

Fair Chance Act: Criminal History and Employment



FAQ

1 | What is the Fair Chance Act?

The Fair Chance Act, which went into effect on January 1, 2018, is a California law that generally prohibits employers with five or more employees from asking about your conviction history before making you a job offer. This type of law is also known as a “Ban the Box” law. California enacted the Fair Chance Act to reduce barriers to employment for individuals with conviction histories because gainful employment is essential to these individuals supporting themselves and their families and to improving their community ties and mental health – all of which reduce recidivism. The Fair Chance Act is part of California’s employment anti-discrimination statute called the Fair Employment and Housing Act (FEHA), which is enforced by the Department of Fair Employment and Housing (DFEH). The Fair Chance Act is codified at Government Code section 12952.

2 | How does the law work?

The law generally prohibits employers from:

- Including on a job application any questions about conviction history before a conditional job offer has been made
- Asking about or considering your criminal history before a conditional job offer has been made
- Considering information about arrests not followed by conviction, participation in pretrial or posttrial diversion programs that have been completed and the underlying pending charges or conviction dismissed, sealed, or eradicated, or convictions that have been sealed, dismissed, expunged, or statutorily eradicated

After offering you a job, employers are allowed to conduct a criminal history check, but the law requires an individualized assessment about your conviction history. That means that an employer can’t take back the job offer without considering the nature and gravity of the criminal history, the time that has passed since the conviction, and the nature of the job you are seeking. If the employer decides to take back the job offer based on your criminal history, they must tell you so in writing, provide a copy of any conviction history report they relied on, and give you at least five business days to respond.

3 | Which employers are covered by the law?

Public and private employers with five or more employees are covered by the law. This includes union hiring halls, labor contractors, temporary employment agencies, and client employers. The law does not apply to certain positions at health care facilities, farm labor contractors, or positions with state criminal justice agencies. It also does not apply to any position where an employer is required by another law to conduct background checks or restrict employment based on criminal history. However, while employers do not have to comply with the requirements of the Fair Chance Act when hiring for such positions, their use of criminal history may still be challenged as discriminatory if it has an adverse impact on individuals in a protected basis (such as race). In such cases, the employer must show that the consideration of criminal history is job-related and consistent with business necessity. Even if the consideration of criminal history is job-related and consistent with business necessity, it will be unlawful if there is a less discriminatory way to meet the business necessity.

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4 | After a conditional offer of employment, what can an employer ask me about my criminal history?

After a conditional offer, an employer may ask you if you have any history of convictions. But employers may not ask about or consider information about (1) an arrest that did not result in a conviction (subject to the exceptions in Labor Code § 432.7(a)(1) and (f)); (2) referral to or participation in a pretrial or posttrial diversion program; or (3) convictions that have been sealed, dismissed, expunged or statutorily eradicated pursuant to law. The following is an example of a permissible question after a conditional offer:

Have you ever been convicted of a misdemeanor or felony? Answer “NO” if : (1) you have never been convicted of a misdemeanor or felony; (2) the misdemeanor or felony was sealed, dismissed, expunged, or reversed on appeal; (3) you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

5 | What happens if an employer learns about my conviction history and wants to take back the job offer?

The law provides you with important rights if the employer wants to take back (rescind) your conditional job offer because of your criminal history.

- Individualized assessment: The employer must make an individualized assessment about your conviction history. That means that an employer has to consider the nature and gravity of your criminal history (the harm caused by the criminal conduct), the amount of time that has passed since the conviction, and the nature of the job you are seeking (the essential functions and the job environment). The employer cannot simply say that they won't hire anyone convicted of a certain crime.
- Notification in writing: The employer must notify you in writing of the preliminary decision that your conviction history disqualifies you from employment.
- Notice of disqualifying conviction: The employer must provide you a notice of the convictions that disqualify you from employment.
- Copy of conviction history report: If the employer obtained a copy of your conviction history report, they must provide you with a copy of the report.
- Chance to respond: The employer has to give you at least five business days to respond to the preliminary decision to take back your job offer (and has to tell you that you can respond). If you dispute the conviction history report, and you tell the employer within five days, then you get an additional five days to respond.¹ The employer has to tell you that your response can include any evidence challenging the accuracy of the conviction history report, plus any evidence of your rehabilitation or circumstances that you believe are important for the employer to consider about your life or the crime. Examples of this type of evidence include your employment history, an explanation of circumstances about your involvement in the crime, and rehabilitation efforts such as education or training.
- Consideration of your response: The employer must consider any information you submit in response.
- Final notification in writing: After considering any information you submit, the employer must notify you in writing of any final disqualification from the job, any procedure the employer has to challenge that final disqualification, and your right to file a complaint with the Department of Fair Housing and Employment.

¹ If notice is transmitted through a format that does not provide a confirmation of receipt, such as a written notice mailed by an employer without tracking delivery enabled, the notice shall be deemed received five calendar days after the mailing is deposited for delivery for California addresses, ten calendar days after the mailing for addresses outside of California, and twenty calendar days after mailing for addresses outside of the United States 2 C.C.R 11017.01

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6 | **What happens if I'm applying for a job and the employer's application asks me about my criminal history and I do not disclose my criminal history because the application would violate the Fair Chance Act? Can the employer use my non-disclosure on the application of my criminal history as the sole reason to deny me the job?**

Employers who violate the prohibition on inquiring into criminal history information prior to making a conditional offer of employment may not, after extending a conditional offer of employment, use an employee's failure to disclose criminal history information on the unlawful application as a factor in subsequent employment decisions, including denial of the position conditionally offered.

7 | **What should I do if I think an employer has violated the law?**

Within three years of an employer's violation of the law, you may file a complaint with DFEH. You may do so by filling out a complaint form online in our Cal Civil Rights System, downloading an intake form from our website and mailing it in, visiting a DFEH office, or calling our Communication Center below.

If you think you have been a victim of employment discrimination, please contact DFEH.

TO FILE A COMPLAINT

Department of Fair Employment and Housing

dfeh.ca.gov

Toll Free: 800.884.1684

TTY: 800.700.2320

If you have a disability that requires a reasonable accommodation, DFEH can assist you with your complaint. Contact us through any method above or, for individuals who are deaf or hard of hearing or have speech disabilities, through the California Relay Service (711).