

# Daily Journal

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## Criminal history shouldn't stand in the way of employment

By JJ Johnston

This past December, California's Civil Rights Department filed a lawsuit against Ralph's grocery stores for violations of the Fair Chance Act. According to the agency's news release, this is the first-ever lawsuit filed under the law. For more than three years, the CRD says, Ralph's illegally discriminated against job applicants with criminal backgrounds, "including by screening out otherwise qualified applicants on the basis of criminal histories that do not have any adverse relationship with the duties of the job for which they were applying."

The Fair Chance Act originally took effect Jan. 1, 2018, and it was updated last year. The law limits what employers can ask job applicants about their criminal histories. In the words of the CRD, it "aims to combat discrimination and ultimately enhance public safety by reducing undue barriers to employment for people who have been previously involved in the criminal legal system."

With limited exceptions, private and public employers may not ask applicants if they have been convicted of felonies or other crimes. They cannot include such questions on job applications, nor can they ask them at job interviews before making conditional offers. The majority of employers are also barred from asking about or considering information about arrests that didn't lead to convictions, participation in pretrial or post-trial diversion programs, or convictions that were

**Do you have a criminal record?**

<b>Yes</b>	<input type="checkbox"/>
<b>No</b>	<input type="checkbox"/>
<b>Don't ask</b>	<input checked="" type="checkbox"/>

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sealed, dismissed, expunged or statutorily eradicated.

Only after making an offer can a business run a criminal history check and ask the applicant about convictions. The applicant is under no obligation to answer questions or provide information, and any information provided must be considered by the employer. If the em-

ployer decides to rescind an offer after learning about a candidate's criminal history, it must do so in a writing that identifies the disqualifying conviction. It must also provide a copy of any report or background check that was relied upon, along with at least five business days for the applicant to respond to the decision. Applicants

have the right to provide additional information before an employer can reject them because of their criminal history.

The law does not apply to employers with fewer than five employees or to jobs - such as those in healthcare, banking, education, or law enforcement - for which the employer is required to restrict

employment based on criminal history or for which a background check is mandated. When a background check is conducted by a third party, the California Investigative Consumer Reporting Agencies Act requires employers to obtain written permission to run that check. They must also notify applicants about the purpose of the background report; the name, address and telephone number of the company doing the background check; and applicants' rights to see reports and request copies of any reports. If a background check is done in-house, applicants should be able to receive a copy of the public records used to create the report.

The initial complaint against Ralph's was received by the state in 2020. The CRD began an investigation, and the grocery chain was notified of that investigation in 2021. Despite several attempts to settle the matter through mediation, the case remained open. In the interim, the Fair Chance Act was amended. Effective Oct. 1, 2023, the law imposed even greater constraints on the ability of businesses to consider criminal history in reviewing job applicants.

The changes include a broader definition of "applicant" that captures employees who undergo a background check in connection with a change in ownership, a change in management, or a change in policy or practice. The term "employer" now encompasses not just direct employers but also entities acting as agents or evaluating an applicant's criminal history on be-

half of an employer, staffing agencies, and those obtaining workers from a pool or availability list.

Damages for failure to consider the new criminal evaluation factors may include back pay, front pay, and hiring or reinstatement. In its action against Ralph's the CRD has signaled that it will seek appropriate compensation for applicants who were improperly passed over for jobs, including reimbursement of costs for mental health treatment resulting from the company's actions. It will also seek punitive damages, which are likely to be significant.

Could Ralph's now face higher penalties following the law's amendment? How might an early settlement have staved off those potentially large penalties? The company's failure or refusal to settle the case suggests that it did not intend to modify its application processes. Any settlement with the state would have included a commitment to comply with the law going forward. It is possible that the company calculated that it gained more by keeping prior offenders off its payroll than by paying penalties for violating the law. All these years later, and with tighter restrictions in place, the math may no longer be as favorable.

In addition to limits imposed under the Fair Chance Act, California employers are subject to the provisions of Labor Code Section 432.7, which preclude them from asking applicants for information concerning arrests or detentions that did not result in conviction, re-

ferral to or participation in pretrial or post-trial diversion programs, or convictions that were judicially dismissed or ordered sealed pursuant to law.

Other governmental bodies, including the cities of San Francisco and Los Angeles, have their own laws protecting job applicants with criminal backgrounds. San Francisco's "Ban the Box" ordinance bars employers from considering offenses other than felonies or misdemeanors, most convictions that are more than seven years old, and any conduct that has been decriminalized such as cannabis cultivation. Los Angeles, home to a large number of Ralph's stores, requires covered employers to provide a "fair chance process." After conducting an individualized assessment about the conviction and deciding not to hire someone the employer must provide the applicant with written notice of the action; hold the job open for at least five business days after the applicant has been informed; and give the applicant an opportunity to submit documentation while the job is held open.

When a post-offer criminal background check reveals a prior conviction that is drug-related, employers should also be mindful that under state and federal employment discrimination laws, past drug addiction may qualify as a disability, entitling workers to additional rights. For employers attempting to comply with the updated Fair Chance Act, one approach may be to employ a series of pre-adverse

action letters. These letters would convey and solicit information on the new evaluation factors under state law, as well as the factors to be considered under federal law. Although California has not officially sanctioned this approach, it may be worth adopting pending further guidance.

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**JJ Johnston** is the founder of Johnston Mediation. He has been mediating employment and class action matters for more than two decades and has more than three decades' experience as an employment attorney representing both plaintiffs and defendants in a wide range of cases, including wage and hour class actions, PAGA claims, wrongful terminations, discrimination and retaliation cases, sexual harassment cases, prevailing wage claims, fair pay act claims, and defamation claims.

