

February 14, 2014

## **“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**

By Rod Fliegel and Jennifer Mora

### **Update: San Francisco’s “ban-the-box” ordinance went into effect on August 13, 2014.**

On February 11, 2014, the San Francisco Board of Supervisors passed sweeping amendments to San Francisco Police Code, Article 49, and Administrative Code, Article 12 (“the amendments” or “the ordinances”) that significantly restrict the ability of covered employers to inquire into, and use, criminal records.<sup>1</sup> The scope of the amendments, which are effective 30 days after enactment and become operative for area businesses 180 days after they become effective,<sup>2</sup> is ambitious and far exceeds the breadth of any of the other so-called “ban-the-box” laws.<sup>3</sup> The new local ordinances impact businesses (1) “located or doing business in” the City of San Francisco and (2) that employ at least 20 employees (in the City or elsewhere) (3) with regard to “employment” of virtually any kind (e.g., paid or unpaid work, temporary or seasonal work, part-time work, work through the services of a temporary agency, etc.) that is physically located “in whole, or in substantial part, within” the City.

The “Findings” by the Board explicitly state that the amendments are not intended to give ex-offenders preference in hiring decisions and that employers retain the discretion to choose the most qualified and appropriate candidates. The amendments also acknowledge the potential for preemption by federal or state law.<sup>4</sup> Still, covered employers and businesses that contract with the City (or that are subcontractors of such contractors) should become familiar with the terms of the amended ordinances 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

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1 To read the ordinances, click [here](#).

2 Mayor Ed Lee has 10 days from receipt to sign the ordinances into law. Enactment occurs once he signs them, fails to sign them within 10 days, or the Board of Supervisors overrides the Mayor’s veto of the ordinance.

3 See Rod Fliegel and Jennifer Mora, *Rhode Island Enacts “Ban the Box” Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (July 17, 2013); Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *Minnesota Enacts “Ban the Box Law” Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers*, Littler ASAP (May 17, 2013).

4 See Rod Fliegel, Jennifer Mora, and Amanda Fu, *New California Laws Restrict the Discretion Employers Have to Inquire Into and Use Criminal Record Information*, Littler ASAP (Oct. 24, 2013).

“systemic” investigations—employers also may want to conduct a broader (and privileged) assessment to strengthen their compliance with federal, state, and local laws.<sup>5</sup>

## San Francisco Police Code Article 49

### Coverage (Section 4903)

The amendment defines the term “Employer” as “any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that is **located or doing business in** the City,<sup>6</sup> and that employs 20 or more persons regardless of location, including the owner or owners and management and supervisory employees.” The term “Employer” includes “job placement and referral agencies and other employment agencies.”

The amendment 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 that “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.**”

### Prohibited Inquiries and Considerations At Any Time (Section 4904)

With respect to both applicants and employees, Section 4904 prohibits inquiries into, and consideration of, the following: “(1) An Arrest not leading to a Conviction, excepting under circumstances identified in this Section as an Unresolved Arrest;<sup>7</sup> (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.”

Employment applications cannot ask for the fact or details of any “Conviction History,”<sup>8</sup> “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.”

### Conditions On Obtaining Criminal History Information (e.g., Background Check Reports) (Section 4904)

No Conviction History inquiry of any kind can be made without **first** providing the individual with the notice specified by Section 4905(b), which will be available to employers from the Office of Labor Standards Enforcement (OLSE). 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 (the California Investigative Consumer Reporting Agencies Act or ICRAA).

5 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).

6 “City” shall mean the City and County of San Francisco.”

7 “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.”

8 “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.”

### Requirements for Assessing Criminal History Information (Section 4904)

Section 4909(f) 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.”<sup>9</sup>

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 Findings state: “This Article does not intend, and shall not be construed, to require an employer to give preference to anyone or to hire an unqualified person with an arrest or conviction record. Moreover, this Article shall not be construed to limit 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.”

### Adverse Action Notice (Section 4904)

**Before** taking an “Adverse Action”<sup>10</sup> against an applicant or employee based on his or her Conviction History, 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 employer also must 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.

### Job Advertisements (Section 4904)

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.” On the other hand, employers must “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.”

### Posting Requirements (Section 4904)

Employers must 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

9 “Evidence Of Rehabilitation Or Other Mitigating Factors’ may include but is not limited to a person’s satisfactory compliance with all terms and conditions of parole and/or probation (however, inability to pay fines, fees, and restitution due to indigence shall not be considered noncompliance with terms and conditions of parole and/or probation); employer recommendations, especially concerning a person’s post-conviction employment; educational attainment or vocational or professional training since the conviction, including training received while incarcerated; completion of or active participation in rehabilitative treatment (e.g., alcohol or drug treatment); letters of recommendation from community organizations, counselors or case managers, teachers, community leaders, or parole/probation officers who have observed the person since his or her conviction; and age of the person at the time of the conviction. Examples of mitigating factors that are offered voluntarily by the person may include but are not limited to explanation of the precedent coercive conditions, intimate physical or emotional abuse, or untreated substance abuse or mental illness that contributed to the conviction.”

10 “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.”

employees in San Francisco.<sup>11</sup> 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.”

### **Prohibition Against Retaliation (Section 4908)**

The anti-retaliation provision, Section 4908, 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.”

### **Record Retention (Section 4910)**

Employers must “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.”

### **Enforcement (Section 4904)**

The OLSE can enforce the new law, including levying penalties in an administrative proceeding. The City Attorney also has enforcement authority and “may 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.”

## **Administrative Code, Article 12**

Employment-related restrictions imposed by the 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.

## **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 which regulate use of an individual’s criminal history. Suggested action items are as follows:

- Assess coverage under both ordinances.
- 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.

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<sup>11</sup> A copy of the notice may be found by clicking [here](#).

- 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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