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San Francisco's OLSE Issues "FAQs" On Fair Chance Ordinance

By Rod Fliegel and Jennifer Mora

Starting on August 13, 2014, employers doing business in the City of San Francisco, California have had to comply with sweeping amendments to San Francisco Police Code, Article 49, and Administrative Code, Article 12 ("the amendments," "the ordinances" or the "FCO"), which significantly restrict the ability of covered employers to inquire into, and use, criminal records for hiring and other employment purposes. The scope of the amendments far exceeds the breadth of any of the other so-called "ban-the-box" laws.¹

The Office of Labor Standards Enforcement (OLSE), which is responsible for administering and enforcing the FCO, issued a publication entitled, "The San Francisco Fair Chance Ordinance for Employers and City Contractors Frequently Asked Questions" (FAQ). The FAQ provides employers operating in San Francisco with much-needed advisory guidance for ensuring compliance with the FCO. While the text of the FCO acknowledged the potential for preemption by federal or state law, the FAQ goes further and states that where a conflict exists, "state and federal requirements supersede the FCO's requirements." Regardless, covered employers and businesses that contract with the City (or that are subcontractors of such contractors) should become familiar with the FAQ and terms of the FCO and consider the various action items set out below. Due to the proliferation of such laws – and related class action litigation and Equal Employment Opportunity Commission "systemic" investigations – employers also may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state, and local laws.²

San Francisco Police Code Article 49

Who is Affected?

The FCO defines the term "Employer" as "any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that is

1 See Philip Gordon, Jennifer Mora, Joseph Harkins and Zoe Argento, [Four New Laws Within 40 Miles: The Washington D.C. Area Accelerates the "Ban-the-Box" Movement](#), Littler ASAP (Dec. 2, 2014); Rod Fliegel, Jennifer Mora, Joseph Harkins and Melanie Augustin, [Private Sector Employers in the District of Columbia Will Soon Be Required to Comply with a New Law Restricting Their Ability to Rely on Criminal Records for Employment Purposes](#), Littler ASAP (Aug. 22, 2014); Adam Wit, Darren Mungerson and Jennifer Mora, [Illinois Enacts New Law Impacting Inquiries on Criminal Background Checks](#), Littler ASAP (July 20, 2014).

2 See Rod Fliegel and Jennifer Mora, [Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014](#), Littler ASAP (Jan. 6, 2014); Rod Fliegel, Barry Hartstein and Jennifer Mora, [EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers](#), Littler ASAP (Apr. 30, 2012).

located or doing business in the City.³ The FAQ reiterates that the ordinance applies to private employers that employ 20 or more persons regardless of location, including “owner(s), management, and supervisory employees.” Job placement and referral agencies and other employment agencies also are covered.

The FCO defines the term “Employment” as “any occupation, vocation, job, or work, including but not limited to temporary or seasonal work, part-time work, contracted work, contingent work, work on commission, and work through the services of a temporary or other employment agency, or any form of vocational or educational training with or without pay.” As a geographical scope limitation, however, the amendment states “the physical location of the employment or prospective employment of an individual as to whom Section 4904 applies **must be in whole, or in substantial part, within the City.**”

The FAQ states the OSLE interprets the phrase “in substantial part” to mean “an average of 8 hours of work performed a week in San Francisco” (i.e., one day). As an example, according to the FAQ:

A company is based in Australia and employs 19 people in Australia and 1 person in San Francisco. Because the company employs 20 or more people total, and is doing business in San Francisco, the FCO applies to the 1 employee who is working in San Francisco.

Coverage also applies to individuals who telecommute. For example, according to the FAQ, “if the employee is working at least 8 hours a week in San Francisco, and the company employs at least 20 people anywhere, the position is covered.”

In determining whether a position will be “in substantial part within the city,” the FAQ states an employer “may look to previous years to determine if a position will involve an average of 8 hours of work a week in San Francisco.” If the position or employer is **new**, “the employer should evaluate the job description and the work that is expected of that position, before making a reasonable, good faith determination as to whether the position would fall within the 8 hours per week average and thus be covered under the FCO.”

If an employer uses a third-party recruiting firm for hiring, the FAQ states the employer retains responsibility for ensuring compliance and “will be held liable for any violations of the FCO.” Moreover, if an employer uses a temporary staffing agency or a professional employer organization to employ individuals, the FAQ provides that both the employer **and** the staffing agency or PEO must comply with the FCO “and both may be held responsible for compliance with regard to particular employee(s).”

What Inquiries and Considerations are Prohibited at any Time? (Section 4904)

The FCO does not bar employers from asking about an individual’s “Unresolved Arrest or “Conviction History.” However, with respect to both applicants and employees, employers can **never** inquire about or consider the following: “(1) An Arrest not leading to a Conviction, excepting under circumstances identified in this Section as an Unresolved Arrest;⁴ (2) Participation in or completion of a diversion or a deferral of judgment program; (3) A Conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative, by way of example but not limitation, under California Penal Code sections 1203.4, 1203.4a, or 1203.41; (4) A Conviction or any other determination or adjudication in the juvenile justice system, or information regarding a matter considered in or processed through the juvenile justice system; or (5) A Conviction that is more than seven years old, the date of Conviction being the date of sentencing; or (6) Information pertaining to an offense other than a felony or misdemeanor, such as an infraction.”

The FAQ adds to this list of “Off Limits” information by including unresolved arrests that are older than seven years. With respect to convictions, the FAQ reiterates that the seven years is counted from the date of sentencing. Thus, “if the date of sentencing was more than seven years ago, information about this conviction is OFF LIMITS, regardless of when the person finished serving the sentence.” The troubling upshot here is that an applicant may be fresh out of jail at the time of application, but the employer will only know this by carefully reviewing the “gaps” in the applicant’s employment history.

³ “‘City’ shall mean the City and County of San Francisco.”

⁴ “‘Arrest’ shall mean a record from any jurisdiction that does not result in a conviction and includes information indicating that a person has been questioned, apprehended, taken into custody or detained, or held for investigation, by a law enforcement, police, or prosecutorial agency and/or charged with, indicted, or tried, and acquitted for any felony, misdemeanor or other criminal offense.” An “Unresolved Arrest” is “an Arrest that is undergoing an active pending criminal investigation or trial that has not yet been resolved. An Arrest has been resolved if the arrestee was released and no accusatory pleading was filed charging him or her with an offense, or if the charges have been dismissed or discharged by the district attorney or the court.”

When Can Employers Request Criminal History Information or Order a Background Check Report? (Section 4904)

Employment applications cannot ask for the fact or details of any “Conviction History,”⁵ “Unresolved Arrest,” or any matter otherwise off-limits under Article 49. However, the term “inquiry” is broadly defined as “any direct or indirect conduct intended to gather information from or about an applicant, candidate, potential applicant or candidate, or employee, using any mode of communication, including but not limited to application forms, interviews, and **Background Check Reports.**” Pursuant to Section 4916, regulated employers “may inquire about criminal convictions outside of the time periods set forth in this Article where required by federal or state law or a government agency implementing federal or state law.”

The FAQ addresses a common question for nationwide employers that use a single job application form. Specifically, “[c]an the form include a question about an applicant’s arrest and conviction record, with a disclaimer that if the applicant is applying for a position in San Francisco, he/she should skip that question?” The OLSE takes the position in the FAQ that the question should be omitted from the form because otherwise, “the employer runs the risk that an applicant will inadvertently provide arrest and conviction information” and also that “the employer will improperly consider such information.” If the employer does not wish to remove the question, the FAQ advises that “it would be preferable to use a separate job application form for San Francisco positions to ensure compliance with the FCO.” Another option is for the employer to “disable the answer field for any such question in electronic applications.”

Regardless, if the employer still chooses to use a single application form, the FAQ advises the employer to “include a clear and conspicuous disclaimer next to the question instructing applicants for San Francisco positions not to answer that question.”

The FCO bars employers from asking about an applicant’s conviction history or unresolved arrests until after the employer has either (1) conducted a live interview with the applicant (via phone, videoconferencing, other technology or in person) or (2) made a conditional offer of employment to the applicant. The same holds true for criminal background checks – they are permissible following a live interview or after a conditional offer.

Moreover, no criminal history inquiry or background check of any kind can be made without **first** providing the individual with the OLSE notice. The FAQ recommends that this notice be provided “at the start of the hiring process.” No background check report may be obtained without **first** complying with the employment-related provisions of both the federal Fair Credit Reporting Act (FCRA) and its California equivalent.

What are the Requirements for Assessing Criminal History Information? (Section 4904)

The FCO provides: “In making an employment decision based on an applicant’s or employee’s Conviction History, an Employer shall conduct an **individualized assessment**, considering only Directly-Related Convictions, the time that has elapsed since the Conviction or Unresolved Arrest, **and** any evidence of inaccuracy or Evidence of Rehabilitation or Other Mitigating Factors.”

The FAQ adds that such an individualized assessment must be conducted for “unresolved arrests.” Moreover, the FAQ reiterates the factors it requires employers to consider as part of the individualized assessment. Specifically, the FAQ provides six types of information that qualify as evidence of rehabilitation:

- An applicant’s satisfactory compliance with all terms and conditions of parole and/or probation. The FAQ clarifies, however, that the applicant’s “inability to pay monetary damages should not be considered.”
- Employer recommendations, especially recommendations after the applicant’s conviction.
- Educational attainment or vocational and professional training since the conviction, including any training or education received while incarcerated.
- Completion of, or active participation in, rehabilitation programs (e.g., alcohol and drug treatment).

5 “‘Conviction History’ shall mean information regarding one or more Convictions or Unresolved Arrests, transmitted orally or in writing or by any other means, and obtained from any source, including but not limited to the individual to whom the information pertains and a Background Check Report.” “‘Background Check Report’ shall mean any criminal history report, including but not limited to those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement or police agencies, or courts, or by any consumer reporting agency or business, employment screening agency or business, or tenant screening agency or business.”

- Letters of recommendation from community organizations, counselors, case managers, teachers, community leaders, or parole and probation officers who have observed the applicant since the conviction; and
- The applicant's age at the time of the conviction.

The FAQ provides the following as examples of mitigating factors:

- Coercive circumstances.
- Intimate physical or emotional abuse.
- Untreated substance abuse or mental illness that contributed to the conviction.

The FCO states that the standard for whether the conviction information is "Directly-Related" is "whether the conduct for which a person was convicted or that is the subject of an Unresolved Arrest has a direct and specific negative bearing on that person's ability to perform the duties or responsibilities necessarily related to the employment position." In determining this, the employer must "consider whether the employment position offers the opportunity for the same or a similar offense to occur and whether circumstances leading to the conduct for which the person was convicted or that is the subject of an Unresolved Arrest will recur in the employment position."

The FAQ states that employers are not required to give preference to anyone or to hire an unqualified person with an arrest or conviction record. Moreover, the FAQ adds that the FCO is not to be construed to interfere with an employer's ability to choose the most qualified and appropriate candidate from applicants for employment. Section 4904(k) further states: "Nothing in this Section 4904 shall be construed to prohibit an Employer from observing the conditions of a seniority system or an employee benefit plan, provided such systems or plans are not a subterfuge to evade the purposes or requirements of this Article."

What are the Adverse Action Notice Requirements? (Section 4904)

According to the FAQ, the adverse action requirements apply if an employer makes an adverse decision because of a conviction or an unresolved arrest. They also apply regardless of whether the individual is a job applicant or an incumbent employee.

The FCO states that, **before** taking an "Adverse Action"⁶ against an applicant or employee based on his or her conviction history or unresolved arrest, the employer must provide the applicant or employee with a copy of the Background Check Report, notice of the prospective adverse action, and the specific basis for the action (e.g., the disqualifying criminal record). The FAQ states the employer must explain to the applicant or employee "which aspect of his/her unresolved arrest or conviction history is motivating the adverse action."

The FCO also requires employers to defer the adverse action for an unspecified "**reasonable period of time**" if, within seven days of the date that the notice is provided, the applicant or employee "gives notice, orally or in writing, of evidence of the inaccuracy of the item or items of Conviction History or any Evidence of Rehabilitation or Other Mitigating Factors." During the deferral period, the employer must "reconsider the prospective Adverse Action in light of the information." If it decides to proceed with the adverse action, the employer also must provide final notice of the action. The FAQ requires employers to hold the position open during this process.

The OLSE attempts to answer the question of what is considered a "reasonable period" by stating that it "will usually depend upon the specific circumstances of the applicant, the position, and the employer." Additional factors for determining reasonableness include "the amount of mitigating evidence submitted by the applicant, the average length of time that the employer spends in selecting a candidate, and the urgency with which a position must be filled." The length of the "reconsideration period" also will vary, but "will likely be reasonable if it gives the employer an opportunity to conduct a new individualized assessment that takes into account all additional information."

6 "Adverse Action" in the context of employment shall mean to fail or refuse to hire, to discharge, or to not promote any individual; or to limit, segregate or classify employees in any way which would deprive or tend to deprive any individual of employment opportunities, or otherwise adversely affect his/her status as an employee." The Adverse Action "must relate to employment **in whole or substantial part in the City.**" The FAQ provides the following examples of an Adverse Action: "failing or refusing to hire an individual, discharging an individual, or not promoting an individual."

What are the Notice Requirements for Job Postings and Solicitations (Section 4904)

The FCO states that employers may not “produce or disseminate any solicitation or advertisement that is reasonably likely to reach persons who are reasonably likely to seek employment in the City, and that expresses, directly or indirectly, that any person with an Arrest or Conviction will not be considered for employment or may not apply for employment.” In this regard, according to the FAQ, “job ads that state ‘no felons,’ or ‘no criminal history allowed,’ are not permitted.” Moreover, the FAQ states that job postings and solicitations that state “a background check must be passed,” are not permitted because this language “can be construed to mean the employer will exclude any applicant with an arrest or conviction record.” Instead, employers should “wait until after conducting a live interview with the applicant, or making the applicant a conditional offer of employment, to conduct or obtain a background check.”

The FCO also requires employers to “state in all solicitations or advertisements for employees that are reasonably likely to reach persons who are reasonably likely to seek employment in the City, that the Employer will consider for employment qualified applicants with criminal histories in a manner consistent with the requirements of this Article.” According to the FAQ, the statement can simply state: “Pursuant to the San Francisco Fair Chance Ordinance, we will consider for employment qualified applicants with arrest and conviction records.”

The FAQ further adds that the rules applicable to job advertisements and solicitations apply as well to online job postings.

What are the Posting Requirements? (Section 4904)

The FCO requires employers to post the OLSE notice “in a conspicuous place at every workplace, job site, or other location ***in San Francisco under the Employer’s control frequently visited by their employees or applicants***, and shall send a copy of this notice to each labor union or representative of workers with which they have a collective bargaining agreement or other agreement or understanding, that is applicable to employees in San Francisco. The notice shall be posted in English, Spanish, Chinese, and any language spoken by at least 5% of the employees at the workplace, job site, or other location at which it is posted.” The notice in English, Spanish, Chinese and Tagalog currently is on the OLSE’s website.

According to the FAQ, employers may comply with the notice posting requirement by posting the notice in the employee break room or on a company bulletin board. “Employees and applicants must be able to readily access this notice.”

Prohibition Against Retaliation (Section 4908)

The FAQ reiterates the FCO’s anti-retaliation provision, Section 4908, which makes it unlawful for an employer “to refuse to hire an applicant, or to discharge, threaten to discharge, demote, suspend, or otherwise take Adverse Action against an employee in retaliation for exercising rights protected under this Article. Such rights include but are not limited to: (1) the right to file a complaint or inform any person about any Employer’s alleged violation of this Article; (2) the right to inform any person about an Employer’s alleged violation of this Article; (3) the right to cooperate with the OLSE or other persons in the investigation or prosecution of any alleged violation of this Article; (4) the right to oppose any policy, practice, or act that is unlawful under this Article; or (5) the right to inform any person of his or her rights under this Article.”

Furthermore, “taking Adverse Action against a person within 90 days of the exercise of one or more of the rights described in this Section 4908 shall create a rebuttable presumption that such Adverse Action was taken in retaliation for the exercise of those rights.”

What are the Record Retention Requirements? (Section 4910)

The FCO requires employers to “retain records of employment, application forms, and other pertinent data and records required under this Article, for a period of three years, and shall allow the OLSE access to such records, with appropriate notice and at a mutually agreeable time, to monitor compliance with the requirements of this Article.”

The FAQ provides a non-exhaustive list of records that must be retained for the three-year period:

- Documentation showing that the FCO notices were posted.
- Background check reports.

- Copies of job advertisement and solicitations.
- Job applications distributed to and received by applicants.
- Documentation of interviews.
- Documentation provided to an applicant or employee regarding potential adverse action and implemented adverse action.
- Information the applicant or employee provided in response to a background check.
- Documentation pertaining to individualized assessments, mitigating factors, and rehabilitation.
- Documentation reflecting applicants hired with unresolved arrests or conviction records.

The FAQ states that employers that fail to comply with these record retention requirements are “presumed to have violated the FCO, absent clear and convincing evidence otherwise.”

What are the Penalties for Noncompliance with the FCO? (Section 4904)

The FCO gives the OLSE authority to enforce the new law, including levying penalties in an administrative proceeding. The ordinance also grants to the City Attorney the authority to “bring a civil action in a court of competent jurisdiction against the Employer or other person violating this Article, and, upon prevailing, shall be entitled to such legal or equitable relief as may be appropriate to remedy the violation including, but not limited to: reinstatement; back pay; the payment of benefits or pay unlawfully withheld; the payment of an additional sum as liquidated damages in the amount of \$50.00 to each employee, applicant or other person whose rights under this Article were violated for each day such violation continued or was permitted to continue; appropriate injunctive relief; and, further shall be awarded reasonable attorney’s fees and costs.”

According to the FAQ, a first violation, or any violation that occurs between August 13, 2014 and August 13, 2015, results in the OLSE issuing “warnings and notices to correct.” Second violations are \$50 to each affected individual and subsequent violations are \$100.

Administrative Code, Article 12

Employment-related restrictions imposed by the FCO’s amendments to the Administrative Code are substantially similar to those imposed by the amendments to the Police Code. These impact businesses that have contracts with the City of San Francisco (with narrow exceptions, for example, “for a cumulative amount of \$5,000 or less per vendor in each fiscal year”) and subcontractors, including “any person or entity who enters into an agreement with any Subcontractor for the performance of 10 percent or more of any Subcontract.” The restrictions “only apply to a Contractor’s or Subcontractor’s operations to the extent those operations are in furtherance of performing a Contract or Property Contract with the City.” The ordinance affords narrow exceptions and waivers.

The FAQ provides examples of the types of City contracts that are covered under the FCO, including: public works contracts; contracts for goods of service; grants; and property contracts for use of real property for a term exceeding 29 days in a calendar year, including leases and certain permits. Moreover, according to the FAQ, the FCO applies to all contractors regardless of the size of the company.

Contracts that are **excluded** under the FCO include: legal settlements and contracts for urgent litigation expenses; contracts for less than \$5,000 per year; revocable at-will use or encroachment permits for use of City property for non-profit activities; street constructions permits subject to eminent domain; and permits to exercise First Amendment rights.

Additional Considerations

One important question that arose after enactment of the FCO was compliance when an employer uses a third-party background screening company. Many employers outsource the pre-adverse and adverse action notice function to their background screening provider. According to the FAQ, employers **may** continue to do so, but “must ensure that the third party entity complies with all of the FCO restrictions that apply to background checks as set forth” in the FCO.

Action Items

Due to the proliferation of “ban-the-box” laws, employers in San Francisco and elsewhere may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state, and local employment laws that regulate use of an individual’s criminal history. Suggested action items are as follows:

- Assess coverage under the FCO.
- Review impacted job advertisements and postings both for impermissible and mandatory language regarding criminal records.
- Review job application and related forms for impermissible inquiries regarding criminal records.
- Provide training to employees who conduct job interviews and make or influence hiring and personnel decisions, regarding permissible and impermissible inquiries into, and uses of, criminal records, including best practices for storing records and documenting hiring and personnel decisions.
- Review the hiring process to ensure compliance, including the timing of criminal background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.
- Update postings and record retention requirements.

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