

California Employment Law Update:  
February 2017

---

**Presenter: Aaron N. Colby**

Tel: (213) 633-6882 | [aaroncolby@dwt.com](mailto:aaroncolby@dwt.com)  
[www.dwt.com/people/AaronNColby](http://www.dwt.com/people/AaronNColby)

# Criminal History *Outside* of City of Los Angeles

- The **Equal Employment Opportunity Commission** has a strong position on [criminal background checks](#). While the EEOC does not require the same “Conditional Offer” process as the Los Angeles Fair Chance Ordinance, it does require an “individualized inquiry” when reviewing criminal history.
  - <http://www.dwt.com/EEOCs-Tough-Enforcement-Stance-Against-Criminal-Background-Checks-12-18-2012/>
- The **California Department of Fair Employment And Housing** has [proposed regulations](#) that mirror the EEOC guidance, finding that consideration of criminal convictions may violate the California Fair Employment and Housing Act (“FEHA”) by adversely impacting individuals based on protected characteristics, such as gender or race.
  - <http://www.dfeh.ca.gov/files/2016/09/Third-Notice-of-Modifications-to-Text-of-Proposed-Consideration-of-Criminal-History-in-Employment-Decisions-Regulations.pdf>

# Criminal History *Outside* of City of Los Angeles

- Other cities have similar ordinances, including:
  - [San Francisco](#)
    - <http://www.dwt.com/San-Francisco-Enacts-Ordinance-Restricting-Employers-Ability-to-Ask-About-and-Use-Criminal-History-03-05-2014/>
  - [New York City](#)
    - <http://www.dwt.com/NYC-Mayor-Signs-Ban-the-Box-Legislation-Prohibiting-Criminal-Background-Inquiries-Prior-to-Offer-of-Employment-07-13-2015/>
  - [Seattle](#)
    - <http://www.dwt.com/Seattles-Criminal-Background-Check-Ordinance-and-New-Rules-Take-Effect-Nov-1-2013-10-30-2013>

# City of Los Angeles Limits Employer Inquiries Regarding *Criminal History* of Job Applicants

- The Los Angeles Fair Chance in Hiring Ordinance (the “Ordinance”), limits the practice of many employers to require prospective job applicants to provide criminal histories as part of information on their job application. The Ordinance took effect on January 22, 2017, with penalties and fines imposed starting July 1, 2017.
- **Private employers with 10 or more employees are prohibited from inquiring about criminal convictions until after a conditional offer of employment is made.** The conditional offer must be contingent only upon the assessment of the criminal history of the applicant and the duties and responsibilities of the position.
  - Employers: within the City of Los Angeles. [Addresses can be checked at <http://zimas.lacity.org/> ]
  - Applicants: applies to any individual who “*performs at least two hours a week on average each week within the geographic boundaries of the City [of Los Angeles].*”
- For violations re applications procedures, employer assessment of criminal history, and retaliation: up to \$500 for the 1<sup>st</sup> violation, up to \$1,000 for a 2<sup>nd</sup> violation, and up to \$2,000 for each subsequent violation. For violations re notice and posting requirements and record retention: up to \$500 for each violation.

# “Criminal History” Defined...

- “*Criminal History*” is “information regarding one or more Convictions... obtained from any source, including... a Criminal History Report.”
- “*Convictions*” are any record that an individual has been convicted of a felony or misdemeanor for which the person has been placed on probation, fined, imprisoned, or paroled.
- “*Criminal History Report*” is “any criminal history report, including, but not limited to, those produced by the California Department of Justice, the Federal Bureau of Investigation, other law enforcement or police agencies, or courts, or by any consumer reporting agency or business or employment screening agency or business.”
  - Under this definition, it is questionable whether Motor Vehicle Reports are included as “Criminal History Reports.”

# Exceptions...

- The requirements of the Ordinance *do not apply* where:
  - (1) the employer is required by law to obtain applicants' criminal history information,
  - (2) the applicant would be required to possess or use a firearm in the course of his or her employment,
  - (3) the applicant is prohibited by law from holding the position sought, *or*
  - (4) the employer is prohibited by law from hiring an applicant who has been convicted of a crime.

# Compliance...

- **State in all solicitations or advertisements** seeking job applicants that the employer will consider for employment qualified applicants with criminal histories consistent with the Los Angeles Fair Chance Initiative;
- **Post a notice** in each workplace, and distribute a notice to all labor union representatives or other representatives of workers with whom the employer has a collective bargaining agreement or similar understanding or agreement;
- **Refrain from asking**, in any way, about an applicant's criminal history until after a conditional offer of employment is made;
- Conduct an **individualized written assessment** for each applicant with a criminal history, comparing the applicant's criminal history with the risks inherent in the duties of the position sought, and notify the applicant of any intent to withdraw a conditional offer based on the written assessment;
- Allow the applicant five business days to **respond to the written assessment** and to provide any additional information for consideration, conduct a written reassessment if additional information is provided, and notify the applicant of any final decision to withdraw a conditional offer; and
- **Maintain records** relating to applications, and any assessments or reassessments conducted, for a period of three years.

# Compliance... (cont.)

- In performing the assessment, employers must consider:
  - (1) the time that has elapsed since the offense;
  - (2) the individual's age at the time of the offense;
  - (3) circumstances surrounding the offense;
  - (4) the number of offenses for which the individual has been convicted;
  - (5) employment history before and after the conviction; and
  - (6) evidence of rehabilitation, and
  - (7) other mitigating factors.



# “Off-Duty” Rest Breaks Defined...

- In its 2012 decision in *Brinker Restaurant Corp.* 53 Cal. 4th 1004 (2012), the California Supreme Court made clear that denial of one or more rest breaks in any workday entitles an employee to a statutory one-hour penalty payment.
  - An unanswered question was whether employers could require employees to be on-call, or could otherwise restrict their movement or activities, during rest breaks.
- Now, in *Augustus, et al. v. ABM Security Services, Inc.*, S224853 (December 22, 2016), a split California Supreme Court has ruled that in order to be compliant with state law, **a rest break must be free of compulsion to “remain at the ready, tethered by time and policy to particular locations or communications devices.”**

## “Off-Duty” Rest Break (cont.)

- The case involved security guards who were required to wear pagers or beepers during rest breaks, and to be prepared to respond to emergencies or other urgent security issues while on break. If a guard responded to a page or call and the rest break was *actually* interrupted, the guard was either given a replacement break or paid the one-hour penalty.
- The issue was **whether guards were denied a rest break when they did *not* receive a page or call, and were not required to respond to a security need during a break.**
- The Court ruled that except where an express exemption exists under an applicable wage order or had been provided by the Division of Labor Standards Enforcement (DLSE), **rest breaks must be wholly “off-duty,” and that “*employers must relieve their employees of all duties and relinquish any control over how employees spend their break time.*”**

# “Off-Duty” Rest Breaks (cont.)

- ***Schedule relief coverage*** for employees during rest breaks, and clarify that break policies do not require employees to be on call while on break even though an employee may be carrying a communications device.
- ***Reschedule a rest break*** when an employee on break is interrupted.
- ***Pay the one-hour penalty*** for a missed rest break when an employee is required to be on-call or is interrupted and no replacement break is scheduled.
- ***Seek an exemption*** from the DLSE. Under certain wage orders, the DLSE is permitted to grant an exemption where the employer can demonstrate that providing an on-duty rest break “would not materially affect the welfare or comfort of employees and would work an undue hardship on the employer.”
- ***Review policies and handbooks*** to ensure they are compliant with the ruling.
- ***Train supervisors*** to provide breaks in accordance with legal requirements, including that no work is expected or is performed.

# New Version of Form I-9

- U.S. Citizenship and Immigration Services (USCIS) published a new version of the Form I-9.
  - [https://www.uscis.gov/system/files\\_force/files/form/i-9.pdf?download=1](https://www.uscis.gov/system/files_force/files/form/i-9.pdf?download=1)
- **Starting January 22, 2017, employers must use only the new version of the Form I-9 with the 11/14/2016N date.**
  - Prior to Jan. 22, 2017, employers may use either the new version or the prior version (which is dated 03/08/2016N).
- Employers are required to complete the form for all new employees within three days of hire

# New Version of Form I-9 (cont.)

- According to USCIS, the revised form is designed to help reduce errors by making it easier to complete on a computer by those who choose to do so:
  - Addition of clickable instructions icons in the e-version of the form;
  - Drop-down lists and calendars for filling in dates in the e-version;
  - The ability to enter multiple preparers and translators in the e-version;
  - A dedicated space to add additional information for certain types of employees in place of using the margins of the form;
  - The generation of a quick response (QR) code upon printing a form completed on a computer;
  - The separation of the Instructions from the form.
- USCIS has not updated its more comprehensive guidance for completing the Form I-9, the M-274 Handbook for Employers, since 2013.

# Links...

- Limitations on Pre-Employment Criminal Histories  
<http://www.dwt.com/City-of-Los-Angeles-Limits-Employer-Inquiries-Regarding-Criminal-History-of-Job-Applicants-01-31-2017/>
- Defining Off-Duty Rest Breaks  
<http://www.dwt.com/California-Supreme-Court-Holds-That-California-Law-Requires-Unencumbered-Rest-Breaks-01-17-2017/>
- New Version of I-9 Form  
<http://www.dwt.com/Employers-must-adopt-new-version-of-Form-I-9-by-Jan-22-2017-11-16-2016/>

# Questions?

Thank you for attending today's presentation. Any questions?



- Aaron N. Colby
  - (213) 633-6882
  - aaroncolby@dwt.com
  - [www.dwt.com/people/AaronNColby](http://www.dwt.com/people/AaronNColby)

# Disclaimer

This presentation is a publication of Davis Wright Tremaine LLP. Our purpose in making this presentation is to inform our clients and friends of recent legal developments. It is not intended, nor should it be used, as a substitute for specific legal advice as legal counsel may only be given in response to inquiries regarding particular situations. It is attorney advertising. Prior results do not guarantee a similar outcome.

Davis Wright Tremaine, the D logo, and Defining Success Together are registered trademarks of Davis Wright Tremaine LLP. © 2016 Davis Wright Tremaine LLP.