California Community Colleges

MARC LEFORESTIER
General Counsel
Office of the General Counsel

December 31, 2018

California Community College District
Human Resources Officers

Re: **Office of General Counsel Advisory 2018-04**[1]
Using criminal history records in hiring

Dear Colleagues:

Recent developments in federal and state law constrain the use of criminal history records in the employment process.[2] These laws impact hiring, promotion, and retention decisions, including those made by community colleges and districts. The purpose of this advisory is to provide a survey of the applicable laws, and to suggest approaches to employment decisions that will help community colleges comply with their legal obligations.

---

[1] The General Counsel's legal opinions and advisories on the implementation and interpretation of laws affecting community colleges do not form an attorney-client relationship, and are not a substitute for community college districts obtaining legal advice in appropriate circumstances. (Ed. Code, § 70901, subd. (b)(14).)

[2] The phrases "criminal history" and "criminal history record" refer to information obtained from a variety of sources, including the Livescan report produced by the California Department of Justice (DOJ), and private commercial background check vendors. For the purposes of this advisory, the phrase "criminal record" includes any record reported on an individual that documents contact with the criminal justice system, including arrests, convictions, participation in a pretrial or post-trial diversion program, dismissed and sealed records, the sex offender registry status of the individual, records related to juvenile justice proceedings, and sentencing information.

In a nutshell, employment decisions must be based upon individualized assessments of job-related qualifications and business necessities. Federal and state laws ensure that community colleges retain broad discretion to make individualized suitability determinations that balance an applicant's prior conviction history against evidence of rehabilitation and other mitigating factors—even with respect to convictions for sex and drug offenses. And for students seeking employment in non-instructional positions, the Education Code's express restrictions against hiring based on sex and drug offenses do not apply.

Hiring processes that adhere to an individualized assessment of qualifications and business needs will likely avoid misusing criminal history records, and will help community colleges achieve greater levels of equity in the hiring process.
The Fair Chance Act (FCA) (Asm. Bill No. 1008 (2017-2018 Reg. Sess.) (also known as "Ban the Box") took effect on January 1, 2018, and provides California community colleges with a framework for using criminal history records that will help community colleges base their decision-making on individualized assessments and business necessities, and avoid the using criminal history records in ways that perpetuate invidious discrimination.

I. Limiting the Use of Criminal History in Employment Decisions Supports Our Hiring Equity Objectives

Federal and state laws have evolved significantly in recent years to address the use of criminal history in the employment context. Most recently, the California Legislature passed the Fair Chance Act, which became effective January 1, 2018. This legislation, and other developments in the law, are responses to the impact criminal history records may have on an individual's employment opportunities based upon their race, gender, ethnicity, or national origin.

In particular, blanket policies requiring the use of criminal history records in hiring may compound the adverse effects of California's disproportionate incarceration of people of color. While African Americans in California represent 6 percent of the population, they account for 18.5 percent of all felony arrests in the state, 15.3 percent of all misdemeanor arrests, and 28.9 percent of all those incarcerated in the State. For every non-Latino white Californian who is arrested for a felony, nearly four African Americans and one and half of Latinos are arrested for that level of charge. The ratio

of felony arrests for African Americans in California compared to non-Latino whites (3.9:1) means that in 2013 alone, nearly 60,000 more African Americans were arrested for felonies than would have been if they were arrested at the same rate as non-Latino whites.[3]

Recognizing that criminal history requirements in hiring represent a barrier to employment, the law has placed limits on the use of criminal records, emphasizing the importance of making individualized determinations about the relevance of criminal history, rather than allowing blanket restrictions against hiring people with criminal records.

These laws are of particular relevance to the community college system, because it is required by law to promote equity and diversity (see, e.g., Ed. Code, §§ 66010.2, subd. (c), 66030, subd. (b), 66250, 66270, 78222, 87360), and the Board of Governor's equal employment opportunity regulations require "identifying and eliminating barriers to employment that are not job-related." (Cal. Code Regs., tit. 5, § 53001, subd. (d)(1).) Moreover, the State Legislature has made clear that the community college system is a partner in supporting and rehabilitating current and formerly incarcerated persons. It has required the Department of Corrections and Rehabilitation and the Office of the Chancellor of the California Community Colleges to enter into an interagency agreement to expand access to community college courses that lead to degrees or certificates that result in enhanced workforce skills or transfer to a 4-year university. (Ed. Code, §§ 84810.7, 84810.7.) Finally, the 2018-19 State Budget provided the Board of Governors for the California Community Colleges with $5 million in one-time funding to support re-entry programs for current and formerly incarcerated students. (Assembly Bill No. 1809, Reg. Sess. 2018-2019, § 72.) Community colleges can play an important role in building the work history of our students—including qualified students with criminal records, whose professional success may depend upon a career start within the community college system.

---

[3] Letter of Bendick and Egan Economic Consultants to the California Fair Employment and Housing Council in Support of the Proposed Criminal Background Check Regulations (dated March 25, 2016).

II. Federal and State Equal Employment Opportunity ("EEO") Laws

California community colleges must comply with all federal and state EEO laws in their hiring decisions, and must consider the implications of these laws when using criminal history records in the hiring process.

A. Federal EEO Law

Hiring policies that place undue weight on criminal history records risk violating Title VII of the Civil Rights Act of 1964 (Title VII) (42 U.S.C. §§ 2000e et seq.), which prohibits discrimination against protected groups in hiring, promotion, and other terms and conditions of employment. Under Title VII, even a neutral policy or practice that disproportionately and adversely affects a protected group may violate the disparate impact doctrine. (42 U.S.C. § 2000e-2(k)). Accordingly, a neutral hiring policy that uses employment applicants' criminal history records as a screening mechanism may disproportionately affect African Americans and other protected groups by keeping them out of candidate pools for reasons that are not "job related or consistent with business necessity." (42 U.S.C. § 2000e-2(k)(1)(A)(i)). Such policies risk violating Title VII. While employers may lawfully decline to offer employment to an individual due to their criminal record, Title VII requires that such a decision is "job related for the position in question and consistent with business necessity." (*Id.*) In other words, unless specifically authorized by law, such decisions should be individualized, and not based upon blanket policies.

Federal policy governing the use of criminal history records in hiring is modeled on a federal court of appeals decision in *Green v. Missouri Pacific Railroad* (8th Cir. 1975) 523 F.2d 1290, 1293. In the *Green* case, the federal appeals court identified several factors that must be considered by employers in assessing whether an employment decision based on a conviction record is job related and consistent with business necessity. The *Green* factors include:

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

(*Green*, 523 F.2d at p. 1293.) The U.S. Equal Employment Opportunity Commission has issued a guidance incorporating the *Green* factors, and encouraging employers to conduct an "individualized assessment" before making an employment decision based on a person's criminal record.[4] (U.S. Equal Employment Opportunity Commission Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act, as amended (42 U.S.C. §§ 2000e et seq.) (April 25, 2012) ("EEOC Guidance").) Meaningful individualized assessments must include an opportunity for applicants to challenge the accuracy of criminal history records, and produce other mitigating information, such as evidence of rehabilitation.[5]

The EEOC Guidance and case law construing Title VII strongly disfavor the consideration of arrest records (absent a conviction) in employment decisions, except when the employer has independently verified the underlying conduct, and the conduct itself renders the individual unfit for the position. (EEOC Guidance, p. 12 [stating that "an exclusion based on an arrest, in itself, is not job related and consistent with business necessity"].)

To summarize, federal law prohibits employment-related discrimination against protected groups and requires that employment decisions be job-related and based

---

[4] Title VII contains a very limited exception to the requirement of an individualized assessment, where an employer is able to validate that a specific criminal history restriction is job-related. (EEOC Guidance, p. 18.)

[5] The EEOC Guidance includes a non-exhaustive list of mitigating factors that may be considered, including: (1) the facts or circumstances surrounding the offense or conduct; (2) the number of offenses for which the individual was convicted; (3) the applicant's age at the time of conviction, or release from prison; (4) evidence that the individual performed the same type of work post conviction, with the same or a different employer, with no known incidents of criminal conduct; (5) the length and consistency of employment history before and after the offense or conduct; (6) rehabilitation efforts including education and training; (7) employment or character references and any other information regarding fitness for the particular position; and (8) whether the individual is bonded under a federal, state, or local bonding program. (EEOC Guidance, p. 18.)

upon business needs. The EEOC Guidelines provide the Green factors as a non-discriminatory framework for evaluating an applicant's criminal history.

B. State Equal Employment Opportunity Laws

California civil rights laws also regulate employers' ability to make employment decisions based on criminal history records. As with the federal laws, the California laws are designed to promote equity and diversity and to protect against discrimination. (Govt. Code, § 12940; Ed. Code, § 87100; Cal. Code Regs., tit. 5, §§ 51010, 53001, 53003-53006, 53020-53027, 53030, 53033-53034.) Similarly, California's equal employment opportunity laws protect against employment practices that have an "adverse impact" on groups protected from discrimination by state law. (Govt. Code § 12940 [enumerating protected classes as including: race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, sex, age, and sexual orientation of any person]; Cal. Code Regs., tit. 5, § 53001, subd. (a).)

The purposes of the state's civil rights laws are also supported by the Education Code, which states that "[a] work force that is continually responsive to the needs of a diverse student population may be achieved by ensuring that all persons receive an equal opportunity to compete for employment and promotion with the community college districts and by eliminating barriers to equal opportunity." (Ed. Code, § 87100, subd. (a)(3).) Of special significance, California's anti-discrimination law was amended effective January 1, 2018, when the Fair Chance Act (Govt. Code, § 12952) was added to the Fair Employment and Housing Act (FEHA) (Gov't Code, §§ 12940–12952). The Fair Chance Act regulates the consideration and use of criminal history records in employment decisions.[6]

---

[6] On February 16, 2018, the Fair Employment and Housing Council published proposed regulations implementing the Fair Chance Act to be codified at Cal. Code Regs, tit. 2, § 11017.1, available at the URL https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/10/AddEmployRegCriminalHist-CFRA-NewParentLeave.pdf, last accessed on 12/28/2018.

1. The Fair Chance Act ("Ban the Box")

The Fair Chance Act (FCA) (Asm. Bill No. 1008 (2017-2018 Reg. Sess.) (also known as "Ban the Box") took effect on January 1, 2018, and extends to all FEHA-covered employers including, in a limited way, California's community colleges. Although the community colleges are exempt from the law when they are hiring for anything other than a non-instructional student position, community colleges are free to adopt its framework for all hiring decisions, and should do so to help ensure compliance with federal and state EEO laws.

a. The FCA's basic mandate is applicable to applicants for non-instructional student worker positions.

The FCA regulates how and when employers may use applicants' criminal history records in the hiring process. The Act applies directly to applicants for non-instructional student worker positions with Community Colleges. According to the FCA, employers are prohibited from requesting or obtaining conviction information relating to a job applicant until after a conditional offer of employment has been made. In addition, employers are prohibited from considering arrests that do not result in convictions, charges that have been dismissed, sealed, or expunged, juvenile records, certain marijuana convictions, and other specific records.

Once an employer determines which conviction records may be considered in an employment decision, the FCA requires that the employer perform an "individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job[.]" (Gov't Code, § 12952(c)(1)(A)). In making such a determination, the employer must apply the three *Green* factors relied upon by the EEOC.

If an employer decides to revoke a job offer based on a review of criminal history records, the employer must take additional steps. First, it must issue a preliminary notice of revocation to the applicant identifying the disqualifying conviction, providing a copy of the criminal history report, and offering the applicant at least five business days to respond. The applicant's response may take the form of a challenge to the accuracy of the report or the production of mitigating information—including

evidence of rehabilitation.[7] The employer may reaffirm the revocation of the employment offer after reviewing the information provided by the applicant, and waiting at least five business days. The employer must provide a second notice of the final decision, documenting its consideration of the evidence provided by the applicant, and describing the applicant's right to file a complaint with the California Department of Fair Employment and Housing (DFEH).[8]

b. Other community college positions are exempt from the FCA

The FCA generally regulates the use of criminal history by California employers. However, colleges are exempt from complying with the FCA, unless they are filling a non-instructional student position. The FCA exempts employers from the requirements of the law "where an employer . . . is required by any . . . law to conduct criminal background checks for employment purposes, or to restrict employment based on criminal history." (Govt. Code, § 12952, subd. (d)(4).) Section 87405 of California's Education Code generally restricts community colleges from hiring people

[7] Under the FCA, the applicant is provided an additional 5 days to respond to the preliminary notice after notifying the employer that he or she will produce corrected criminal history information.

[8] DFEH has published sample documents to assist employers in complying with the FCA, including the sample conditional job offer letter, the preliminary notice revoking a conditional offer of employment because of conviction history, and the final notice revoking the conditional offer of employment). (DFEH documents available at the URL: https://www.dfeh.ca.gov/useofcriminalhistoryinemployment/, last accessed Dec. 30, 2018)

with certain sex and drug convictions. But this restriction does not apply to non-instructional student employees.[9,10] (Ed. Code, § 87406.5.)

2. FEHC Criminal Background Check Regulations

In July 2017, the California Fair Employment and Housing Council (FEHC) issued regulations that address the use of criminal history records in hiring under the anti-discrimination provisions of the Fair Employment and Housing Act (FEHA). (Cal. Code Regs, tit. 2, § 11017.1 [authorized by Govt. Code, §§ 12900-12996].) These regulations now incorporate the requirements of the FCA.[11]

---

[9] Education Code states that community colleges may "employ any student enrolled in the district who is an ex-convict or who is on parole, other than a person determined to be a 'sexual psychopath,' to perform non-instructional duties and such student workers shall not be classified employees." (Ed. Code, § 87406.5.) Although the Education Code has retained its reference the term "sexual psychopath," the designation was effectively repealed from California law in 1981. Like the more current term, "sexual violent predator" (Welf. & Inst. Code, § 6600), the "sexual psychopath" designation referred to a "civil" determination, not a criminal conviction. (*People v. Levy (1957)* 151 Cal. App. 2d 460, 463 [describing civil nature of "sexual psychopath" determination proceedings].) Accordingly, to the extent there remain individuals who were determined to be "sexual psychopaths" in civil proceedings prior to 1981, this information is not included in criminal history records provided by the Department of Justice.

[10] The community colleges and districts would also be exempted from the FCA if they were hiring for certain law enforcement positions, childcare and recreational employees, and other positions specifically regulated by other California laws.

[11] On February 16, 2018, the FEHC published proposed regulations implementing the Fair Chance Act to amend Cal. Code Regs, tit. 2, § 11017.1 (Link to Proposed FEHC Regulations, the proposed regulations are available at the URL https://www.dfeh.ca.gov/wp-content/uploads/sites/32/2018/02/Text-EmployRegCrimHist-CFRA-NewParentLeaveAct.pdf, last accessed Dec. 30, 2018.

Significantly, the FEHC regulations extend the FCA protections beyond employers' hiring processes, to promotion and other terms and conditions of employment. As a compliment to Title VII and the EEOC Guidance, the FEHC regulations adopt an "adverse impact" analysis to regulate the use of criminal history records under FEHA. (Cal. Code Regs, tit. 2, § 11017.1(e)). The FEHC regulations detail the criminal history information employers may not consider, invoke the EEOC's *Green* factors, and incorporate the FCA's approach to provide applicants a right to notice and an opportunity to respond to a revocation of a conditional employment offer.[12]

III. The Education Code Requires the Use of Criminal History in Most Community College Hiring

The Education Code requires the use of criminal history for many categories of workers, but does not prevent community colleges from hiring processes that allow notice and an opportunity to respond to adverse employment decisions based upon criminal history records. Its provisions address academic employees, classified employees, students employed in various positions, and certain part-time and temporary employees. Community colleges must comply with the Education Code as well as with federal Title VII, the FCA, and the FEHA.

A. The Employment of Individuals with Specified Sex and Drug Offenses is Prohibited, Unless they are Rehabilitated

Districts retain considerable discretion over hiring individuals with criminal convictions. The Education Code states that districts "shall not employ or retain in employment" any person who has been convicted of specified sex or drug offenses. (Ed. Code, § 87405, subd. (a).)[13] This prohibition does not apply to convictions for other offenses, and does not apply to students with sex and drug convictions seeking non-instructional positions.

---

[12] Similar to the FCA, the FEHC regulations provide a defense to liability for employers hiring for positions requiring an occupational license or a criminal background check.

[13] The specified sex offenses are compiled in Education Code section 87010; the specified drug offenses are compiled in Education Code section 87011.

The hiring prohibition established by section 87405 can be overcome in three important ways: (1) the applicant has obtained a reversal of the conviction resulting in dismissal of the charges, or an acquittal in a new trial (Ed. Code, § 87405, subd. (a)); (2) the applicant has received or applied for a certificate of rehabilitation and pardon pursuant to Penal Code section 1203.4 (Ed. Code, § 87405, subd. (b)); or (3) the applicant presents evidence that they have "been rehabilitated for at least five years" (Ed. Code, § 87405, subd. (c)). The Education Code states that each of these exceptions to the hiring prohibition is subject to a determination made by the college district governing board. (Ed. Code, § 87405, subd. (c)). Notably this power, like others vested in community college district governing boards, may be delegated to district officers, employees, or committees on majority vote of the district governing board. (Ed. Code, § 70902, subd. (d).)

In keeping with the community college system's strong interests in supporting educational and employment opportunities for formerly incarcerated persons, and in promoting employment equity, districts should determine whether an applicant has been rehabilitated for at least five years. Education Code section 87405 does not specify at what point this time period commences, or what forms of proof are required. The Education Code leaves it to district discretion to establish such rules based on local considerations. (Ed. Code, § 88022.) However, relevant factors would presumably include participation in drug or alcohol treatment, education and training, education or career programming undertaken during incarceration, recent employment history, and references from faculty, community leaders, and others. This rehabilitation exemption represents an important avenue for formerly-incarcerated individuals to develop pathways to community college employment, but will only be meaningful if community colleges engage in the kind of individualized assessments contemplated by federal law, the FEHC regulations, and the Fair Chance Act.

B. Consumer and Labor Laws Also Regulate the Use of Criminal History

In addition to the Education Code, colleges should be aware of provisions of California consumer protection and labor laws that add additional restrictions on how criminal history records may be used. Community colleges and districts are authorized to request criminal history records for their applicants and employees from the

California Department of Justice (DOJ), which typically include criminal history records from California and other states. These records list state convictions (not including juvenile records unless the individual was tried as an adult), certain arrests that are still actively pending adjudication, and the sex offender registry status of the individual. (Penal Code, § 11105(p)). The DOJ criminal history report does not include arrests that are no longer pending adjudication, certain convictions for solicitation and prostitution (provided the individual was certified as a victim of human trafficking), arrests that were resolved through successful completion of a diversion program, arrests for which the person has been exonerated, or arrests for which the records have been sealed. (*Id*.)

As with most other entities that are authorized to access DOJ criminal history records for employment and licensing purposes, community colleges are required by California law to mail "expeditiously" a copy of the DOJ criminal history report to the individual if an adverse employment determination is made based on the report. (Penal Code, § 11105, subd. (t).)

When community colleges rely on private consumer reporting agencies to generate a local, state, or national criminal background check report, additional federal and state consumer protection laws apply. (See 15 U.S.C. §§ 1681 et seq.; Civ. Code, §§ 1786.1 et seq.) Generally, these laws require that applicants receive notice and an opportunity to consent to the background check, a statement of an individual's rights under the law, a copy of the record, and an opportunity to challenge its accuracy.

California's consumer protection laws specifically require that applicants receive a copy of the record within three days of when the employer receives it. (Civ. Code, § 1786.16, subd. (b)(1)).[14] In addition, California law precludes commercial background check firms from reporting convictions aged more than seven years from the date of the request. California law also prohibits private agencies from providing criminal history reports that include arrest records that did not result in a conviction unless there is a "pending pronouncement of judgment" in the case. (Civ. Code, § 1786.18(a)(7).)

---

[14] In contrast, federal consumer protection laws only requires the criminal records to be mailed to the applicant when it forms the basis for an "adverse action." (15 U.S.C. § 1681b(b)(3)(A).)

The Labor Code places certain limits on the criminal history information that community colleges may seek to obtain. Specifically, colleges may not consider information related to an arrest that did not lead to a conviction, a juvenile record, a record related to participation in a diversion program, or a record that has been dismissed, expunged, or sealed. (Labor Code, §§ 432.7, subds. (a)(1), (2)). Individuals seeking employment in law enforcement are exempt from these Labor Code protections, and certain arrest records may be considered for positions that involve access to drugs and medication. (Labor Code, § 432.7, subd. (f)(1)).

IV. Conclusion

Community colleges should base their employment decisions upon individualized assessments of job-related qualifications and business necessities in order to ensure compliance with federal and state laws governing both employment discrimination and the use of criminal history records. When an applicant or employee has a criminal record, colleges should provide the employee with a meaningful opportunity to contest its accuracy, and to provide evidence of mitigating circumstances, including rehabilitation. California's Fair Chance Act provides an excellent framework for addressing criminal history in a way that will ensure these best practices are met. Although the Fair Chance Act mandates community college compliance only with respect to the hiring of students in non-instructional positions, there are good reasons to adopt it more generally.

###