An Overview of the San Francisco Fair Chance Ordinance
and Recommended Best Practices

Effective August 13, 2014, San Francisco’s Fair Chance Ordinance requires private employers in San Francisco who employ 20 or more employees (in any location) to limit the use of criminal background checks during the hiring process. The restrictions apply to employees whose duties are performed in whole or substantial part within San Francisco’s city limits. An overview of the key terms of the ordinance and recommended best practices are provided below.

**Timing of Criminal History Inquiries.** The ordinance prohibits employers from asking about a candidate’s criminal history or conducting a background check in an employment application or during the first live interview. Employers may make criminal history inquiries after the first live interview or after making a conditional offer of employment.

**Job Posting Requirements.** All job postings must state that the employer will consider qualified candidates with criminal histories in a manner consistent with the requirements of the ordinance. Employers may not advertise that any person with an arrest or conviction will not be considered for employment or may not apply for employment.

**Notice of Rights.** Employers must post a notice informing candidates and employees of their rights under the ordinance in a conspicuous place at every workplace, job site, or other location that is frequently visited by the employer’s candidates and employees. The notice must be posted in any language spoken by at least 5% of the employees at that specific location. Employers must also send a copy of this notice to each union with which the employer has a collective bargaining agreement. Additionally, prior to any criminal history inquiry (including running a background check), the employer must provide a copy of this notice to a candidate or employee. The applicable notice of rights will be published by the city within the next several months for use by employers.

**Pre-Adverse Action Notification Requirement.** Similar to federal and state requirements, if an employer runs a background check and intends to take an adverse action against the candidate based on information from the background check, the employer must: (1) provide the candidate with a copy of the background check, (2) notify the candidate of the adverse action, and (3) identify the reason for the adverse action on the background check.

**Factors to Consider When Reviewing Criminal History.** An employer considering an employment decision based on a candidate’s criminal history must consider the following three factors: (1) “Directly-Related Convictions,” (2) the time that has elapsed since the conviction or pending arrest, and (3) any evidence of inaccuracy or “Evidence of Rehabilitation or Other Mitigating Factors.” “Directly-Related Convictions” are defined as any criminal history information that has a direct and specific negative bearing on an individual’s ability to perform the duties or responsibilities necessarily related to the employment position. To make this determination, the employer should consider whether the position offers the opportunity for the same or similar offense to occur and whether circumstances leading to the conduct for which the individual was convicted (or that are the subject of the pending arrest) will recur in the position. “Evidence of Rehabilitation or Other Mitigating Factors” may include but is not limited to an
individual’s satisfactory compliance with all terms and conditions of parole and/or probation, employer recommendations, educational training, rehabilitative treatment, recommendation letters, and the age of the individual at the time of the conviction. Examples of mitigating factors may include but are not limited to explanations of the conditions leading to the criminal history, intimate physical or emotional abuse, or untreated substance abuse or mental abuse that contributed to the conviction.

Additionally, employers are prohibited from considering (1) any arrests that do not lead to convictions, (2) offenses other than felonies or misdemeanors, (3) convictions more than seven years old, (4) a candidate’s participation in or completion of a diversion or deferral of judgment program, and (5) sealed, inoperative, or juvenile convictions.

**Opportunity for Individual to Respond.** After issuing a pre-adverse action notification letter, employers must give candidates seven days to respond with evidence about whether their conviction is inaccurate, or offer evidence of rehabilitation or other mitigating factors.

**Adverse Action and Retaliation Prohibited.** If an employer decides to take an adverse action based on criminal history information, it must notify the candidate of the final adverse action. Retaliation for exercising rights under the ordinance is prohibited. The ordinance also creates a presumption of retaliation if the adverse action is taken against a person within 90 days of the exercise of a right under the ordinance.

**Records.** Employers must retain all pertinent records, including applications, for three years.

**Enforcement and Penalties.** There is no private cause of action under the ordinance; however, the San Francisco Office of Labor Standards Enforcement (OLSE) will have the authority to enforce the ordinance, and may refer the matter to the city attorney for civil action if it determines an employer is not taking corrective measures. The OLSE does not have the authority to second-guess the employer’s decision about whether a conviction history is directly related to a position, but will look into whether an employer made an individualized assessment into each employee, rather than maintaining a generalized policy not to hire individuals with criminal backgrounds. The OLSE will also check to see if employers are adhering to the ordinance’s procedural, posting, record keeping, and retaliation provisions.

For the first year, violations of the ordinance will result in warnings and a notice to correct. After the first year, the penalty is $50 for a first violation and $100 for subsequent violations. If the city attorney brings a civil action against the employer, relief can include reinstatement, back pay, payment of benefits or salary unlawfully withheld, additional liquidated damages, appropriate injunctive relief, attorney’s fees and costs.

**Recommended Best Practices.** Employers should begin their preparation to comply with the ordinance, which becomes effective on August 13, 2014. The following steps should be taken as part of that preparation:

- Review policies, interview outlines or guides, job posting or advertisement templates (including internet-based postings), application forms, notices sent out to candidates, and
disclosure and authorization forms to make sure these are compliant with the ordinance and contain the required “fair chance” statements. Remove from applications the box or question asking about criminal convictions.

- When the notice language becomes available from the city, employers should post the notice and make sure this language is included in any notification letters to candidates.

- Set up a protocol for conducting criminal background inquiries, communicating with individuals about the same, and handling individualized assessments. Require careful documentation of the individualized assessment as part of the protocol.

- When appropriate, partner with legal counsel to complete the individualized assessment.

- Train employees making hiring decisions and conducting individualized assessments about the requirements of the ordinance, including the anti-retaliation provisions, and the Company’s new protocol.

- Maintain relevant records, including applications and documentation of the individualized assessment, for three years.