State Rules Register Alert

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New California Regulations on Use of Criminal Records

New regulations issued by the California Department of Fair Housing and Employment became effective July 1, 2017. There has been much ado raised over these new regulations. However, the regulations really contain very little impact beyond current California or EEOC law. This writer had been waiting for the state to pass its ban the box rule to allow a joint alert, but that apparently will not happen soon.

This is similar to the requirement of the Massachusetts CORI [recall such pre-adverse action requirements are now applied to all criminal records, not just CORI records]. The regulations do not state how this identification is to be done. One way would be to list them in the pre-adverse action notice by saying: Johnson County Case No. 1234 Arm Robbery or just by saying: "See highlighted records". Again, as in the CORI alert, identifying the record can help prevent discrimination claims by limiting issues. **O**f importance to employment screening firms is that the pre-adverse action notice now required must identify the criminal record(s) that may result in the adverse action.

So what do the regulations do? My take is that while there is no substantial new legal requirements, it signals an attitude/priority shift in the Department toward the issue of reintegration of those with criminal records into the work place. There is no question that this is a serious issue. Approximately 10% of the United States population has a criminal record. In some areas of the inner cities that percentage runs up to 75%. However, the reason why someone committed a crime may be the result of many factors throughout their life which created the person who opted for crime versus other alternatives. Can that "result" be ignored by an employer? Books could be filled on this subject, and have been.

In general, the regulations outline the very difficult issue of adverse action discrimination. Books can be written on this topic as well, and have been. Basically this is the process that results in unintentional discrimination. An employer uses certain hiring criteria, which could be education, requirements to have a license, strength, experience, whatever the employer believes will make for a good employee. Every hiring criteria in the world of employment must be justified as job related. Some hiring criteria will adversely affect minority groups. Let us say the employer wants the employee to have a high school diploma. However, within the inner city hiring area, only approximately 20% of African Americans have a high school diploma, while 80% of the white population has a high school diploma. Okay, this criteria has an adverse impact upon African Americans. The employer now must be able to justify that having a high school diploma is **necessary** for the job, not just the employer's preference. Let us assume that it is determined that a high school diploma is in fact necessary. The next step in the adverse action analysis is whether there are less discriminatory alternatives that will achieve the same results for the employer. In

our example, maybe having a GED is enough, or giving the applicants a test to see if they have the skills necessary for the job that supposedly the high school diploma would supply. Keep these decision stages in mind: Hiring criteria → adverse impact → necessary for job → any alternatives → decision.

For employers, the courts, to date, have been sympathetic to their decisions. So long as they do not have a "no conviction rule" which is also prohibited by these regulations and existing law, and the convictions selected by the employer seem to have a relationship to the job, the courts generally have agreed with the employer that their selection criteria is not a violation of the discrimination laws. Frankly, it is impossible to really individually analyze any person. Two people with identical experiences and records can have completely different outcomes. Experts on both sides of this question sincerely come up with completely different conclusions. Whether any employer is truly capable of making such an analysis is problematic.

The regulations do not have the Los Angeles requirements of written analysis for each employee. The regulations also acknowledge that some laws, state and federal, prohibit the hiring of people with certain convictions.

CRAs can help the employers by providing reports not only in accordance with restrictions placed upon them, but by filtering out records that California law prohibits employers from considering.

Note that copies of the Notice of Proposed Action, the Initial Statement of Reasons, the text of the regulations, and any modified texts and the Final Statement of Reasons can be accessed through the Council's Web page at www.dfeh.ca.gov/fehcouncil/.