

CALIFORNIA PROPOSES REGULATIONS WHICH, IF ADOPTED, WOULD CREATE ADDITIONAL AVENUES FOR JOB APPLICANTS AND EMPLOYEES TO SUE EMPLOYERS FOR VIOLATIONS OF THE FAIR EMPLOYMENT AND HOUSING ACT

Mr. Richard Fader of Ft. Lee, New Jersey asks: “Is it true that California employers may need to re-examine their employment background check policies given proposed regulations that are intended to define and clarify how a prospective employer may use an employment candidate’s criminal history in the hiring process?” While the proposed regulations have not yet been enacted Mr. Fader, they nevertheless should be a “wake up” siren to employers, landlords and property managers about the legislation’s view towards the use of criminal background checks in business decisions.

In early 2016, the California Fair Employment and Housing Council (“FEHC”) proposed regulations intended to define and clarify how using a person’s criminal history may violate the Fair Employment and Housing Act (“FEHA”). If adopted, the regulations would create additional avenues for job applicants and employees to sue employers for violations of FEHA. These regulations are yet another reminder that employers should proceed with caution when using an employee’s criminal history to make an employment decision. *Importantly, if enacted, this policy may expand and greatly affect a prospective landlord’s ability to undertake a similar search for a prospective tenant in the residential housing industry.*

Under the current FEHA, employers may be liable for discrimination if an employment decision has an **adverse impact** on an employee and the employment decision was based on a FEHA-protected category, such as race, gender religion, or disability. A person is not currently protected under FEHA based on their status as an “ex-offender.” However, the proposed FEHC regulations specifically state that a person may file a discrimination claim under FEHA if the employer’s reliance on a criminal conviction “adversely impacts” an individual within a protected class. The proposed regulations define “adverse impact” by adopting the U.S. Equal Employment Opportunity Commission’s definition of “disparate impact” -- an “adverse impact” may occur if: (i) an employer uses facially neutral tests or selection procedures that disproportionately exclude persons based on race, color, religion, sex, or national origin; and (ii) the tests or selection procedures were not “job-related and consistent with business necessity.”

The proposed regulations would allow an existing employee (terminated after employment because of a background search) or job applicant to prove “disparate impact” discrimination with state or national criminal conviction statistics by using those statistics to show a correlation between disparities in the conviction rates of persons of color and adverse employment decisions (*i.e.*, the failure to hire an applicant). If an employee or job applicant demonstrates that a policy or practice creates an “adverse impact,” the employer must then prove that the policy or practice is (1) job-related and (2) consistent with business necessity. California law already requires employers to demonstrate that their use of an employee or applicant’s criminal history is “job-related.” The proposed regulations require employers to prove there is a relationship between job performance and an individual’s fitness for the specific position. The regulations specify that employment practices must consider (a) the nature and gravity of the offense, (b) the amount of

time that has passed since the offense and/or completion of the sentence, and (c) the nature of the job held or sought.

If enacted, an employer's policies or practices regarding the weight given to conviction history must be "appropriately tailored" to the job by either: (1) demonstrating that a "bright-line" rule barring individuals with convictions can distinguish between persons who actually pose an unacceptable level of risk and that the convictions relied upon in the employment decision have a direct and specific bearing on the individual's ability to perform the specific job duties; or (2) conducting an individualized assessment and affording the individual an opportunity to explain why the conviction should not prevent him or her from receiving the employment opportunity.

The federal Fair Credit Reporting Act currently requires employers to provide notice to employees or job applicants when an employment decision is made, in part, on information obtained by an employer through a background check. The FEHC's proposed regulations would require that employers notify an employee or applicant of the disqualifying criminal conviction if the information were obtained from any source other than the applicant or employee. The employee or applicant would need to be given a "reasonable opportunity to present evidence that the information is factually inaccurate," and the criminal record could not be considered if the employee could establish that the information was inaccurate.

Anybody with a computer is well aware of the ease by which employers can obtain information regarding employees' or applicants' criminal histories without conducting a formal background check. The abundance of information accessible through internet searches, including social media, invites many employers into collecting information regarding job applicants and employees. If enacted, employers obtaining information from social media will be required to notify the employee or applicant of the criminal conviction they have considered in making their decision, and they will be required to provide the individual an opportunity to present evidence the information is inaccurate.

Given the uncertainty in the use of criminal histories in employment decisions Mr. Fader, employers should consider adopting the following practices:

- ✓ Re-evaluate whether criminal background checks are beneficial to their business hiring practices.
- ✓ Draft a narrowly tailored written policy for your Employee Handbook that shows how the policy is job-related, is consistent with business necessity, and includes an individualized assessment of employees and applicants.
- ✓ Train staff responsible for hiring about the proper collection and use of job applicants' and employees' criminal conviction histories.

The contents of this column are not intended to be a complete summary of the legal issues discussed in this column. Rather, this column is intended to alert you to the broad impact of changes in the law or the means in which to comply with the law to reduce the risk of liability and claims. Because of the complexity of the law, it is recommended that all employers consult with experienced labor and employment counsel to ensure that all policies and practices are

compliant with applicable state and federal law. Please feel free to reach out to the author at jroth@TheRothLawFirm.com with any questions or comments.