



San Francisco “Ban the Box” FAQs

The Fair Chance Ordinance (“FCO”), No. 17-14

1. Who does the law apply to?

Any employer that is located in or does business in San Francisco and that employs 20 or more employees worldwide. The FCO applies to employee positions located within San Francisco, regardless of where the employer is located, as long as the position is “in whole, or in substantial part, within the City.” The Office of Labor Standards Enforcement (“OLSE”) interprets “in substantial part” to mean an average of eight hours of work performed a week in San Francisco.

2. What is the effective date?

August 13, 2014.

3. When is it permissible to ask an applicant about criminal records?

An employer may only inquire about any criminal history information after the first live interview or, at the employer’s discretion, after a conditional offer of employment is made.

4. Does the law affect when you can conduct a background check?

Yes. An employer may only conduct a criminal background check after the first live interview or, at the employer’s discretion, after a conditional offer of employment is made.

5. Are there any “pre-adverse” notification requirements beyond those of the FCRA?

Yes. Before taking any adverse action against an employee or applicant because of criminal history, an employer must provide the applicant or employee with a copy of the background report (if any) and notify the applicant/employee of the prospective adverse action; explain to the applicant which aspect of his/her unresolved arrest or conviction history is motivating the adverse action; and give the applicant/employee at least seven days to respond.

If, within seven days, the applicant gives the employer notice (orally or in writing) of evidence of the inaccuracy of the conviction history or provides evidence of rehabilitation or other mitigating factors, the employer must delay the adverse action for a reasonable period and reconsider the prospective adverse action in light of the information provided.

6. Are there any “adverse action” notification requirements beyond those of the FCRA?

If the employer takes an adverse action based on conviction history, the employer must notify the applicant of the final adverse action. While the ordinance does not indicate that the notice must be in writing, employers should provide the notice in writing to show compliance with the ordinance.



7. Are there any other additional notice/disclosure requirements?

Prior to making any criminal record inquiry or conducting a criminal background check, employers must provide a specific notice prescribed by the Office of Labor Standards (Section 4905(b)) and still comply with the disclosure and authorization requirements under the California Investigative Consumer Reporting Agencies Act (ICRAA).

Employers covered by the FCO must include in all job ads or solicitations, that are reasonably likely to reach persons who are reasonably likely to seek employment in San Francisco, a statement that the employer will consider qualified applicants with criminal histories in a manner consistent with the requirements of the FCO. An example of a statement that would satisfy this requirement is: “Pursuant to the San Francisco Fair Chance Ordinance, we will consider for employment qualified applicants with arrest and conviction records.”

An employer may not disseminate any job solicitation or advertisement that expresses—directly or indirectly—that any person with an arrest or conviction record will not be considered for employment, or may not apply for employment. As a result, job ads that state “no felons,” or “no criminal history allowed,” are not permitted.

Employers must post the OLSE FCO Notice in a conspicuous location at every workplace, job site or other area in San Francisco under the employer’s control that is frequently visited by their employees or applicants. Employers may comply

with this requirement by posting the notice in the employee break room or on the company notice board. Employees and applicants must be able to readily access this notice.

8. Does the law impose any additional restrictions or requirements on employers?

Employers cannot ask, inquire about or consider the following information at any time about an applicant or employee:

1. Arrests not resulting in a conviction (unless the charges are still pending);
2. Completion of any diversion or deferral of judgment program;
3. Expunged, sealed, dismissed and juvenile convictions;
4. Convictions older than seven years from the date of sentencing; and
5. Offenses that are not felonies or misdemeanors (infractions, for instance).

If you do make employment decisions based on conviction history, you must conduct an individualized assessment, and only convictions and unresolved arrests that are directly related to the applicant’s ability to do the job may be considered. In addition, you must consider the amount of time that has elapsed since the conviction or unresolved arrest and any evidence of inaccuracy, rehabilitation or other mitigating factors.

The law also contains a record retention requirement. For three years, the employer must maintain “all records of employment,”



application forms and “other pertinent data and records required under the ordinance,” including records documenting the employer’s compliance with the FCO, and shall allow the OLSE access to those records.

9. Does the law allow employment applications to still include the criminal history question with a carve-out for this jurisdiction?

The law does not address this, however, the OLSE’ FAQs document states that “if an employer chooses to use a single application form, then it should include a clear and conspicuous disclaimer next to the question instructing applicants for San Francisco positions not to answer that question.” Nonetheless, it would be a best practice for employers to adopt a conservative approach and remove any criminal history questions from all application forms used for employment in San Francisco.

10. Does the law provide any exceptions?

The FCO contains a preemption provision making clear that if a federal or state law has a criminal history requirement that conflicts with the FCO, the federal or state requirement supersedes the FCO. (See Police Code Sec. 4916, Admin. Code Sec. 12T.9). If federal or state law requires a criminal background check for a particular position in your company that conflicts with the FCO, then the FCO, including the notice and posting

requirements, do not apply to that particular position and its applicants. However, if the company has other positions that are not governed by superseding federal or state law—and which are therefore subject to the FCO—then the company must comply with the FCO notice and posting requirements with respect to those positions and those applicants.

11. Does the law supersede or preempt any other law?

No.