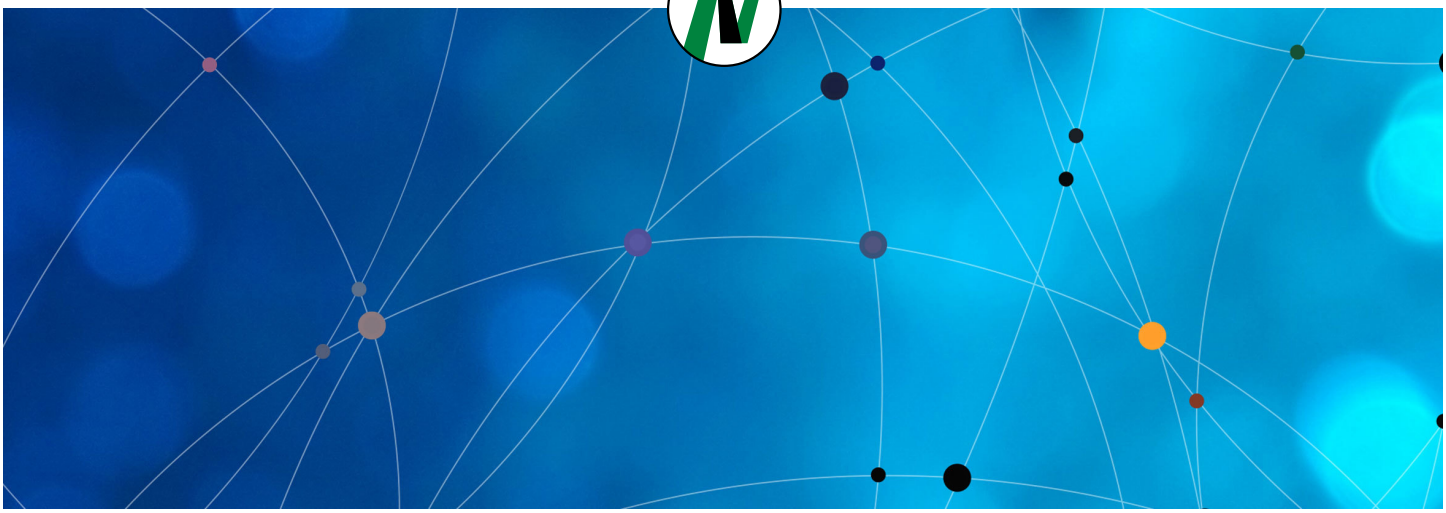

Does California's State-Wide "Ban-the-Box" Put Employers in a Box?

11.08.2017 | By John T. Kennedy

On October 14, 2017, Governor Jerry Brown announced that he had signed Assembly Bill 1008, which prohibits most California public and private employers from asking applicants about criminal conviction history until *after* a conditional offer of employment has been made. This means that employers will have to remove check boxes or questions from employment applications regarding the disclosure of an applicant's criminal conviction history (hence the phrase, ban-the-box). This also means criminal background checks cannot be conducted prior to an employer making a conditional offer of employment. The new law, which goes into effect on January 1, 2018, amends the Fair Employment and Housing Act, which covers all California employers (with very few exceptions) with five or more employees.

This follows a state-wide trend that has been building for some time. In 2013, California enacted Labor Code section 432.9, which prohibited public employers from inquiring about criminal conviction history until the employer has determined that the applicant met the minimum qualifications for the job.[1] Subsequently, the cities of Los Angeles and San Francisco enacted their own ban-the-box local ordinances that apply to private employers doing business in those cities. And, in June 2017, we updated you on new regulations from the California Fair Employment and Housing Council that limit an employer's ability to consider the criminal history of a job applicant or employee when making employment decisions. The sponsor of AB 1008 stated that the intent of the bill is to give applicants with a criminal record the opportunity to be judged on their qualifications and not their criminal histories.

What Does This Mean For Employers In California?

Assembly Bill 1008 makes it unlawful for a California employer to include any questions about conviction history on any application *before* a conditional offer of employment is made. Employers are also prohibited from inquiring into or considering an applicant's conviction history *before* extending a conditional offer of employment – this includes questions during the interview process and criminal background checks.

Once a conditional offer of employment has been made, employers are permitted to inquire into conviction history. However, in the event the employer decides to make an adverse decision (i.e., withdraw the conditional offer of employment), based on the applicant's conviction history (in whole or in part), AB 1008 sets out specific steps that the employer must follow:

1. Employers must make an individualized assessment of whether the conviction history has a direct and adverse relationship with the specific duties of the job justifying denial of the applicant for the position. In doing so, the employer must consider (a) the nature and gravity of the offense, (b) the time that has passed since the offense or completion of the sentence, and (c) the nature of the job sought.
2. Once the individualized assessment has been made, the employer must notify the applicant in writing that a preliminary decision has been made disqualifying the applicant from employment. The notification must (a) identify the disqualifying conviction(s), (b) provide a copy of the conviction history report, if any, (c) explain the applicant's right to respond before the preliminary decision becomes final (including the applicant's right to provide evidence challenging the accuracy of the conviction history and/or evidence of mitigating circumstances or rehabilitation), and (d) provide a deadline by which the applicant must respond (no less than *five business days* after providing the notice). In the notice, the employer *may* justify or explain its reason for making the preliminary decision, but it is *not required* to do so.
3. After providing the notice, the applicant must have a minimum of five business days to respond before the employer may make a final decision. The applicant's response may include submission of evidence challenging the accuracy of the conviction history and/or evidence or mitigating circumstances or rehabilitation. In the event the applicant notifies the employer that he or she disputes the accuracy of the conviction history and is obtaining evidence to support that dispute, the applicant must be provided five *additional* business days to respond to the notice.
4. If the employer's final decision is to deny employment, the employer must notify the applicant in writing. The notice must notify the applicant of (a) the final decision, (b) the employer's procedure (if any) for the applicant to challenge the decision or request reconsideration, and (c) the right to file a complaint with the Department of Fair Employment and Housing. Again, the employer *may* justify or explain its reason for making the final decision, but it is *not required* to do so.

In the event an applicant files a lawsuit based on a perceived violation of AB 1008, the applicant may sue for the full range of damages available under the Fair Employment and Housing Act, including compensatory damages and attorney's fees and costs.

Which Employers Are Covered By The New Law?

Assembly Bill 1008 covers all California employers with five or more employees. Only the following positions are exempted: (1) positions for which a government agency is required by law to conduct a conviction history background check; (2) positions with criminal justice agencies; (3) Farm Labor Contractors (as defined by the Labor Code); and (4) positions for which a state, federal, or local law mandates that an employer conduct a criminal history background check for employment purposes, or restricts employment based on criminal history.

Employers should note that local ban-the-box ordinances (such as those in Los Angeles and San Francisco) *are not* abrogated by AB 1008, and thus remain in full force and effect. Local ordinances may place additional burdens on employers beyond the requirements of AB 1008. For example, the Los Angeles ordinance requires employers to provide applicants a document setting forth the reasons for a preliminary adverse decision, which AB 1008 does not.

What Should California Employers Do In Response?

Employers should review their employment applications to determine whether they need to be revised or replaced before January 1, 2018. Employers should also carefully review their hiring and interview practices, and make sure that employees interviewing applicants are familiar with AB 1008. Employers who intend to utilize criminal background checks after a conditional offer of employment has been made should revise or create written preliminary decision and final decision notices to comply with the requirements of the new law.

How Nossaman Can Help

Nossaman provides client-focused, high caliber, legal services that exceed our clients' expectations while staying within their budgets. Our employment attorneys provide litigation, counseling, advice, and training services to private and public companies and public entities throughout California, as well as meeting their out-of-state-needs. The scope of our representation runs the full gamut from prosecuting misappropriation of trade secrets to defending wrongful termination claims and wage and hour class actions. We have also been on the front line of e-discovery, privacy rights, cybersecurity, data breach, and workplace violence. We stay on top of emerging employment issues and are well prepared to counsel our clients on how to address and control related issues.

[1] With the enactment of AB 1008, Labor Code section 432.9 was repealed.