

Overview: San Diego County's New Criminal Record Screening Regulations

October 10, 2024

Highlights:

- Effective October 10, 2024, employers in San Diego County must assess compliance with new criminal record screening regulations.
- The ordinance applies only in the unincorporated areas of San Diego County.

Effective October 10, 2024, the latest local [ordinance](#) will take effect in the unincorporated areas of San Diego County. Employers that comply with California state law will *mostly* satisfy their obligations under the San Diego County ordinance.

Coverage and Definitions

The ordinance regulates any “employer” with five or more employees that is doing business in the unincorporated areas of San Diego County.

- **“Employer”** includes any entity that evaluates an “applicant’s” or “employee’s” “criminal history” on behalf of an employer or acts as an agent of an employer.
- **“Applicant”** means any individual applying for employment, transfer, or promotion whose employment position involves performing at least two hours of work on average each week within the unincorporated areas of the County.
- **“Employee”** means an individual whose employment position involves performing at least two hours of work on average each week within the unincorporated areas of the County.
- **“Employment”** means any work provided in furtherance of an employer’s business enterprise within the unincorporated areas of the County, which includes remote work.
- **“Criminal history”** means information regarding one or more convictions or arrests.

Prohibitions on Covered Employers

The ordinance makes the following actions unlawful:

- Declaring in a job posting or similar listing, including for transfer or promotion, any limitation due to a conviction or arrest, unless required by law.
- Including in any form of job application or similar document, including for transfer or promotion, any question that directly or indirectly asks about the individual’s criminal history. This prohibition applies to all stages of the hiring process before the employer extends a conditional job offer. Employers are prohibited from inquiring about criminal records in any way, directly or indirectly, before extending a conditional job offer.
- Taking an “adverse action” against an applicant based on criminal history information until after a conditional offer of employment is made. “Adverse action” means an employer’s action or decision that materially and adversely affects the terms, conditions, or privileges of employment of an applicant or employee.
- Except as otherwise allowed or required by law, inquiring about or considering prohibited information about arrest records (not resulting in conviction), diversion programs, or any conviction that has been sealed, dismissed, expunged, or statutorily eradicated, or for which the candidate has received a full pardon or has been issued a certificate of rehabilitation.

Obligations

Employers must conduct an individualized assessment of a candidate’s criminal record to determine if it has a “direct and adverse relationship” with the specific duties of the job that justify

denying employment, transfer, or promotion. The assessment must be in writing, but the written assessment does not have to be provided to the candidate.¹

Employers must provide a pre-adverse action notice to the candidate before taking adverse action. The notice must inform the candidate of, among other things, the right to file a complaint with the California Civil Rights Department and the County of San Diego Office of Labor Standards and Enforcement (OLSE).² Employers must afford candidates at least five business days to respond to the pre-adverse action notice. Absent “exigent circumstances,” the job must remain open during the notice period.

Employers are subject to a one-year record retention requirement for all records and documents related to an applicant’s employment, transfer, or promotion applications and the written assessment of criminal records.

Remedies

The OLSE can impose fines on employers, but the ordinance otherwise does not provide a private right of action.

Recommendations

Employers with operations in, or that do business or have contracts with, the County of San Diego, at a minimum, should evaluate necessary changes in when and how they inquire into criminal history during the hiring process. They should also consider whether to undertake a broader (and privileged) assessment to strengthen their compliance with federal, state, and local employment laws that regulate use of a candidate’s criminal history.

Suggested action items for employers with employees in the County and other jurisdictions having ban-the-box laws are as follows:

- Review and update job applications and related forms for impermissible inquiries regarding criminal records;
- Review and update workplace postings to help ensure all required postings are included;
- Review and update company webpages for necessary additions about fair chance hiring;
- Provide training to recruiters and other personnel involved in posting job openings;
- Provide training to personnel who conduct job interviews and make or influence hiring and staffing decisions to explain permissible inquiries into, and uses of, criminal history;
- Provide training to personnel involved in ordering and adjudicating background reports;
- Review written and electronic communications about the hiring process, including conditional job offer templates and pre-adverse action and adverse action notices; and
- Review the hiring and screening process to help ensure compliance, including the timing of background checks, the distribution of mandatory notices, and the application of mandatory deferral periods.

¹ Employers must share the written assessment with the candidate when subject to the ordinance in the City or County of Los Angeles.

² No other law in California requires such information in the pre-adverse action notice. Similar information is required by state law and local ordinances in the adverse action notice (*i.e.*, the notice mailed to the candidate to inform the candidate of the employer’s final decision).