

EMPLOYMENT LAW UPDATE: EMPLOYER ALERT: CHANGES IN HIRING AND COMPENSATING EMPLOYEES

California Minimum Wage Increases Effective July 1

California's much-anticipated **increase in minimum wage to \$9.00** per hour goes into effect **July 1, 2014**.

The increase impacts more than just hourly employees; minimum salary and wage requirements for exempt employees also increase. Because California's commonly referred to "white collar" exemptions require employers pay exempt employees at least twice the state minimum wage, the minimum salary for such exempt employees increases to \$37,440. Minimum wage for exempt commissioned sales employees (who must make 1.5 times the state minimum wage) increases to \$13.50. Finally, employees who furnish their own tools and equipment must be paid two times the state minimum wage, or \$18.00.

The California Department of Industrial Relations has updated each of the 17 Industrial Welfare Commission Wage Orders to reflect the increase in minimum wage. **Make sure to post the applicable, updated Wage Order in your workplace starting July 1, 2014.** You can find them here: <https://www.dir.ca.gov/iwc/wageorderindustries.htm>.

The state minimum wage is scheduled to increase again to \$10.00 per hour on January 1, 2016.

Note: Both San Jose and San Francisco already have city-wide minimum wage ordinances setting minimum wage in excess of \$10.00 per hour. San Jose's Minimum Wage Ordinance currently requires employees be paid a minimum wage of \$10.15 per hour. San Francisco's minimum wage is currently \$10.74 per hour. These city-wide ordinances do not impact minimum pay thresholds for exempt employees or employees who furnish their own tools and equipment—those thresholds are based on the state minimum wage.

San Francisco's Fair Chance Ordinance

A new trend is emerging across cities and states in America to eliminate the check box on employment and housing applications regarding an applicant's criminal history—the so-called "Ban-the-Box" movement. San Francisco has joined the trend, enacting **San Francisco's Fair Chance**

Ordinance, which will become **operative on August 14, 2014**.

The New Ordinance

The Fair Chance Ordinance covers **employees who perform work in the City and County of San Francisco** (in whole or in substantial part), whose employers are located or doing business in the City, and have **20 or more employees** (regardless of the employees' locations). The ordinance covers all jobs, including temporary, seasonal, part-time, contract, contingent, and commission-based work. It also covers work performed through temporary or other employment agencies and any vocational and educational training, with or without pay.

At the start of the hiring process (including job applications, interviews, informal conversations or otherwise), the San Francisco ordinance prohibits employers from inquiring about or otherwise requiring employees disclose factors or details of *any* criminal history, unresolved arrests, or the off-limits matters described below.

Can employers ever consider criminal history? Employers may consider matters that are not off limits (as defined below), but *only after* providing a notice to applicants or employees, *and only after* a live interview has been conducted or a conditional offer has been made.

What can't employers consider? The ordinance makes certain matters **off-limits at any stage** of the hiring process; it prohibits employers from inquiring about, requiring disclosure of, or basing any adverse employment action on the following:

1. arrests that did not lead to convictions;
2. participation in or completion of a diversion or a deferral of judgment program;
3. a conviction that has been judicially dismissed, expunged, voided, invalidated, or otherwise rendered inoperative;
4. a determination in the juvenile justice system;
5. convictions that are more than seven years old; or
6. information pertaining to an offense other than a felony or misdemeanor.

Employers may continue to obtain background checks (being mindful of existing federal and state limitations) and may decline to hire an applicant due to a criminal conviction. However, in making employment decisions, **employers must conduct an individualized assessment**, considering only those convictions and unresolved arrests that directly relate to the individual's ability to do the job, and taking into account the time that has elapsed since the conviction or unresolved arrest, any evidence of inaccuracy, or evidence of rehabilitation or other mitigating factors.

If an employer intends to base an adverse action on an applicant's or employee's criminal history, prior to doing so, the employer must provide the applicant or employee with a copy of the background check report, if any, and notify the applicant or employee of the prospective adverse action and the items forming the basis for it. **The applicant or employee then has seven days to provide the employer with information regarding inaccuracy, rehabilitation, or other mitigating factors.** The employer must then reconsider the decision in light of the new information. If the employer still chooses to base an adverse action on the criminal history, it must notify the employee that the final adverse action was taken because of the conviction history.

The ordinance also requires that **job postings or advertisements** must state that the employer will consider all qualified applicants with criminal histories. Moreover, **employers must post a notice** published by the City of San Francisco's Office of Labor Standards Enforcement (OSLE), which you can find here:<http://sfgsa.org/modules/showdocument.aspx?documentid=11600>.

Employers are required to **retain records** from the application process, including applications, interview notes, criminal background reports, applicant responses to inquiries, and prospective adverse actions, for three years. Employers must **verify compliance** with the OSLE annually.

Individuals who believe employers have violated the Fair Chance Ordinance may report such violations to the OLSE for investigation and a potential action by the OLSE. However, individuals do not have private rights of action to enforce the ordinance. Nevertheless, because the ordinance makes it unlawful to retaliate against an applicant or employee for exercising his/her rights under the ordinance, a private action for common law wrongful termination may exist. Notably, if an employer takes an adverse action within 90 days of a person exercising his/her rights under the ordinance, it creates a rebuttable presumption of retaliation.

What You Should Do Now

The ordinance is quite comprehensive and complicated. To comply, employers should:

- **Review and revise employment applications, job postings, disclosure and authorization forms, and general policies and procedures for hiring applicants.**
- **Post and distribute the required notices.**
- **Train employees involved in the hiring and interview processes to avoid violations of the ordinance.**

If you have any questions, **Hoge Fenton's employment attorneys** are always available to guide you through the process.