

AGENCY

California

Statewide Ban-the-Box Regulations Further Limit Inquiries Into and Consideration of Employee and Applicant Criminal History

Effective July 1, 2017, California adopted new regulations governing an employer's ability to seek out and consider information pertaining to employees' and applicants' criminal history. Below is a summary of the key points outlined in the regulations:

Employers Are Precluded from Seeking or Considering Certain Criminal History Information, Regardless of Whether Doing so has an Adverse Impact on Individuals within a Class Protected under the Fair Employment & Housing Act ("FEHA").

Unless otherwise specifically permitted by law, employers may not (a) consider the following types of criminal history or (b) seek information about such criminal history from the employee, applicant, or third party, when making employment decisions such as hiring, promotion, training, discipline, lay-off, and termination:

- 1) An arrest or detention that did not result in conviction;
- 2) Referral to or participation in a pretrial or post-trial diversion program;
- 3) A conviction that has been judicially dismissed or ordered sealed, expunged or statutorily eradicated pursuant to law (e.g., juvenile offense records sealed pursuant to Welfare and Institutions Code section 389 and Penal Code sections 851.7 or 1203.45);
- 4) An arrest, detention, processing, diversion, supervision, adjudication, or court disposition that occurred while a person was subject to the process and jurisdiction of juvenile court law; and
- 5) A non-felony conviction for possession of marijuana that is two or more years old. (2 Cal. Code Regs., § 11017.1(b).)

Employers should therefore update their job application forms to remove any request for such information, train managers and other employees who interview applicants not to ask about such information, and ensure that such information is not captured through any background check conducted on applicants or employees.

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Employers Must Give Notice to the Applicant or Employee of a Disqualifying Conviction.

Before taking adverse action against an employee or applicant based on conviction history, the employer must provide the employee or applicant (a) notice of the disqualifying conviction and (b) an opportunity to present evidence that the information is factually inaccurate. If the employee establishes that the record is factually inaccurate, the record cannot be considered in making an employment decision. (2 Cal. Code Regs., § 11017.1(e)(3).) Employers should therefore review their criminal history consideration policies and procedures to ensure that appropriate notice is provided and that employment decisions are not made until the affected individual has a chance to challenge the record at issue.

Employers Cannot Consider Criminal History where Doing So Will Have an Adverse Impact on Individuals within a Class Protected under FEHA.

An employee or applicant bears the initial burden of proving that a policy or practice of considering criminal history has an adverse impact on individuals falling within a protected class under the FEHA (e.g., by providing conviction statistics). If the employee or applicant makes this showing, the burden then shifts to the employer to prove that the policy is job-related and consistent with business necessity. To establish job-relatedness and business necessity, the employer must show that the policy or practice is “appropriately tailored,” taking into account (at a minimum) the following factors:

- 1) The nature and gravity of the offense or conduct;
- 2) The time that has passed since the offense or conduct and/or completion of the sentence; and
- 3) The nature of the job held or sought.

Establishing that a policy or practice is appropriately tailored further requires that an employer either:

- a) Demonstrate that the use of a bright-line conviction disqualification or consideration (i) can properly distinguish between those who do and do not pose an unacceptable level of risk and (ii) the convictions used to disqualify have a direct and specific negative bearing on the person’s ability to perform the duties necessarily related to the job; or
- b) Conduct an individualize assessment of the circumstances and qualifications of the persons excluded by the conviction screen. If conducting such an assessment: (i) notice must be provided to the adversely impacted individual that he or she has been screened out because of a criminal conviction; (ii) a reasonable opportunity must be provided to the individual to demonstrate that the exclusion should be apply based on his or her particular circumstances; and (iii) the employer must consider whether additional information from the individual (or some other source) warrants an exception to the exclusion policy or shows that the policy as applied is not job-related or consistent with business necessity. (2 Cal. Code Regs., § 11017.1(e)(1-2).)

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Employers should review their policies of considering conviction history to determine whether such policies are job-related and consistent with business necessity, in accordance with the factors outlined above.

Employers Must Ensure that There is no Less Discriminatory Alternative to the Criminal Conviction Policy.

Even if the employer establishes that its policy of considering criminal convictions is job-related and consistent with business necessity, an employee or applicant can still prevail under the FEHA if he or she demonstrates that there were less discriminatory policies or practices that would effectively serve the employer's goals. (2 Cal. Code Regs., § 11017.1(g).) Employers should review their policies to determine whether to narrow the list of disqualifying conditions or to otherwise revamp their policies to find less discriminatory alternatives to evaluate qualification for the position.

Employers are Permitted to Consider Criminal History Where Required by Law to Do So.

Some federal, state, and local laws prohibit certain individuals from holding particular positions or working in particular occupations, or require employers to undertake a screening process before hiring individuals in such occupations or positions. The new regulations expressly permit employers to continue complying with such laws.

Employers Should Consider All Governing Laws and Regulations when Utilizing a Criminal History Consideration Policy.

In California, employers are subject to state and federal laws and regulations concerning the consideration of criminal history (e.g., the federal Fair Credit Reporting Act, the California Investigative Consumer Reporting Agencies Act, etc.). Because an increasing number of municipal ordinances place further restrictions upon the consideration of criminal history (including San Francisco and Los Angeles), employers should determine whether any such local laws impact employment policies.

Ninth Circuit Rules That Nominal Damages May Be Awarded As Equitable Relief in ADA Cases

In *Bayer v. Neiman Marcus Group, Inc.*, the Ninth Circuit Court of Appeals ("Ninth Circuit") ruled that even if legal remedies and injunctive relief are unavailable in a claim under the Americans with Disabilities Act ("ADA"), nominal damages may be awarded as an equitable remedy. This ruling bolsters the rights of plaintiffs in ADA cases, as claims that would otherwise be moot may potentially be pursued solely to affirm the rights of aggrieved parties.

Retailer Neiman Marcus hired plaintiff Tayler Bayer ("Bayer") in 2006 as a full-time employee. This designation made him eligible for employer-sponsored health coverage. In 2007, Bayer became disabled, requiring him to reduce his

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workdays. This reduction brought Bayer below the threshold number of hours required to be eligible for the employer plan. In June 2007, Bayer filed a charge with the EEOC, alleging that Neiman Marcus had failed to accommodate his disability by refusing to modify his schedule to ensure his continued insurance eligibility. At approximately the same time, Neiman Marcus circulated a mandatory arbitration agreement to all employees. Bayer refused to sign the arbitration agreement, and instead filed a second EEOC charge arguing that the mandatory arbitration agreement was discriminatory (because he believed that it forced him to waive his claims under the ADA pending before the EEOC). Bayer ultimately reached a settlement with Neiman Marcus in 2008 to resolve the insurance dispute, although the second EEOC charge remained open.

Neiman Marcus discharged Bayer in January 2009, leading him to file a lawsuit alleging retaliation in July 2011. Neiman Marcus attempted to enforce the arbitration agreement, but the district court found that the agreement was unenforceable against Bayer because he never signed it. Neiman Marcus appealed the ruling.

In July 2013, while the Neiman Marcus appeal was pending, Bayer filed a third lawsuit against Neiman Marcus, seeking monetary damages, an injunction prohibiting the misuse of the arbitration agreement, and equitable relief. In July 2014, the Ninth Circuit affirmed the district court's ruling that the arbitration agreement was unenforceable. Based on that decision, Neiman Marcus sought summary judgment on the third lawsuit on the grounds that the case was moot. The district court granted the motion, finding that because there was no longer a controversy to be resolved as to the enforceability of the arbitration agreement, there was no relief available to Bayer. Bayer appealed this ruling, seeking at very least nominal damages as a means of averting summary judgment.

The Ninth Circuit reversed the district court's grant of summary judgment, holding that even though legal remedies and injunctive relief were not available, equitable relief was. Because the arbitration agreement had already been deemed unenforceable against Bayer and he was no longer an employee, there was no future harm to Bayer addressed via injunction or monetary damages to be awarded. In contrast, the Ninth Circuit found that nominal damages, as a form of equitable relief, were still available to Bayer. Nominal damages operate as a symbolic tool to vindicate a plaintiff's rights, even if the monetary value is minimal. Here, based on the civil rights implicated in the case, the potential award of nominal damages was sufficient to allow for a ruling as to the alleged violation of the ADA. The case was therefore sent back to the district for further proceedings.

Since many employment lawsuits turn on civil rights protected under the ADA or Title VII, this decision is important for employers. Even where monetary damages or injunctive relief are unavailable or minimal, courts may consider the potential for nominal damages as a basis to allow cases a full hearing on the merits. Because the costs, stress, and business disruption associated with litigation are substantial, the need for effective personnel management strategies that can help to avoid preventable lawsuits becomes all the more important.

California

Court of Appeal Clarifies that Nonmonetary Benefits are *Not* Considered In Determining Exempt Status

In *Kao v. Joy Holiday*, a California Court of Appeal held that an employer may not consider nonmonetary benefits when determining if employees meet the salary threshold for a particular exemption.

Plaintiff Ming-Hsiang Kao (“Kao”) moved to the United States from Taiwan in early 2009 to work with Joy Holiday, a tour company catering to Chinese-speaking travelers. Joy Holiday is owned and operated by Jessie Lin (“Lin”) and Harry Chen (“Chen”). Kao came to the U.S. with an agreement that he would receive a \$2,500 monthly stipend and the promise that Chen would sponsor him for his H-1B work visa.

Kao began work for Joy Holiday immediately upon his arrival. He initially worked under a tourist visa; no H-1B visa application was filed until October 2009. Kao was living in the home of Lin and Chen and received \$1,700 a month, representing a \$2,500 gross amount less an \$800 rent deduction. In February 2010, Kao received his H-1B visa. He then signed a “work agreement” stating that he was “officially hired as the office manager of Joy Holiday.” Per the agreement, Kao would receive \$2,500 per month, and he was obligated work 20 hours per week. The agreement stated that if Kao stayed in the office beyond 20 hours per week, doing so was his personal choice. Kao typically worked fifty hours per week.

Kao was discharged in May 2011. He thereafter brought his lawsuit alleging violations of state and federal wage and overtime statutes. He further alleged that Joy Holiday failed to provide wage and hour statements and failed to timely pay wages upon his termination. Joy Holiday contended that Kao was an administrative employee receiving a sufficient salary to be exempt from minimum wage and overtime compensation requirements. The trial court agreed, relying on testimony by Joy Holiday’s accounting expert that Kao’s “total compensation package” was \$34,305 annually (\$2,858.67 monthly). The compensation package included gross salary and the calculated value of the company car, phone, and employer-provide meals. Relying on that valuation, the trial court found no statutory wage and hour violations.

Kao appealed the denial of his statutory wage claims and the Court of Appeal reversed the trial court’s findings. The Court of Appeal noted that the minimum monthly salary for an exempt administrative employee (at the time Kao was employed) was \$2,773.33. The court further noted that while no California case has expressly held that nonmonetary benefits are not to be included in determining exempt status, federal law provides that exempt employees must receive a minimum monetary salary rate “exclusive of board, lodging or other facilities.” The court reasoned that the fact that the minimum salary is stated as a monetary amount under both state and federal law, it follows that monetary payments alone determine whether the mandated minimum salary rate is met. Based on this analysis, the court held that Kao was entitled to wages and overtime pay.

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This case highlights the need for employers to carefully analyze whether or not their employees may be properly classified as exempt given that nonmonetary benefits may *not* be considered in determining if employees meet the salary threshold for any particular exemption.

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This is Pettit Kohn Ingrassia & Lutz PC's monthly employment update publication. If you would like more information regarding our firm, please contact Tom Ingrassia, Jennifer Lutz, Jenna Leyton-Jones, Ryan Nell, Lauren Bates, Jennifer Suberlak, Shannon Finley, Cameron Flynn, or Cameron Davila at (858) 755-8500; or Grant Waterkotte, Jennifer Weidinger or Tristan Mullis at (310) 649-5772.