

State Rules Register Alert

November 1, 2017

You are receiving this Alert because you are a subscriber to the
State Rules Register at CRAHelpDesk.com

So What About California Ban-the-Box?

A few years ago, California adopted ban-the-box for government employees. This year with the passage and signing of [AB1008](#), ban-the-box now applies to all employers in the State of California with more than 5 employees. The provisions of this new law are not beyond the norm for the typical ban-the-box.

The law is not effective until January 1, 2018

When can an employer seek criminal history? Employers may seek criminal records after a conditional offer of employment has been made. They cannot ask the applicant or inquire from others, e.g., CRAs before that time.

What cannot be considered? The law incorporates existing California restrictions regarding taboo criminal records:

1. Arrests/charges without convictions.
2. Referral to a pretrial/post-trial diversion program. The application of this restriction has been the subject of debate over the years: can these be considered and reported if the person is in the diversion program but has not completed it? A participant in a diversion program may fail and ends up with a conviction and in prison. It would seem that a failure, followed by a conviction would be reportable as a conviction in California and could be considered by an employer. Clearly, once completed successfully, and the charge is dismissed, an employer cannot consider it, but while the consumer is still participating is the subject of debate.
3. Sealed, expunged or eradicated convictions.

Exceptions.

Healthcare providers can consider some arrests without a conviction. Applicant/employees who have access to patients are subject to a sex offender review. The law references §690 of the Penal Code. Those applicants/employees who will have access to drugs and medications are subject to review of drug related arrests. The law references §11590 of the Health and Safety Code. Both of these sections reference a multitude of offenses and provide different time periods for which an employer can consider them. If you have a California healthcare provider, the employer and the CRA should become familiar with these very complicated rules.

Exclusions.

The following employers are excluded:

1. State and local government when a criminal background check is required for the position.
2. Any position with the Criminal Justice Agency, §13101 Penal Code.
3. Position as a farm labor contractor, §1685 Labor Code.
4. Employers required by law or regulation to conduct a criminal background check.

Employer Obligations.

The employer is to make an individual assessment of each individual considering the following issues: nature and gravity of the offense, how long ago the offense occurred, and the nature of the job (job relatedness of the offense). These are the regular EEOC standards, so nothing new for the employers to consider. The employer is not required to make or present to the applicant a written assessment.

Pre-Adverse Notice.

In addition to the FCRA requirements, the employer must identify the criminal record(s) that causes concern and the potential adverse action. The applicant/employee must have a minimum of 5 business days to respond. If the applicant/employee disputes the accuracy of the record within 5 days, then an additional 5 days are added to permit the dispute to be processed. This extension should be stated in the notice.

Adverse Action.

If the employer concludes to take adverse action, then it shall notify the consumer. In addition to the FCRA requirements, the adverse action notice shall also include notice of any company rights to appeal or to challenge that decision and notice of the right to file a complaint with the Department of Fair Employment and Housing, <https://www.dfeh.ca.gov/complaint-process/>, or 2218 Kausen Drive, Ste. 100, Elk Grove, CA 95758. The California employers will need special pre-adverse and adverse action notice forms. There is nothing in California law that indicates these points could not be included in the FCRA notices. Further, the FCRA only sets forth minimum information required in the notices rather than required maximum language.

Status of City and Local Ban-the-box Laws.

This law does not supersede any local law; therefore Los Angeles, San Francisco, etc. requirements are still in force.

Again, this law is not effective until January 1, 2018. This Alert will be posted to the Alerts List later today.

Best Regards
Larry Henry
lhenry@rhodesokla.com

The State Rules Register - www.CRAHelpDesk.com

Larry Henry - lhenry@rhodesokla.com
Mike Sankey - mike@brbpublications.com