
CALIFORNIA

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California Employer Guide to Background Checks [2021]

Background checks are an essential part of the hiring process. California has some of the most stringent background screening laws. These laws can be confusing when you're running background checks on potential applicants. Violations could make you liable to the applicant/employee for \$10,000 or actual damages, whichever is greater. Generally, these laws apply to any applicant applying for employment in California. If an applicant lives in a different state, but will be working in California, they are still protected.

The Fair Credit Reporting Act **FCRA** exists to protect employers and applicants. It promotes accuracy, fairness and privacy of information contained in consumer reporting agency files. The FCRA is the national standard for employment background checks. It guarantees an applicant the right to obtain a copy of their background check report and allows them to file a dispute if the report contains inaccurate or incomplete information.

California has two versions of the **FCRA** which impact background checks. The Investigative Consumer Reporting Agencies Act **ICRAA** and the Consumer Credit Reporting Agencies Act **CCRAA**. The California Consumer Privacy Act **CCPA** also expands on the minimum privacy protections set forth in the FCRA. These acts supersede the FCRA in any provisions where its laws are more restrictive.

ICRAA | CCRAA | CCPA

These acts govern the use of **investigative consumer reports** used for employment purposes in California. They cover all potential checks such as criminal records, driving records, employment and education verifications, reference checks, credit reports etc. and provide more control over consumers personal information.

EMPLOYER REQUIREMENTS

Consent Disclosure

- Make a **clear and conspicuous disclosure in writing** to the individual in a **document which consists solely of the disclosure** that you may obtain an investigative consumer report, include the permissible purpose, (i.e., employment, volunteer, contractor.) Note that the investigation may include information on the “consumer’s character, general reputation, personal characteristics, and mode of living.”
 - ❖ **The disclosure must be on its own page.** It should not be part of an employment application or include any liability waivers.
 - ❖ It must identify the name, address, telephone number, and privacy policy of the company compiling the report.
 - ❖ It must include a checkbox for the applicant to receive a copy of their report.
- Obtain the applicants written authorization.
 - ❖ The applicant authorization may be included in the disclosure.
- Provide a copy of California Summary of Rights under Section 1786.22 of the California civil code and Summary of Rights under the FCRA.
- Provide City or County required notices if the employee is a resident of or working in San Francisco or Los Angeles. See more about Ban the Box/Fair Chance Hiring below.

Employment Credit Reports. California restricts the use of credit reports for employment purposes. Prior to obtaining this type of report, the employer must provide written notice informing the individual and must identify the specific basis for obtaining the report. Permissible purposes include:

- A position in the California Department of Justice.
- A managerial Position (defined as a position that qualifies for the executive exemption from overtime.)
- A sworn peace officer or other law enforcement position.
- A position that involves regular access (other than in connection with routine solicitation of credit card applications in a retail establishment) to people's bank or credit card account information, social security number, and date of birth.
- A position in which the employee would be a named signatory on the employer's bank or credit card account, authorized to transfer money on behalf of the employer, or authorized to enter into a financial contract on behalf of the employer.
- A position that involves regular access to cash totaling \$10,000 or more of the employer, a customer, or client during the workday.
- A position that involves access to confidential or proprietary information (defined as a legal "trade secret" under civil Code 3426.1(d).)

The only exception to the above is suspicion of wrongdoing or misconduct. Then no notice or consent is required.

ADVERSE ACTION

If an employer decides not to hire a candidate based on information contained in their background report, it is an **adverse action**. Before taking this action, the employer must conduct an individual assessment to determine if the information is directly relevant to the candidate's job. **Adverse action notices must be provided even if the information in their report disqualifies them from the position.**

Under California State Law, employers with five or more employees may not inquire about criminal history on an employment application or consider criminal history until after a conditional offer has been made. If considering an adverse action, employers must conduct an individualized assessment as to whether the conviction history has a direct and adverse effect on the applicant's duties which would justify denying them the position.

Employers may not consider certain types of criminal history including:

- Arrests which did not lead to conviction.
- Convictions which have been judicially dismissed, sealed, or expunged.
- Referral to or participation in a pre-trial or post-trial diversion program.

Taking an adverse action is a two-step process.

Pre-Adverse Action – Employer must notify the applicant in writing.

- The notice must identify the information in the report being used to make the decision.
- An unredacted copy of their report.
- A summary of their rights.
- Notify them they have five business days to make an initial response disputing any information in their report.

If the applicant does dispute the report, they have five additional days to provide additional information, evidence of rehabilitation or mitigating circumstances. You must consider the additional information before making a final decision.

Adverse Action – Employer must notify the applicant in writing.

If an employer still decides not to hire the applicant based on information in their report, the applicant must be sent an **Adverse Action Notice**. The Notice must include:

- The contact information of the consumer reporting agency which prepared the report.
- Provide the applicant with a summary of rights and their right to file a dispute.
- Include a statement that the consumer reporting agency did not make the decision to take adverse action.

BAN THE BOX/FAIR CHANCE

California has a statewide regulation, statewide law and two city level ordinances; San Francisco and Los Angeles. The regulation and laws apply to employers with five or more employees nationwide and at least one employee in California. Employers are prohibited from the following prior to making a conditional offer of employment:

- Including questions that seek the disclosure of criminal conviction history on any job application.
- Employers may not consider certain types of criminal history information:
 - Arrests that did not lead to a conviction.
 - A conviction that has been judicially dismissed, sealed, or expunged.
 - Referral to or participation in a pre-trial or post-trial diversion program.
 - Juvenile criminal record information.
 - Non-felony conviction for marijuana possession that is two or more years old.

Employers are permitted to ask about any pending criminal charges.

San Francisco Ordinance applies to employers with five or more employees regardless of where those employees are located. Employers may not inquire into, including conducting a third-party background check until after the first live interview or until a conditional offer of employment has been made. Employers must provide a copy of the Fair Chance Ordinance Notice.

Employers are required to conduct an individualized assessment considering only convictions directly related to the position. They must consider the time elapsed since the conviction or an unresolved arrest and any evidence of inaccuracy, mitigating factors or rehabilitation.

The Fair Chance Ordinance must be posted in every workplace/jobsite.

Additional requirements for San Francisco should be reviewed in the sources section below.

Los Angeles Ordinance applies to employers with at least ten employees. The term employee is broadly defined and should be reviewed with legal counsel.

Employers cannot include questions that seek the disclosure of criminal conviction history on any job application. Prior to taking any adverse action, employers must complete a **written assessment** that links the specific aspects of the criminal history to the risks inherent in the job duties and responsibilities of the employment position. If an employer proposes to withdraw their offer of employment, then the steps outlined under Adverse Action must be followed.

The Fair Chance Ordinance must be posted at every workplace, job site or other location in the City under the employer's control.

Additional requirements for Los Angeles should be reviewed in the sources section below.

SALARY HISTORY

Statewide laws impose various restrictions on all employers from relying on salary history information of an applicant for employment as a factor in determining whether to offer an applicant employment or what salary to offer an applicant.

Employers and agents are prohibited from, orally or in writing, seeking salary history information, including compensation and benefits, about an applicant for employment. Employers can ask an applicant about their salary expectations for the position. An employer, upon reasonable request, shall provide the pay scale for a position to an applicant applying for employment.

An applicant can voluntarily and without prompting, disclose salary history. In this case an

employer can use this information to determine the salary for that applicant.

Employers cannot pay any of its employees at wage rates less than the rates paid to other employees based on sex, race, or ethnicity for substantially similar work. Any wage differential needs to be justified by one or more specified factors including a seniority system or merit system.

In addition, **San Francisco** employers are prohibited from:

- Retaliating in any way against an applicant for refusing to disclose salary history.
- Releasing salary history on current or former employees to a prospective employer without written authorization from the candidate.
- Parity in Pay Ordinance must be posted for employees to easily read.

SOCIAL MEDIA

“Social media” means an electronic service or account, or electronic content including videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

Employers may not require or request an employee or applicant to do any of the following:

- Disclose a username or password for the purpose of accessing personal social media.
- Access personal social media in the presence of the employer.
- Divulge any personal social media.
- Employers may not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand in violation of the law.

The above does not apply to employer requests to disclose a username, password, or other method for the purpose of accessing employer-issued electronic devices. Employers may also request access to social media reasonably believed to be relevant to an investigation or allegations of employee misconduct or employee violation of applicable laws and regulations, if it is used solely for the purpose of the investigation or a related proceeding.

SEX OFFENDER REGISTRY

It is prohibited by law to use information from the California sex offender registry for employment purposes. There are exemptions for certain employers.

WORKERS COMPENSATION

California Labor Code specifically notes, “any employer who discharges, or threatens to discharge, or in any manner discriminates against any employee because he or she has filed or made know his or her intention to file a claim for compensation with his or her employer or an application for adjudication, or because the employee has received a rating, award, or settlement, is guilty of a misdemeanor.” Although the law does not reference job applicants, employers should only use this information if an injury might interfere with the applicant’s ability to perform specific job functions.

CRIMINAL REPORTING HISTORY

California currently restricts the reporting of criminal convictions to seven years. Any misdemeanors, complaints, indictments, arrests, and convictions older than that cannot be reported. Arrests which did not lead to conviction, expungements and pardons cannot be reported at all. Pending cases are reportable.

COMPLIANCE MADE EASY

Understanding California screening requirements and keeping up with the changes in recent years is not easy. Bay Area Background Checks screening tools make delivering the right documents to your candidates easy and consistent.

- Our background checks are designed to suit you and your business.
- The screening platform is easy to use across all your mobile devices.
- Our **quick app** tool delivers all required federal, state and city notices to your candidates electronically based on their work location via email or text.
- Automated adverse action support includes all the forms you need.
- No set-up or monthly fees make it easy to get started.

If you’d like to learn more visit us at www.bayareabackgroundchecks.com or call for a complimentary consultation: 888-551-8360.

Sources:

- [Investigative Consumer Reporting Agencies Act ICRAA](#)
- [Consumer Reporting Agencies Act CCRAA](#)
- [California Consumer Privacy Act CCPA](#)
- [Fair Employment and Housing Act](#)
- [AB 1008 Employment Discrimination Conviction History](#)
- [Fair Chance Initiative for Hiring Ordinance \(FCIHO\) Los Angeles](#)
- [FCIHO Individual Assessment and Reassessment Form.pdf \(lacity.org\)](#)
- [Fair Chance Ordinance San Francisco](#)
- [California Penal Code Sex Offenders](#)
- [Labor Code Workers Compensation](#)
- [Salary Information](#)
- [Salary History Amended](#)
- [SF Salary History Ordinance](#)
- [Social Media Employer Use](#)