 457 U.S. 440, 450 (1982).

[65] EEOC Arrest and Conviction Guidance, *supra* note 59.

[66] Cal. Gov. Code § 12952(a); *id.* § 12952(d).

[67] Cal. Code of Regulations Title 2 § 11017.1(j)(1).

[68] *Id.*

[69] Cal. Gov. Code § 12952(a)(3)(A) – (D).

[70] Cal. Gov. Code § 12952(a)(2).

[71] Cal. Code of Regulations Title 2 § 11017.1(a)(3).

[72] Cal. Gov. Code § 12952(c)(1)(A).

[73] Cal. Code of Regulations Title 2 § 11017.1(c).

[74] *Id.*

[75] Cal. Gov. Code § 12952(c)(1)(A)(i) – (iii).

[76] Cal. Code of Regulations Title 2 § 11017.1(b); *See also Fair Chance Act: Guide to Using CRD's Sample Forms* (last visited July 28, 2025), at https://calcivilrights.ca.gov/fair-chance-act/fca-forms/**Error! Hyperlink reference not valid.**

[77] Los Angeles Municipal Code, Chapter XVIII, Article 9; City of Los Angeles Ordinance No. 184652 (December 7, 2016).

[78] *Id.*

[79] San Francisco Police Code, Article 49; San Francisco Administrative Code, Chapter 12T; *see also California Corner: San Francisco "Bans the Box" for Private Employers* (June 2014), http://www.vedderprice.com/san-francisco-bans-box-for-private-employers/; Rod Fliegel and Jennifer Mora, *"Ban-the-Box" and Beyond: Employers That Do Business In or Contract with the City of San Francisco Should Review Sweeping Restrictions Regarding Inquiries Into, and the Use of, Criminal Records* (Feb. 14, 2014), http://www.littler.com/publication-press/publication/ban-box-and-beyond-employers-do-business-or-contract-city-san-franci.

[80] Los Angeles County Ordinance No. 8.300.050(g); San Diego County Ordinance No. 21.2704(b).

[81] San Diego County Ordinance No. 21.2704(d)(2).

[82] Los Angeles County Ordinance No. 8.300.070.

[83] EEOC Arrest and Conviction Guidance, *supra* note 59.

[84] Cal. Gov. Code § 12952(f)(2)(B).

[85] Cal. Civ. Code § 1786.18(a)(7).

[86] EEOC Arrest and Conviction Guidance, *supra* note 59. The EEOC gave this example:

> Andrew, a Latino man, worked as an assistant principal in Elementary School for several years. After several ten and eleven-year-old girls attending the school accused him of touching them inappropriately on the chest, Andrew was arrested and charged with several counts of endangering the welfare of children and sexual abuse. Elementary School has a policy that requires suspension or termination of any employee who the school believes engaged in conduct that impacts the health or safety of the students. After learning of the accusations, the school immediately places Andrew on unpaid administrative leave pending an investigation. In the course of its investigation, the school provides Andrew a chance to explain the events and circumstances that led to his arrest. Andrew denies the allegations, saying that he may have brushed up against the girls in the crowded hallways or lunchroom, but that he doesn't really remember the incidents and does not have regular contact with any of the girls. The school also talks with the girls, and several of them recount touching in crowded situations. The school does not find Andrew's explanation credible. Based on Andrew's conduct, the school terminates his employment pursuant to its policy.
>
> Andrew challenges the policy as discriminatory under Title VII. He asserts that it has a disparate impact based on national origin and that his employer may not suspend or terminate him based solely on an arrest without a conviction because he is innocent until proven guilty. After confirming that an arrest policy would have a disparate impact based on national origin, the EEOC concludes that no discrimination occurred. The school's policy is linked to conduct that is relevant to the particular jobs at issue, and the exclusion is made based on descriptions of the underlying conduct, not the fact of the arrest. The Commission finds no reasonable cause to believe Title VII was violated.

[87] Cal. Lab. Code § 432.7(a).

[88] Cal. Lab. Code § 432.7(m).

[89] *See Green v. Missouri Pacific Railroad Co.*, 549 F.2d 1158, 1160 (8th Cir. 1977); EEOC Arrest and Conviction Guidance, *supra* note 59.

[90] EEOC Arrest and Conviction Guidance, *supra* note 59.

[91] *Id.*

[92] *See* Cal. Penal Code § 4852.01.

[93] Reentry Legal Clinic, *supra* note 6, at 11.

[94] For more information on these programs, see Susan Ellis, *Court-Ordered Community Service: Volunteers or Prison Labor* (Feb. 21, 2011), Blue Avocado, at https://blueavocado.org/volunteers/court-ordered-community-service-volunteers-or-prison-labor/.

[95] State of California Department of Justice Office of the Attorney General, *Background Checks: Applicant Agencies*, at http://oag.ca.gov/fingerprints/agencies (last visited July 28, 2025).

[96] *Id.*

[97] Federal Bureau of Investigation, *Identity History Summary Checks*, at https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/identity-history-summary-checks (last visited June 16, 2025).

[98] Cal. Penal Code § 290.4(d).

[99] Cal. Gov. Code § 12954.

[100] Cal. Lab. Code § 1024.5(a).

[101] See notes 15-22 and accompanying text.

[102] Note that while a request for references is a useful tool for verifying the veracity of a job candidate's statements, a lie detector test is almost always illegal under the federal Employee Polygraph Protection Act. 29 U.S.C. § 2001 *et seq*.

[103] Cal. Civ. Code § 47(c).

[104] See *Randi W. v. Muroc Joint Unified School Dist.*, 14 Cal. 4th 1066 (Cal. 1997) (holding that a parent could sue the school district for negligent misrepresentation and fraud in providing an employment reference "without reservation" for a former vice principal when the former vice principal was hired and continued molesting children at another school).

[105] Cal. Civ. Code § 47(c).

[106] Cal. Lab. Code § 132a(1).

[107] 15 U.S.C. §§ 1681a(i)(1); 1681b(g)(1).

[108] 2 Cal. Code Regs. § 11071(a).

[109] 2 Cal. Code Regs. § 11071(c).

[110] 15 U.S.C. §1681b(b)(3); *Goode v. LexisNexis Risk & Info. Analytics Group, Inc*., 848 F. Supp. 2d 532, 537-538 (E.D. Pa. 2012) (stating that purpose of notice requirement is to afford employees time to respond prior to adverse action); *Magallon v. Robert Half Int'l, Inc.,* 311 F.R.D. 625, 634 (D. Or. 2015) (same).

[111] 15 U.S.C. § 1681b(b)(3)(A)(i-ii).

[112] *Kelchner v. Sycamore Manor Health Center*, 305 F.Supp.2d 429, 435-6 (M.D.Pa. 2004); *see also Johnson v. ADP Screening & Selection Services, Inc*., 768 F. Supp. 2d 979, 983 (D. Minn. 2011) (stating that fourteen days (ten business days) was sufficient).

[113] Cal. Lab. Code § 432.7; 2 Cal. Code Regs § 11017(d)(1)(A).

[114] Cal. Lab. Code § 432.8.

[115] Cal. Lab. Code § 432.7(a).

[116] Cal. Penal Code § 851.7; Cal. Welf. & Inst. Code § 389; Cal. Lab. Code § 432.7(a).

[117] Cal. Penal Code §1203.4; 2 Cal Code Regs. § 11017 (d)(1)(B).

[118] 2 Cal Code Regs. § 11017 (d)(1)(C).

[119] Cal. Lab. Code §432.7; Cal. Lab. Code § 432.8.

[120] Cal. Lab. Code § 432.7(a).

[121] EEOC Arrest and Conviction Guidance, *supra* note 59.