

Proposed Revisions

Article 2. Particular Employment Practices

§ 11017.1. Consideration of Criminal History in Employment Decisions.

Introduction. Employers and other covered entities (“employers” for purposes of this section) are explicitly prohibited under the Act and other state laws from inquiring into or considering certain enumerated criminal records and information in hiring, promotion, training, discipline, layoff, termination, and other employment decisions as outlined below. Unless an exception applies, the Act also prohibits employers from rescinding a conditional offer of employment because of an applicant’s conviction history unless and until, following an individualized assessment, the employer can demonstrate that the conviction has a direct and adverse relationship with the particular position for which the employer is hiring. Further, employers are prohibited under the Act from using any conviction history in employment decisions if doing so would constitute disparate treatment of, or have an unjustified adverse impact on, individuals on a basis protected by the Act.

The legislative intent of the Fair Chance Act is to eliminate barriers to employment for people with conviction histories. The Legislature cited studies showing people with conviction records have *lower* rates of turnover and *higher* rates of promotion on the job than other employees. Moreover, criminal justice histories are more common than is generally understood: the Legislature found that nearly one in three adults in California has an arrest or conviction record that could impede employment. The Legislature found that eliminating barriers to work for people with conviction histories will promote public safety (employment reduces recidivism), economic growth (people with conviction histories are under- and unemployed), and help ameliorate the adverse impacts of the criminal justice system on men and communities of color. And employment itself helps prevent recidivism, so employing someone with a conviction history reduces the risk that the person will pose a threat to the business.

Fair Chance Act legal standards are influenced by, but not identical to, the legal standards that govern disparate impact analysis under employment discrimination law. There are significant differences. First, under the Fair Chance Act, an applicant or employee is not required to demonstrate that a challenged employment policy (i.e., denying work or promotions based on conviction history) has a disparate impact on a protected group. Second, the Legislature adopted a Fair Chance Act legal standard – “directly and adversely related to the specific duties of a job.” This distinction is significant because the standard is not directly derived from disparate impact case law, which is more demanding in its plain language than the “job-related and consistent with

business necessity” standard used in disparate impact cases. Despite these differences, the factors listed in this regulation as relevant to the “directly and adversely related to the specific duties of a job” standard may also be applicable to a “job-related and consistent with business necessity” analysis in disparate impact cases.

Except as expressly required by statute, employers have no obligation to check the criminal history of a job applicant or current employee, and an employer who chooses to do so incurs certain risks and burdens. The risks are that the employer will violate the above mentioned prohibitions and suffer the consequences. The burdens include the obligation to determine that the applicant’s history (i.e. conviction and post-conviction history considered in the appropriate factual and temporal context) has a direct and adverse relationship to the job's specific duties prior to withdrawing a conditional job offer. The employer must present (1) specific information about the applicant’s history as specified in these regulations and (2) general statistical or other information that establishes a direct and adverse relationship between the type of history the applicant has and substantial workplace risks that relate to the specific duties of the job. An employer cannot rely on speculation or “common sense” ideas about the risks that certain types of histories pose in the workplace.

(a) Prohibition on Consideration of Criminal History Prior to a Conditional Offer of Employment. Except in the circumstances addressed in paragraph (4), below, employers are prohibited from inquiring into, considering, distributing, or disseminating information related to the criminal history of an applicant until after the employer has made a conditional offer of employment to the applicant.

(1) Prohibited consideration under this subsection includes, but is not limited to, inquiring about criminal history through an employment application, background check, or internet searches.

(2) Employers are prohibited from including statements in job advertisements, postings, applications, or other materials that no persons with criminal history will be considered for hire, such as “No Felons” or “Must Have Clean Record.”

(3) Employers who violate the prohibition on inquiring into criminal history prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an applicant’s failure to disclose or disclosure of criminal history prior to the conditional offer as a factor in subsequent employment decisions, including denial of the position conditionally offered.

(A) Employers may not revoke a job offer based on an applicant's non-disclosures or denials of convictions that the employer later discovers through a background check or other means that reveal convictions or other criminal history information that are not lawfully reported.

(4) The prohibition against inquiring about or using any criminal history before a conditional offer of employment has been made does not apply in the following circumstances (though use of such criminal history, either during the application process or during employment, is still subject to the requirements in subsections (b) and (d) through (g) of this regulation):

(A) If the position is one for which an ~~employer-state or local agency~~ is otherwise required by law to conduct a conviction history background check **where the employer is a state or local agency**;

(B) If the position is with a criminal justice agency, as defined in Section 13101 of the Penal Code;

(C) If the position is as a Farm Labor Contractor, as described in Section 1685 of the Labor Code; or

(D) If the position is one that an employer or an employer's agent is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. Federal law, for purposes of this provision, includes rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, 15 U.S.C. § 78c(a)(26).

(b) Prohibition on Consideration of Certain Types of Criminal History. Employers are prohibited from inquiring into, considering, distributing, or disseminating information regarding the following types of criminal history prior to making a conditional offer, after a conditional offer has been made, and in any other subsequent employment decisions such as decisions regarding promotion, training, discipline, lay-off, and termination:

(1) An arrest or detention that did not result in conviction (Labor Code section 432.7 (see limited exceptions in subdivisions (a)(1) for an arrest for which the employee or applicant is out on bail or on his or her their own recognizance

pending trial and (f)(1) for specified positions at health facilities); Government Code section 12952 (for hiring decisions));

(2) Referral to or participation in a pretrial or post-trial diversion program (Labor Code section 432.7 and Government Code section 12952);

(A) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, it is permissible to consider these programs as evidence of rehabilitation or mitigating circumstances after a conditional offer has been made if offered by the applicant as evidence of rehabilitation or mitigating circumstances.

(B) While employers are prohibited from considering referral to or participation in a pretrial or post-trial diversion program, until a pretrial or post-trial diversion program is completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, employers may still consider the conviction or pending charges themselves after a conditional offer is made.

(3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45) or any conviction for which the person has received a full pardon or has been issued a certificate of rehabilitation (Id.);

(4) 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 (Labor Code section 432.7); and

(5) A non-felony conviction for possession of marijuana that is two or more years old (Labor Code section 432.8).

(6) Any revocation of parole, probation, or supervised release, or other proceeding or violation that does not require a determination of guilt beyond a reasonable doubt

(~~6~~ 7) In addition to the limitations provided in paragraphs (1) – (~~5~~6) of this subsection, employers that obtain investigative consumer reports such as background checks are also subject to the requirements of the Fair Credit Reporting Act (15 U.S.C. § 1681 et seq.) and the California Investigative

Consumer Reporting Agencies Act (Civil Code section 1786 et seq.). Employers shall not make an adverse employment decision based on non-disclosures or denials of convictions that the employer learns about through a background check revealing convictions that are unlawfully reported.

(7 8) Employers may also be subject to local laws or city ordinances that provide additional limitations.

(c) Requirements if an Employer Intends to Deny an Applicant the Employment Conditionally Offered Because of the Applicant's Conviction History.

(1) Direct and Adverse Relationship to the Specific Duties of the Job.

(A) Before an employer may make a final decision to withdraw a conditional offer of employment based in whole or in part on an applicant's conviction history, the employer must make two separate individual assessments that result in two separate determinations that the applicant's history (i.e., conviction and post-conviction history considered in the appropriate factual and temporal context) has a direct and adverse relationship to the specific duties of the job. These determinations must occur:

(i) When the employer first gathers and considers information about the applicant's conviction history and makes a *preliminary decision* to withdraw a conditional offer of employment pursuant to subsection (2); and

(ii) When, after receiving and considering information submitted by the applicant in response to the notice issued pursuant to subsection (3), the employer makes a *final decision* to withdraw a conditional offer of employment pursuant to subsection (4).

(B) A conviction history has a "direct and adverse relationship with the specific duties of the job that justify denying the applicant the position" when evidence produced by the employer establishes that the applicant's conviction history, when considered in all of the relevant circumstances as outlined in this regulation, indicates that hiring the applicant would pose a substantial increased chance of crime while the applicant performs specific duties of the position. The increased chance must be substantial

and there must be an increased risk when the applicant is compared to the general population.

(C) The individualized assessments must include, at a minimum, consideration of the following factors:

- (i) The nature and gravity of the offense or conduct;
- (ii) The time that has passed since the offense or conduct and/or completion of the sentence; and
- (iii) The nature of the job held or sought.

(D) First Mandatory Factor: Nature and Gravity of the Offense.

(i) The nature of the offense includes these subfactors:

(a) The specific personal conduct of the applicant that underlied the conviction. Employers are expected to know that a wide range of conduct may result in a conviction under particular criminal laws, and convictions may be based on indirect liability for other people's actions (e.g., aiding and abetting liability).

(b) Whether the applicant pleaded nolo contendere (no contest), pleaded guilty, or was convicted after trial. Employers are expected to know that 94-97% of defendants enter into federal or state plea bargains not as an admission of guilt but because of the coercive power of large sentences.

(c) The context in which the offense occurred.

(d) If the applicant chooses to disclose the following prior to the first individualized assessment, an employer must consider the information provided as mitigating factors. The employer may not request this information from the applicant, nor may it seek this information from other sources.

(i) Whether provocation, duress, substance abuse or other mitigating factors contributed to the offense.

(ii) Whether a disability, including but not limited to a past drug addiction or mental impairment, contributed to

the offense. Employers are expected to know that it is illegal to discriminate on the basis of disability under state and federal law.

(iii) Whether youth, childhood trauma, victimization (including sexual or domestic violence or human trafficking) or similar factors contributed to the offense.

(ii) The gravity of the offense includes these subfactors:

- (a) Whether the harm was to property or people
- (b) The degree of the harm (e.g., amount of loss in a theft)
- (c) The permanence of the harm

(iii) Factors not relevant to duties of the job may not be used as a basis for denial or revocation of employment. For example, an employer may not deny a position because of their own moral or societal disapproval or condemnation of the conviction.

(E) Second Mandatory Factor: Time Since Offense or Completion of Sentence

(i) Consideration of the time since offense or completion of sentence includes these subfactors:

(a) The amount of time that has passed since the conduct underlying the conviction, which may significantly predate the conviction itself. This passage of time is relevant even if the applicant was incarcerated for part of the time period, as rehabilitation and maturity often occurs during incarceration.

NOTE: If a conviction did not lead to incarceration, employers CANNOT consider the conviction after seven or more years have elapsed since disposition of the case (i.e., grant of probation or sentencing).

(b) When the conviction led to incarceration, the amount of time that has passed since the applicant's release from incarceration and the applicant's conduct during

incarceration, including participation in work and educational or rehabilitative programming, and other prosocial conduct.

NOTE: Employers CANNOT consider any such conviction when seven or more years have passed since release from incarceration.

- (c) The applicant's employment history since the conviction or completion of sentence. Evidence of previous employment in a job with similar duties, without negative incidents, establishes a rebuttable presumption that the conviction history is no longer directly and adversely related to the specific duties of the job.
- (d) Whether the applicant's criminal history has been cleared for exercise of any benefit, privilege, or right by a licensing, regulatory, or government agency or board. Examples include a license, certificate, authorization, or any other similar credential or criminal record exemption. Receipt of such a benefit, privilege, or right required for the performance of a job establishes a rebuttable presumption that the applicant's conviction history is not directly and adversely related to the specific duties of the job.
- (e) The applicant's community service and engagement since the conviction or completion of sentence, including religious, self-help recovery, and civic participation.
- (f) The applicant's other rehabilitative efforts since the completion of sentence or conviction or mitigating factors not captured in the above subfactors.

(F) Third Mandatory Factor: Nature of Job

(i) Consideration of the nature of the job held or sought includes these subfactors:

- (a) The specific duties of the job, which must be distinguished from general employee duties such as the duty while at work to act professionally and obey the law and workplace rules.

The specific duties of the job must be consistently defined and enforced by the employer before they can be used to deny work based on a conviction history. Written, well-defined, and consistently applied job descriptions that predate the assessment by a substantial period of time, such as job descriptions found in job announcements or postings, are more likely to be found credible.

- (b) Whether the context in which the conviction occurred is likely to arise in the workplace. If the conviction did not occur in the context of the workplace, there is a rebuttable presumption that the conviction is not directly and adversely related.
- (c) Whether the type or degree of harm that resulted from the conviction is likely to occur in the workplace.
- (d) When a conviction history raises legitimate employer concerns, if the employer has practices and policies in place to prevent the type of harm the employer is concerned about, there is a rebuttable presumption that the conviction is not directly and adversely related. For example, when a conviction history raises legitimate theft concerns, if the employer has cash handling, inventory control and theft prevention systems, practices or policies in place, there is a rebuttable presumption that the conviction is not directly and adversely related.

(G) Use of Subfactors

The presence of any one of the aforementioned subfactors may establish that the conviction history is not directly and adversely related to the specific duties of a job. There will be few if any cases in which all of these subfactors are relevant, and in some cases only a few will be relevant. Employers should not require applicants to meet any or a majority of the subfactors identified above. This list of subfactors is non-exhaustive; none of the above subfactors are required to show that the applicant is qualified for the job and that there is not a direct and adverse relationship between the convictions and the position in question. Employers should not conduct a quantitative analysis of the number of subfactors that do and do

not apply to a particular candidate, but should consider the significance of each applicable subfactor with respect to the applicant's qualification for the job.

(H) Prohibited Factors

(i) Employers may not deny a position because of disapproval or condemnation of the conviction history where the conviction history does not have a direct and adverse relationship to the specific duties of the job.

(ii) Employers may not deny a position on the assumption that an applicant's conviction history raises a general risk that the applicant will commit a crime on the job. The fact that the applicant has completed a sentence for the conviction and is free from custody raises a rebuttable presumption that the applicant does not pose a substantial risk to public safety in ordinary circumstances.

(iii) Employers may not rely on "common sense" beliefs that certain conviction histories are directly and adversely related to the specific duties of a job. Instead, the employer must demonstrate through evidence that a conviction history has such a relationship.

(iv) Employers cannot rely on information that was provided by a consumer reporting agency or background company in violation of the Investigative Consumer Reporting Agencies Act, California Civil Code § 1786.10, *et seq.* (ICRAA).

(v) Employers cannot deny employment because of a misdemeanor conviction that followed a no contest or nolo contendere plea, which cannot be used as an admission of responsibility in civil matters.

(I) Examples of Conviction Histories that Are Not Directly and Adversely Related to the Specific Duties of a Job.

(a) An applicant was convicted five years ago of embezzling \$100,000 while working as a CFO. The position is bookkeeper for a large corporation with multiple layers of supervision and monitoring over the bookkeeper's handling of funds.

- (b) An applicant has a conviction for a sex offense against a child who lived in his home. The job is in an office environment where children are not ordinarily present.
- (c) An applicant has a conviction for domestic violence against his wife or elder abuse against his grandmother. The job requires the applicant to work with women or elderly people in an office, retail or other public commercial setting.
- (d) An applicant was convicted as a youth of a violent offense against another youth and has only limited evidence of rehabilitation. The job is cashier at a retail store with supervision.
- (e) An applicant was convicted of organized retail theft committed while under the influence of others as a victim of human trafficking. She is no longer being actively victimized and she has a documented record of psychological treatment and rehabilitation. The job is cashier or salesperson at a retail store or a warehouse worker.
- (f) An applicant was convicted of child endangerment for driving under the influence with a child in the car. The job is child care with no driving responsibilities.
- (g) An applicant was convicted of child endangerment for leaving a child with a relative or intimate partner who abused the child. The job is child care with no discretion to leave the child in other people's care or otherwise place a child in a position of potential mistreatment by non-employees.
- (h) An applicant was convicted of felony murder but her role was as an accomplice to robbery under the influence of a pimp, who killed the victim during the robbery. The job does not provide a substantial opportunity for theft (e.g., an office worker) and the employer would not deny a job to someone with a robbery or theft conviction with similar mitigating circumstances. The job cannot be denied because the applicant's conviction is murder.

- (i) An applicant was convicted of shoplifting a candybar one year ago. The job is a cook in a busy kitchen and the applicant is under supervision.
- (j) An applicant has a conviction for driving while under the influence five years ago. The applicant is actively engaged in recovery and has a record of post-conviction stable employment. The job is office worker or floor staff in a retail store.
- (k) An applicant has a conviction for driving while under the influence and has a well-documented record of recovery and two years of stable employment as a transit driver without negative incidents. The job is driver of a truck or bus.

(J) Examples of Individualized Assessments Considering All Factors

(i) An applicant has a history of childhood trauma (domestic violence in the home, abandonment by parents as a young child). In her 30s and 40s, she suffered from domestic violence and substance abuse, which contributed to a 15-year period of convictions (drug possession and thefts) and incarcerations. During her last incarceration, she engaged in psychological and substance abuse treatment and following her release she was clean and sober and not in abusive relationships. She then worked for six years as a paratransit driver for disabled people, earning employee of the month and driver of the year awards. The company is sold and the new owner conducts a criminal record check. The new employer should conclude her conviction history is not directly and adversely related to the specific duties of her paratransit driver job.

(ii) An applicant was convicted of misdemeanor shoplifting (stole clothes worth less than \$100 from a retail store to sell for cash while indigent; property returned after her arrest) 23 years ago. She has had stable employment ever since. She applied for a job as a cafeteria cook, where access to cash payments would be controlled by a point of sale (POS) system and record-keeping. The employer should conclude her conviction history is not directly and adversely related to the specific duties of her job.

(iii) An applicant was convicted of murder 28 years ago for killing her abusive boyfriend when she was 18 years old. She has had stable employment since her release from prison six years ago. She applied for a job assessing applicants' eligibility for public benefits, which might include some in-home visits. The employer should conclude her conviction history is not directly and adversely related to the specific duties of her job.

(4 2) Preliminary Individualized Assessment. If an employer intends to deny an applicant the employment position they were conditionally offered based solely or in part on the applicant's conviction history, the employer must first make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position.

~~(A) The standard for determining what constitutes a direct and adverse relationship that justifies denying the applicant the position is the same standard described in subsection (f)(4).~~

~~(A B) The employer may, but is not required to, use the sample individual assessment form available on the Department's website. The individualized assessment must include, at a minimum, consideration of the following factors:~~

- ~~(i) The nature and gravity of the offense or conduct;~~
- ~~(ii) The time that has passed since the offense or conduct and/or completion of the sentence; and~~
- ~~(iii) The nature of the job held or sought.~~

(B) An employer who chooses to conduct a criminal background check on an applicant must make a reasoned, evidence-based determination about whether any disclosed conviction history has a direct and adverse relationship to the specific duties of the job. The employer must consider any mitigating or rehabilitative evidence it already has in its possession from the applicant.

(2 3) Notice of Preliminary Decision and Opportunity for Applicant Response. If, after conducting an individualized assessment as described in subsection (2), the

employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from the employment conditionally offered, the employer shall notify the applicant of the preliminary decision in writing. The written notice to the applicant may, but is not required to, justify or explain the employer's reasoning for making the decision. However, the notice to the applicant must include all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer.

(B) A copy of the conviction history report utilized or relied on by the employer, if any (such reports include, but are not limited to: consumer reports, credit reports, public records, results of internet searches, news articles, or any other writing containing information related to the conviction history that was utilized or relied upon by the employer).

(C) Notice of the applicant's right to respond to the notice before the preliminary decision rescinding the offer of employment becomes final.

(D) An explanation informing the applicant that, should the applicant choose to respond, the response may include submission of evidence challenging either the accuracy of the conviction history report that is the basis for the preliminary decision to rescind the offer, evidence of rehabilitation or mitigating circumstances, or both.

(i) Evidence of rehabilitation or mitigating circumstances may include, but is not limited to: the length and consistency of employment history before and after the offense or conduct; the facts or circumstances surrounding the offense or conduct; the applicant's current or former participation in self-improvement efforts, including but not limited to school, job training, counseling, community service, and/or a rehabilitation program; whether the conduct arose from the applicant's status as a survivor of domestic violence, sexual assault, dating violence, stalking, or comparable offenses against the individual; whether the conduct arose from the applicant's disability or disabilities and, if so, whether the likelihood of harm arising from similar conduct could be sufficiently mitigated or eliminated by a reasonable accommodation for the applicant's

disability or disabilities; the likelihood that similar conduct will recur; whether the applicant is bonded under a federal, state, or local bonding program; and/or successful completion, or compliance with the terms and conditions, of probation or parole. **All of this evidence of rehabilitation and/or mitigating circumstances is optional and may only be voluntarily provided by the applicant.**

(ii) Documentary evidence may include, but is not limited to, certificates or other documentation of participation in, enrollment in, or completion of an educational, vocational, training, counseling, community service, or rehabilitation program; letters from current or former teachers, counselors, supervisors, co-workers, parole or probation officers, or others who know the applicant; police reports, protective orders, and/or documentation from healthcare providers, counselors, or victim advocates who can attest to the applicant's status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable offenses; documentation confirming the existence of a disability or disabilities; or any other document demonstrating rehabilitation or mitigating circumstances. **All of this documentary evidence is optional and may only be voluntarily provided by the applicant.**

(iii) **The employer shall not request specific documents or evidence from the applicant in response to the notice of preliminary decision, including, but not limited to, police reports or court documents. The employer shall not require that the applicant disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or comparable statuses or of the existence of a disability or disabilities. It is in the discretion of the applicant to provide any of the documentation or information in subsection (i)-(ii). An employer may not disqualify an applicant from the employment conditionally offered for failing to provide any specific type of evidence or documents.**

(E) Notice of the deadline by which the applicant must respond (which must be at least five business days from the date of receipt of the notice).

(i) If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be

deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States.

(ii) An employer may offer an applicant more than five business days to respond to the notice regarding its preliminary decision.

(F) If the applicant timely notifies the employer in writing that the applicant disputes the accuracy of the conviction history being relied upon and that the applicant is taking specific steps to obtain evidence supporting the applicant's assertion, then the applicant shall be permitted no fewer than five additional business days to respond to the notice before the employer's decision to rescind the employment offer becomes final.

~~(3)~~ **4) Second Individualized Assessment and Final Decision.** The employer shall conduct **another individualized assessment, taking into account all** information submitted by the applicant before making a final decision regarding whether or not to rescind the conditional offer of employment **because the applicant's conviction history has a direct and adverse relationship to the specific duties of the job.** The employer may, but is not required to, use the sample individual reassessment form available on the Department's website. If the employer makes a final decision to rescind the conditional offer and deny an application based solely or in part on the applicant's conviction history, the employer shall notify the applicant in writing. The employer may, but is not required to, use the sample final notice form available on the Department's website. However, any notice to the applicant must include the following:

(A) The final denial or disqualification decision reached. The employer may also include, but is not required to include, the justification or an explanation of the employer's reasoning for reaching the decision that it did;

(B) Any procedure the employer has for the applicant to challenge the decision or request reconsideration; and

(C) The right to contest the decision by filing a complaint with the Department of Fair Employment and Housing.

(d) Labor contractors, union hiring halls, and client employers.

(1) A labor contractor, union hiring hall, and client employer are governed in the same way by section 11017.1 of these regulations as are other employers.

(2) A labor contractor or union hiring hall may not decline to admit a worker to a pool or availability list, discontinue a worker's inclusion in a pool or availability list, or decline to refer a worker to a position with a client employer, because of the worker's criminal history unless the labor contractor or union hiring hall has complied with the procedures and requirements outlined in section 11017.1 of these regulations. To the extent labor contractors or union hiring halls place applicants into a pool of workers from which individuals may be assigned to a variety of positions, the labor contractors or union hiring halls must still comply with the requirements of section 11017.1, including the individualized assessment of whether any conviction history being considered has a direct and adverse relationship with the specific duties of the jobs for which the applicant may be assigned from the pool or hall.

(3) If a labor contractor or union hiring hall re-conducts inquiries into criminal history to maintain the eligibility of workers admitted to a pool or availability list, then it must comply with the procedures and requirements outlined in section 11017.1 of these regulations. When re-conducting an inquiry, labor contractors or union hiring halls cannot satisfy the requirements of subsection (c) if they disqualify a worker from retention in a pool based on conviction history that was already considered and deemed not disqualifying for entry into the pool in the first place unless the decision is based on new material developments such as changes to job duties, legal requirements, or experience or data regarding the particular convictions involved.

(4) A client employer may inquire into or consider the conviction history of a worker supplied by a labor contractor or union hiring hall only after extending a conditional offer of employment to the worker and when following the procedures described in subsections (a) – (c), unless the specific position is exempted pursuant to paragraph (a)(4). A client employer violates this section by instructing labor contractors or union hiring halls to refer only workers without conviction records, unless exempted by subsection (a)(4).

(e) Disparate Treatment. The Act also prohibits employers from treating applicants or employees differently in the course of considering criminal conviction history, or any

evidence of rehabilitation or mitigating circumstances, if the disparate treatment is substantially motivated by a basis protected by the Act.

(f) Adverse Impact. In addition to the types of criminal history addressed in subsection (b) that employers are explicitly prohibited from inquiring about or considering unless an exception applies, consideration of other forms of criminal convictions, not enumerated above, may have an adverse impact on applicants or employees on a basis protected by the Act, including, but not limited to, gender, race, and national origin.

(1) An applicant or employee bears the burden of demonstrating that the policy of considering criminal convictions has an adverse impact on a basis protected by the Act.

(2) Consistent with Sections 11017 and 11010 of these regulations and the Uniform Guidelines on Employee Selection and Procedures (29 C.F.R. part 1607 (1978)) incorporated by reference in sections 11017(a) and (e), adverse impact includes a substantial disparity in the rate of selection in hiring, promotion, or other employment decisions which works to the disadvantage of groups of individuals on the basis of any characteristics protected by the Act.

(3) An adverse impact may be established through the use of statistics or by offering any other evidence that establishes an adverse impact. State- or national-level statistics showing on conviction records that show a substantial disparity based on any characteristic protected by the Act are presumptively sufficient to establish an adverse impact. This presumption may be rebutted by a showing that there is a reason to expect a markedly different result after accounting for any particularized circumstances such as the geographic area encompassed by the applicant or employee pool, the particular types of convictions being considered, or the particular job at issue.

(4) Establishing “Job-Related and Consistent with Business Necessity.”

(A) If the policy or practice of considering criminal convictions creates an adverse impact on applicants or employees on a basis protected by 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 policy or practice needs to bear a demonstrable relationship to successful performance on the job and in the workplace

and measure the person's fitness for the specific position(s), not merely to evaluate the person in the abstract. In order to establish job-relatedness and business necessity, any employer must demonstrate that the policy or practice is appropriately tailored, taking into account at least the following factors:

- (i) The nature and gravity of the offense or conduct;
- (ii) The time that has passed since the offense or conduct and/or completion of the sentence; and
- (iii) The nature of the job held or sought.

(B) Demonstrating that a policy or practice of considering conviction history in employment decisions is appropriately tailored to the job for which it is used as an evaluation factor requires that an employer demonstrate the applicant's or employee's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant or employee the position.

(C) Bright-line conviction disqualification or consideration policies or practices that include conviction-related information that is seven or more years old are subject to a rebuttable presumption that they are not sufficiently tailored to meet the job-related and consistent with business necessity affirmative defense (except if justified by subsection (g) below).

(D) An individualized assessment must involve notice to the adversely impacted applicant or employee (before any adverse action is taken) that they have been screened out or otherwise denied an employment opportunity because of a criminal conviction; a reasonable opportunity for the individuals to demonstrate that the exclusion should not be applied due to their particular circumstances; and consideration by the employer as to whether the additional information provided by the individuals or otherwise obtained by the employer warrants an exception to the exclusion and shows that the policy as applied to the applicant or employee is not job-related and consistent with business necessity. An employer may, but is not required to, use the sample individual assessment form available on the Department's website.

(E) Before an employer may take an adverse action such as discharging, laying off, or declining to promote an adversely impacted individual based on conviction history obtained by a source other than the applicant or

employee (e.g. through a credit report or internally generated research), the employer must give the impacted individual notice of the disqualifying conviction and a reasonable opportunity to present evidence that the information is factually inaccurate. If the applicant or employee establishes that the record is factually inaccurate, then that record information cannot be considered in the employment decision.

(5) Less Discriminatory Alternatives. If an employer demonstrates that its policy or practice of considering conviction history is job-related and consistent with business necessity, adversely impacted employees or applicants may still prevail under the Act if they can demonstrate that there is a less discriminatory policy or practice that serves the employer's goals as effectively as the challenged policy or practice, such as a more narrowly targeted list of convictions or another form of inquiry that evaluates job qualification or risk as accurately without significantly increasing the cost or burden on the employer.

(g) Compliance with Federal or State Laws, Regulations, or Licensing Requirements Permitting or Requiring Consideration of Criminal History. In some instances, employers are subject to federal or state laws or regulations that prohibit individuals with certain criminal records from holding particular positions or occupations or mandate a screening process employers are required or permitted to utilize before employing individuals in such positions or occupations (e.g., 21 U.S.C. § 830(e)(1)(G); Labor Code sections 432.7). 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, and 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 make criminal history a determining factor in eligibility for occupational licenses (e.g., 49 U.S.C. § 31310). Compliance with federal or state laws or regulations that mandate particular criminal history screening processes, or requiring that an employee or applicant possess or obtain any required occupational licenses constitute rebuttable defenses to an adverse impact claim under the Act.

(h) Employers Seeking the Work Opportunity Tax Credit. An employer who wishes to claim the Work Opportunity Tax Credit ("WOTC") provided for under federal law is not exempt from this section or Section 12952 of the Act.

(1) An employer may require an applicant to complete IRS form 8850 ("Pre-Screening Notice and Certification Request for the Work Opportunity Credit"), as revised March 2016, or its equivalent, before a conditional offer is made, so long

as the information gathered is used solely for the purpose of applying for the WOTC. In particular, no applicant may be asked the basis of their qualification for the WOTC other than in the form of questions that do not encourage or force an applicant to identify themselves as a person who has been convicted of a felony or released from prison following a felony conviction rather than as a person who qualifies for the WOTC under one of the several bases listed in Question 2 on form 8850. Information regarding an applicant's criminal history obtained from the applicant's form 8850 may only be considered as otherwise provided by law.

(2) An employer may require an applicant to complete U.S. Department of Labor Employment and Training Administration form 9061 ("Individual Characteristics Form (ICF) Work Opportunity Tax Credit"), as revised November 2016, or its equivalent, only after a conditional offer has been made. Information regarding an applicant's criminal history obtained from the applicant's form 9061 may only be considered as otherwise provided by law.

(i) Definitions. For purposes of section 11017.1 of these regulations only:

(1) "Applicant" includes, in addition to the individuals within the scope of the general definition in section 11008(a) of these regulations, individuals who have been conditionally offered employment, even if they have commenced employment when the employer undertakes a post-conditional offer review and consideration of criminal history. An employer cannot evade the requirements of Government Code section 12952 or this regulation by having an individual lose their status as an "applicant" by working before undertaking a post-conditional offer review of the individual's criminal history. **"Applicant" includes an individual applying for employment and an employee under consideration for promotion.**

(2) "Employer" includes a labor contractor and a client employer; **any direct and joint employer; any entity that evaluates the applicant's conviction history on behalf of an employer, or acts as an agent of an employer, directly or indirectly; any staffing agency; and any entity that selects, obtains, or is provided workers from a pool or availability list.**

(3) "Client employer" means a business entity, regardless of its form, that selects workers from a pool or availability list, or obtains or is provided workers to perform labor within its usual course of business from a labor contractor.

(4) "Labor contractor" means an individual or entity, either with or without a contract, which supplies a client employer with, or maintains a pool or availability

list of, workers to perform labor within the client employer's usual course of business. This definition is not intended to include Farm Labor Contractors.

(5) "Hiring hall" means an agency or office operated by a union, by an employer and union, or by a state or local employment service, to provide and place employees for specific jobs.

(6) "Pool or availability list" means applicants or employees admitted into entry in the hiring hall or other hiring pool utilized by one or more employers and/or provided by a labor contractor for use by prospective employers.