



# Root & Rebound Guide for California Employers

## **HIRING PEOPLE WITH CRIMINAL RECORDS**

7.7.2014



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### **Dear California Employer:**

Congratulations on your first step in fairly considering job applicants with criminal records: reading this guide by Root & Rebound, a reentry advocacy center that works to minimize barriers and maximize opportunities for people in reentry.

This guide, through a format of Frequently Asked Questions (FAQs), sets forth best practices under law for California employers in the consideration of job applicants with criminal records, including:

1. Implementing and maintaining hiring practices that protect every job applicant's federal and state **civil rights** and **privacy rights** (pages 1-8);
2. **Taking care** of your company by mitigating general risk and purchasing insurance (pages 9-10); and
3. **Bonus Section:** Utilizing the **benefits and incentives** offered to employers who hire people with criminal records (pages 11-12).

Keep in mind that federal and state law promotes the hiring of people with criminal records and encourages employers to hire from this group. By fairly considering job applicants with criminal records, you are abiding by federal, state, county, and city laws, and are helping to eliminate discrimination against people who are traditionally underemployed, even though they are motivated, able, and excited to get back to work. *Thank you for being a responsible employer!*

### **Your Responsibility When Using the Information Provided Below:**

*When we wrote this guide, we did our best to give you useful and accurate information. The laws change frequently and are subject to differing interpretations. It is your responsibility to make sure that the law has not changed and is applicable to your situation.\**

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### **FAQs for Employers:**

#### **How to Abide by Law When Considering Applicants With Criminal Records**

**Q: I am a California employer and I want to thoroughly understand the background of my job applicants. Can I ask about criminal records? When and how?**

*A: It depends.* As a California employer, you cannot ask about everything in a person's background and history. *What* you can ask and *when* you can ask it depends on a number of factors, including: (1) whether you are a public or private employer, and (2) what county and city you operate in—and the local laws in your area. Please see below for more details.

**Q: As a California employer, *what* can I ask about a job applicant's criminal record?**

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\* Special thanks to Maurice Emsellem, Program Director at the National Employment Law Project, for reviewing and editing this guide.



*A: Under state law, you can ask **direct questions about certain convictions.***<sup>1</sup> For example, you can ask: “Have you ever been convicted of a crime?” However, you should include a prominent disclosure telling the applicant that **you are not asking** them to report convictions that you as the employer cannot legally ask about.<sup>2</sup> See below on pages 2-3 for what convictions you *cannot* ask a job applicant about.

**Q: As a California employer, what *can't* I ask about a job applicant's criminal record?**

*A: Under state law, you CANNOT ask about:*

1. **Convictions that have been sealed, dismissed, expunged, or statutorily eradicated.** If an applicant has expunged his/her record, then, for the purposes of applying to **private employment**, the applicant's record is considered clean.<sup>3</sup> A private employer, therefore, *cannot* ask a question like, “Have you ever been convicted of any crimes that were dismissed?” **Public employers and law enforcement** agencies can request more information about dismissed records from job applicants than private employers.<sup>4</sup>
2. **Convictions for minor marijuana-related offenses**, if the conviction is over 2 years old.<sup>5</sup>
3. **Arrests that did not lead to a conviction** (meaning an arrest where the person was not found guilty of a crime stemming from that arrest).<sup>6</sup> If you want to learn about a person's criminal record, you should ask about convictions—not arrests.
  - o **There are three exceptions for when an employer *can* ask about an arrest:**
    - a. **An employer may ask about arrests that are still pending or unresolved.** For example, if a person was arrested, has posted bail money, and is awaiting trial, the arrest is pending.<sup>7</sup> Therefore, you can ask, “Do you have any arrests that are pending?” *BUT if you are a California public sector employer, a private employer in San Francisco, or a California public employer or government contractor in a city or county that has “banned the box,” then you must wait to ask questions about pending arrests until after an individual has been deemed minimally qualified for the job, e.g., meeting civil service requirements, after a live interview has been conducted, or after a conditional offer of employment has been made. Please see pages 3-5 for more information on rules under “Ban the Box” in your county or city.*
    - b. **Law enforcement employers can ask about and consider all arrests.**<sup>1</sup>

<sup>1</sup> See Cal. Lab. Code §§ 432.7 and 432.8; *Consideration of Arrest & Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964* (E.E.O.C. Guidance Apr. 25, 2012) at 13-14 (herein “E.E.O.C. Guidance”).

<sup>2</sup> Cal. Lab. Code §§ 432.7 and 432.8. See *Starbucks Corp. v. Superior Court*, 86 Cal. Rptr. 3d 482 (2008).

<sup>3</sup> 2 C.C.R. § 7287.4(d)(1)(B); Cal. Labor Code § 432.7(a).

<sup>4</sup> Cal. Labor Code § 432.7(b).

<sup>5</sup> Cal. Labor Code § 432.8. Minor marijuana-related convictions over 2 years old that an employer cannot ask about include, but are not limited to: marijuana possession, other than concentrated cannabis (Cal. Health & Safety Code § 11357(b) and (c)), giving away or transporting small amounts of marijuana, other than concentrated cannabis (Cal. Health & Safety Code § 11360), possessing a device or paraphernalia for unlawfully smoking marijuana (Cal. Health & Safety Code § 11364), presence in the room or aiding and abetting someone illegally using or smoking marijuana (Cal. Health & Safety Code § 11365), and unlawfully being under the influence of marijuana (Cal. Health & Safety Code § 11350). See Cal. Labor Code § 432.8 for more detailed information.

<sup>6</sup> Cal. Labor Code § 432.7(a).

<sup>7</sup> Cal. Labor Code § 432.7(a).



c. **Health care facilities and pharmacy employers can ask about and consider *certain* drug arrests.**<sup>8</sup> See Section 432.7(a) of the California Labor Code for more information.

4. **Arrests that lead to the completion of a diversion program.** A diversion program (such as a drug rehabilitation program) helps a person charged with certain crimes avoid criminal charges—and therefore a criminal record.<sup>9</sup> Again, an employer should stick to best legal practice: if you must, ask about convictions, but do NOT ask about arrests.

**Q: I am a California public (government) employer. *When* can I ask about a job applicant’s criminal record?**

*A: Beginning July 1, 2014, a California state or local government agency cannot* ask a job applicant—orally, in writing, or on a job application—any information concerning the applicant’s conviction history, **until the agency has determined the applicant meets the minimum employment qualifications**, as stated in any notice or job posting about the job position. This new California state law is known as “Ban the Box” and applies statewide only to public employers. There is an **exception** to this public employer rule for law enforcement positions and other positions that require a criminal background check by law.<sup>10</sup>

**Q: I am a California private employer. *When* can I ask about a job applicant’s criminal record?**

*A: It depends on your city and county.* Generally speaking, for many years, a California private employer could ask about a job applicant’s criminal record at any time. Recently, however, San Francisco passed a “Ban the Box” law that applies to private employers, and other cities and counties are considering similar legislation. For now, San Francisco is the **ONLY** county whose “Ban the Box” legislation applies to private employers. The cities of Richmond<sup>11</sup> and Compton<sup>12</sup> have implemented “Ban the Box” laws that apply to private contractors; therefore, if you are a private contractor operating your business in those cities, you must research the statute that applies (see footnotes). At the time of this guide’s publication, all other counties and cities across the state that have passed local “Ban the Box” legislation have passed laws that apply to public, not private, employers.

Since county and city laws are changing quickly to provide more protection, you should *always* check to see what “Ban the Box” legislation has been passed in your city or county, and whether the law applies to private employers, public employers, or both. It is your responsibility to stay current on what the laws in your city and county are.<sup>13</sup>

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<sup>8</sup> Cal. Labor Code § 432.7(a).

<sup>9</sup> Cal. Labor Code § 432.7(a).

<sup>10</sup> Cal. Labor Code § 432.9 (effective July 1, 2014).

<sup>11</sup> Richmond City Resolution 110-11 (Nov. 22, 2011); Richmond City Council Ordinance No. 14-13 N.S. (July 30, 2013); Municipal Code of the City of Richmond, Article II, Section 2.65.

<sup>12</sup> Compton Resolution (April 5, 2011); City of Compton Standard Operating Manual, Section 3, Policy 3.19 (July 1, 2011).

<sup>13</sup> This memo is current as of July 3, 2014, the date it was published.



**Q: I am a California employer. What are other best practices in line with the Equal Employment Opportunity Commission’s guidelines that I should follow when considering a job applicant with a criminal record?**

A: You should follow two more important practices set out in the Equal Employment Opportunity Commission’s (E.E.O.C.) guidelines, to ensure your compliance with your Title VII and civil rights laws obligations as an employer.<sup>14</sup> Additionally, by using these hiring practices, you are ensuring that you abide by the growing number of “Ban the Box” laws in California cities and counties every year.

1. Include an **equal opportunity statement** on your job application and remove any blanket exclusions of people with criminal records.<sup>15</sup>
2. **Don’t ask about a person’s convictions on a job application.** Many people are unaware of their actual criminal records and what they have to report to employers, so by asking on a job application, you could be getting incorrect or misleading information. If you want to ask about a person’s conviction history, wait until there is a conditional offer of employment, and then look into and consider only a conviction history that directly relates to the person’s ability to do the job position in question.<sup>16</sup>

**Questions Specific to San Francisco’s “Ban the Box”**

**Q: I am a private employer doing business in San Francisco. Beginning August 13, 2014, WHAT *can’t* I ask about a job applicant’s criminal record?**

A: Beginning August 13, 2014, a new “Ban the Box” law will take effect in San Francisco.<sup>17</sup> It applies to city contractors, affordable housing providers, and **private employers** doing business in San Francisco County who have 20 or more employees (regardless of the employees’ locations). These employers may **NEVER** ask about, require a job applicant to disclose, or consider:

1. **An arrest not leading to a conviction** (except arrests that are still pending or unresolved, defined on page 2 above).<sup>18</sup>
2. **Participation in a diversion or deferral of judgment program.** A diversion program (such as a drug rehabilitation program) helps a person charged with certain crimes avoid criminal charges—and therefore a criminal record.<sup>19</sup>
3. **A conviction that has been sealed, dismissed, expunged, or made inoperative.**
4. **Juvenile records.**<sup>20</sup> \*
5. **A conviction more than 7 years old** (based on the date of sentencing).<sup>21</sup> \*
6. **A criminal offense other than a felony/misdemeanor** (for example, an infraction, which is a petty offense that usually comes with a ticket and small fine).<sup>22</sup> \*

*All records marked with a \* indicate additions to the California state law protections described on page 2.*

<sup>14</sup> *Questions and Answers About Race and Color Discrimination in Employment*, (E.E.O.C. Guidance May 16, 2006).

<sup>15</sup> NELP, *Top Ten Best Practices for Fair Chance Policies* at 1-2; E.E.O.C. Guidance; *Questions and Answers About Race and Color Discrimination in Employment*, (E.E.O.C. Guidance May 16, 2006).

<sup>16</sup> NELP, *Top Ten Best Practices for Fair Chance Policies* at 1-2; E.E.O.C. Guidance.

<sup>17</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>18</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>19</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>20</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>21</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>22</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).



**Q: I am a private employer doing business in San Francisco. Beginning August 13, 2014, WHEN can I ask about a job applicant’s criminal record?**

*A: Beginning August 13, 2014, the new SF “Ban the Box” law states:*

**(1): At the beginning of the hiring process, you cannot ask:**

1. **About an individual’s conviction history**—meaning you cannot ask about a criminal conviction history in a job application form, screening, informal conversation, or otherwise.<sup>23</sup>
2. **About an individual’s unresolved or pending arrests**, whether in a job application form, screening, informal conversation, or otherwise.<sup>24</sup>

**(2): After a live interview has been conducted, or a conditional offer of employment has been made, only then can you ask and consider:**

1. **An individual’s conviction history from the last 0-7 years**, if it is outside of the 6 things you can never ask about (set forth on page 6) **AND if it directly relates to the job applicant’s ability to do the job.**<sup>25</sup>
2. **An individual’s pending or unresolved arrests, if it directly relates to the job applicant’s ability to do the job.**<sup>26</sup>

**(3): Before you fire, refuse to hire, refrain from promoting, or take some other action that is adverse to a job applicant based on a conviction or unresolved arrest, you must give the individual an opportunity to present evidence that:**

- The information is **inaccurate**,<sup>27</sup> **AND**
- The individual has been **rehabilitated**<sup>28</sup> (evidence showing that the person has changed his/her life and is no longer engaging in criminal behavior), including evidence showing that the person has:
  - Satisfied and completed terms of parole/probation;
  - Received education and/or training;
  - Participated in alcohol or drug treatment programs;
  - Letters of recommendation;
  - Been free of criminal behavior for a sufficient time period to have changed, based on the person’s age at the time of the conviction, **AND**
- **All other mitigating factors**<sup>29</sup> that led to the conviction and explain or reduce the severity of the person’s criminal behavior, including evidence of:
  - Coercion (the person was forced or threatened into doing the illegal act);
  - Physical or emotional abuse (the person was experiencing physical or emotional violence that led him/her to do the illegal act); and/or
  - Untreated substance abuse/mental illness that contributed to the conviction (the person was addicted to drugs or alcohol, or had a serious mental health issue, and had not received specialized health care treatment for one of those issues).

### **BACKGROUND CHECKS:**

<sup>23</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>24</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>25</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>26</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>27</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>28</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).

<sup>29</sup> S.F. Police Code, Article 49 (San Francisco’s Fair Chance Ordinance, effective Aug. 13, 2014).



## How California Employers Can Legally Conduct and Consider Them

### **Q: I am a California employer. Do I have to conduct a background check?**

*A: Generally, no.* In fact, a background check may be unnecessary for a job position. If the job does not involve unsupervised access to sensitive populations or the handling of sensitive information, you do not need to perform a background check.<sup>30</sup> The only exception is for those professions where a background check is legally required, including federal law enforcement officers,<sup>31</sup> airport security screeners,<sup>32</sup> security guard positions,<sup>33</sup> bank employees,<sup>34</sup> port workers,<sup>35</sup> childcare workers in federal facilities or agencies,<sup>36</sup> certain insurance personnel,<sup>37</sup> any personnel involved in administration of an employee benefits plan,<sup>38</sup> defense contractors,<sup>39</sup> and prisoner transportation personnel.<sup>40</sup>

### **Q: I am a California employer. Can I conduct a background check or have a private company conduct a background check on a job applicant?**

*A: Yes—with some restrictions on how you conduct the check and what is considered.* As a California employer, you can request or conduct a background check on job applicants. **HOWEVER**, you have obligations under federal and state consumer protection laws to the job applicant, which are:

#### **(1) Notice to and Written Permission by the Applicant:**

You must **provide the job applicant clear written notice** that you will be conducting a criminal background check and **obtain his/her written permission** before conducting the background report.<sup>41</sup>

#### **(2) A Copy of the Background Report:**

Within 3 days of receiving the background report, you must provide a copy to the job applicant.<sup>42</sup>

#### **(3) If there is an “Adverse Action” taken because of a background report, the following procedure is required:**

- **STEP 1** – If the employer plans to take an “adverse action” (for example, not hiring the applicant, or firing a recently-hired employee) based on a report, the employer **must provide the applicant with a copy of the report and a copy of the Federal Trade Commission Summary of Rights before the action is taken**—giving the applicant an opportunity to clear up any inaccuracies in the report.<sup>43</sup>
- **STEP 2** – If the employer goes forward with the adverse action, it must provide **notice to the applicant about the adverse decision**, the contact information of

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<sup>30</sup> 42 U.S.C. § 2000e-2; NELP, Top Ten Best Practices for Fair Chance Policies at 1-2; E.E.O.C. Guidance.

<sup>31</sup> 5 U.S.C. § 7371(b)

<sup>32</sup> 49 U.S.C. § 44935(e)(2)(B).

<sup>33</sup> *Security Guard Fact Sheet*, CALIF. DEP’T OF CONSUMER AFFAIRS (July 2012), [http://www.bsis.ca.gov/forms\\_pubs/guard\\_fact.shtml](http://www.bsis.ca.gov/forms_pubs/guard_fact.shtml); Cal. Bus. & Prof. Code § 7583.9.

<sup>34</sup> 12 U.S.C. § 1829.

<sup>35</sup> 46 U.S.C. § 70105(c).

<sup>36</sup> 42 U.S.C. § 13041(a).

<sup>37</sup> 18 U.S.C. § 1033(e).

<sup>38</sup> 29 U.S.C. § 1111(a).

<sup>39</sup> 10 U.S.C. § 2408(a).

<sup>40</sup> 42 U.S.C. § 13726b(b)(1).

<sup>41</sup> 15 U.S.C. § 1681b(b)(2)(A); CA Civil Code § 1786.16(a)(2).

<sup>42</sup> CA Civil Code § 1786.16.

<sup>43</sup> 15 U.S.C. §§ 1681b(b)(3), 1681m; CA Civil Code § 1786.40.

the reporting agency, and the applicant’s right to dispute the accuracy or completeness of the report.<sup>44</sup>

**(4) If a record *illegally* shows up in a background check, an employer should not consider it for employment purposes and should report the mistake to the background check company.** The private background check company cannot report, and you should not consider:

- **Arrests not leading to a conviction** (unless the company has verified in the last 30 days that the arrest is still pending or unresolved).<sup>45</sup>
- **Convictions dating back more than 7 years.**<sup>46</sup> In California, criminal convictions can only be reported for 7 years (unless another law requires employers to look deeper into the job applicant’s background).<sup>47</sup>

*\*\*\*This is another reason why it is critical to give the applicant a copy of the record and a chance to review it—otherwise you will not know if you are illegally relying on inaccurate information!*

**Q: I am a California employer. If I decide to conduct a background check or am legally required to conduct a background check—then what factors can I consider as I review the report, and how should I go about assessing the candidate?**

*A: This is a 4-part answer –*

**(1)** Generally speaking, there should be *no permanent exclusions of people with criminal records*.<sup>48</sup>

**(2)** *You must consider the following three factors in determining whether a specific conviction may be relevant to that job position:*

**I. The nature and gravity of the offense or conduct.** This includes things like:

- a. The harm caused by the crime;
  - b. The legal elements of a crime;
- (With respect to the gravity of the crime, misdemeanors may be less severe than felonies).<sup>49</sup>

**II. The time that has elapsed since the offense, conduct, and/or completion of the sentence.**

- a. Again, there should be *no permanent exclusions of people with criminal records*.
- b. The employer should understand that the risk of recidivism decreases over time.<sup>50</sup>

**III. The nature of the job held or sought.** This includes things like:

- a. The job title and nature of duties (e.g., data entry, lifting boxes);
- b. The job’s essential or most important functions;
- c. The circumstances under which the job is performed (e.g., the level of supervision, oversight, and the amount of agency the employee has);

<sup>44</sup> 15 U.S.C. §§ 1681b(b)(3), 1681m(a); CA Civil Code § 1786.40.

<sup>45</sup> Cal. Civ. Code § 1786.18(a).

<sup>46</sup> 15 U.S.C. §§ 1681c(a)(2), 1681c(b)(3); CA Civil Code § 1786 et. seq.

<sup>47</sup> Cal. Civ. Code § 1786.18(a).

<sup>48</sup> 42 U.S.C. § 2000e-2; E.E.O.C. Guidance at 15; *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975).

<sup>49</sup> 42 U.S.C. § 2000e-2; E.E.O.C. Guidance at 15; *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975).

<sup>50</sup> 42 U.S.C. § 2000e-2; E.E.O.C. Guidance at 15; *Green v. Missouri Pacific Railroad*, 549 F.2d 1158 (8th Cir. 1975).





- d. The environment in which the job's duties are performed (e.g., outside, in a warehouse, or in a private home).<sup>51</sup>

(3) *Additionally, you should **individually assess***<sup>52</sup> any candidate with a criminal record.

This means looking at:

- The number of offenses for which the individual was convicted;
- The age at the time of conviction, or release from prison;
- 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;
- The length and consistency of employment history before and after the offense or conduct;
- Evidence of rehabilitation and efforts to change, e.g., education/training;
- Mistakes in the criminal record;
- Mitigating facts or circumstances surrounding the offense or conduct;
- Employment or character references, and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.<sup>53</sup>

(4) *Lastly, you must treat and consider criminal history information in the same way for all job applicants **regardless of their race or national origin**.* This is required under state and federal civil rights law. For example, if an employer denies an African American job applicant a position on the basis of his criminal record, but then hires a similarly situated White job applicant with a comparable criminal record, that employer is violating federal and state civil rights laws.<sup>54</sup>

*California employers*, if you practice the steps above, you are taking reasonable care and practicing due diligence in hiring and avoiding liability under the law. Great job!

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<sup>51</sup> 42 U.S.C. § 2000e-2; E.E.O.C. Guidance at 15; *Green v. Missouri Pac. R. Co.*, 549 F.2d 1158 (8th Cir. 1975).

<sup>52</sup> E.E.O.C. Guidance at 18-20.

<sup>53</sup> E.E.O.C. Guidance at 18-20.

<sup>54</sup> E.E.O.C. Guidance at 1, 6.



## MITIGATING GENERAL RISK

**Q: I want to give all applicants a fair chance, but how can I also protect my business and understand the risk, if any, in hiring someone with a criminal record? How do I balance protecting myself from risk with protecting the rights of applicants with criminal records?**

*A: In all hiring decisions, there is risk—and you must, for all candidates, exercise reasonable care and “due diligence” in hiring to protect yourself from risk and suit. This means, as an employer, you should take reasonable care and reasonable steps to make sure that a person’s conviction record does not have a “demonstrably tight” connection (a “nexus”) to the job position in question.<sup>55</sup> Reasonable steps in determining risk include:*

- Consider the age of the conviction. Even if there was in the past some relationship between the type of job and the offense, have circumstances changed over time, such that there is no longer a risk of that person committing a similar offense?
- Consider whether an individual poses an undue risk of harm to a third person, in light of the particular responsibilities and tasks to be performed for the position and because of their *particular offense history*. Remember, it is illegal to have policies or practices with blanket criminal records exclusions (e.g. “We don’t hire people with felony conviction records”).<sup>56</sup>
- Check with an individual’s references about past job performance.
- If you deem necessary, offer special supervision and training to support the new employee in performing the job.
- Consider the federal bonding program (discussed in the sections below, pages 11-12) for fidelity insurance if the employee poses a particular risk of theft or embezzlement and is tasked with safekeeping property or finances as part of the position.
- Mitigate general risk for your business—including risks inherent in all hiring decisions, by obtaining insurance (see the section below, page 11).
- If you still have questions or concerns, consult an attorney for advice and information about hiring the candidate with a criminal record.

These steps will allow you to assess what relationship, if any, the applicant’s offense history or conduct *actually* has to the nature of the job and its duties, and whether there are real, foreseeable risks connected to that specific history.<sup>57</sup> If the harm caused by the conviction offense is removed from the nature of the job, or if the relationship between the two is tenuous, then you don’t have foreseeable risk.

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<sup>55</sup> E.E.O.C. Guidance at 14. See also 42 U.S.C. § 2000e-2; *El v. Se. Pennsylvania Transp. Auth. (SEPTA)*, 479 F.3d 232, 245 (3d Cir. 2007).

<sup>56</sup> 42 U.S.C. § 2000e-2; *Green v. Missouri Pacific Railroad*, 523 F.2d 1290, 1293 (8th Cir. 1975); E.E.O.C. Guidance.

<sup>57</sup> *Doe v. Capital Cities* (1996) 50 Cal.App.4th 1038, 1054.



## Q: What other tools can I use to mitigate risk for my business?

A: For any entity or business with employees, it is important to purchase and carry professional insurance to mitigate risks. There is not one specific type of insurance that an employer who hires a person with a criminal record needs to obtain (and it would be illegal to require that); however, generally speaking, insurance helps an employer reduce the likelihood of liability if something goes wrong at work:

1. **General Liability Insurance:** This is the most basic type of commercial insurance, which protects against accidents and injuries that occur on company property or on the property of a customer, and claims of negligence against the employer.<sup>58</sup> Under most policies, general liability insurance will not cover an employee's intentional acts causing harm.<sup>59</sup>
2. **Professional Liability/ Errors and Omissions Insurance:** This type of insurance goes beyond general liability insurance to help you defend against and pay damages for lawsuits alleging that you failed or improperly rendered professional services.<sup>60</sup>
3. **Workers' Compensation Insurance** (required by law in California)<sup>61</sup>: designed to cover the cost of injury and lost time from work for employees who are injured on the job. If an employer is unable to find an insurer willing to cover its business, the State Compensation Insurance Fund ("State Fund") is required to provide coverage to California employers.<sup>62</sup>
4. **Directors and Officers Insurance:** This type of insurance helps cover costs and damages in a lawsuit against your company's directors and officers (as registered with the state) that are a direct result of their actions on the job.<sup>63</sup>
5. **Employment Practices Liability Insurance (EPLI):** This type of insurance helps protect an employer from costs and damages for legal claims based on illegal discrimination, sexual harassment, wrongful termination or discipline, negligence in employment decisions, breaches of employment contracts, libel or slander, emotional distress, invasion of privacy, and mismanagement of employee benefits.<sup>64</sup>
6. **Fidelity/Crime Insurance:** This type of insurance helps cover losses of business assets caused by robbery, burglary, larceny, forgery, embezzlement, or other financial crimes.<sup>65</sup>

Visit the **California Department of Insurance's Guide** on business insurance to learn more about how business insurance works and how to work with an insurance broker.<sup>66</sup>

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<sup>58</sup> See Janet L. Kaminski Leduc, *Corporate Liability Insurance*, <http://www.cga.ct.gov/2008/rpt/2008-R-0183.htm>; *Types of Business Insurance*, U.S. Small Business Administration, <http://www.sba.gov/content/types-business-insurance>.

<sup>59</sup> See Joseph D. Zamore, *Insurance for Business Torts*, Business Torts (2014).

<sup>60</sup> *13 Types of Insurance a Small Business Owner Should Have*, Forbes (Jan. 19, 2012).

<sup>61</sup> Cal. Lab. Code § 3700.

<sup>62</sup> Cal. Ins. Code § 11770.

<sup>63</sup> *13 Types of Insurance a Small Business Owner Should Have*, Forbes (Jan. 19, 2012).

<sup>64</sup> See IRMI, "Employment Practices Liability Insurance," <http://www.irmi.com/online/insurance-glossary/terms/e/employment-practices-liability-insurance-epli.aspx>.

<sup>65</sup> *Guide to Business Insurance*, CALIF. DEPT OF INSURANCE, (Nov. 22, 2010), <http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0030-business/CommercialInsurance.cfm>.

<sup>66</sup> *Guide to Business Insurance*, CALIF. DEPT OF INSURANCE, (Nov. 22, 2010), <http://www.insurance.ca.gov/0100-consumers/0060-information-guides/0030-business/CommercialInsurance.cfm>.



*Bonus Section:*

*Read on if you are interested in incentive programs!*

**BENEFITS & INCENTIVES FOR EMPLOYERS WHO HIRE PEOPLE WITH CRIMINAL RECORDS**

Because the hiring of people with criminal records is encouraged, federal- and state-funded workforce development programs offer benefits and incentives to employers and job seekers who face significant barriers to employment—including people with criminal records. Such benefits and incentives include:

**1. Federal Work Opportunity Tax Credit (WOTC):**

WOTC is a federal tax credit available to employers for hiring individuals who face significant barriers to employment, including veterans, people with felony convictions who are hired no more than one year after their conviction or release from prison, and recipients of certain public benefits, including Supplemental Security Income (SSI) benefits.<sup>67</sup> The WOTC tax credit for the business ranges from \$1,200 to \$9,600, depending on the hours and pay of the employee in the first year of employment, and the maximum allowed credit based on which target group the employee comes from.<sup>68</sup> An employer can use the “WOTC Calculator” tool available online at:

<http://www.doleta.gov/business/incentives/opptax/wotcEmployers.cfm>.

**2. Work Incentives for the Traditionally Underemployed:**

People who receive certain public benefits such as SSI, and who want to work, have access to federal- and state-funded workplace support programs, including the **California Department of Rehabilitation** (DOR) and local **Work Incentives Planning and Assistance** (WIPA) programs.

**3. Federal Bonding Program (FBP) for Fidelity Insurance:**

Some employers require their employees to be covered under fidelity insurance to protect against money or property loss due to employee dishonesty. If you are one of these employers, you should look into the federal bonding program (FBP), a federal incentive program for employers hiring individuals with criminal records. Because many insurance providers will not provide fidelity bonding to companies on behalf of “at-risk” job applicants—including anyone with a history of arrest, conviction, or imprisonment; anyone who has ever been on probation or parole; recovering substance abusers; public benefits recipients; people with poor credit; poor youth who lack a work history; and individuals who were dishonorably discharged from the military—the Federal Bonding Program is a great

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<sup>67</sup> 26 U.S.C. § 51.

<sup>68</sup> WOTC Tax Credit Amounts, U.S. DEP’T OF LABOR, <http://www.doleta.gov/business/incentives/opptax/benefits.cfm>.



option for you and your employees.<sup>69</sup> A California job seeker who has been offered employment with your company will qualify for a fidelity bond through the EDD if they meet the following requirements:

1. Provide verifiable proof of legal status or documentation for authorization to work in the United States.
2. Have a firm job offer or commitment of employment with a reasonable expectation of permanence that can be verified by bonding staff.
3. Are not commercially bondable, or could be denied commercial bonding coverage because of an arrest record or imprisonment, history of drug or alcohol abuse, poor credit history, or a lack of employment history.
4. Are being hired for a position that requires that the employee is bonded, or are required to be bonded to retain or remain on the job.
5. Are qualified for the position being offered.
6. Are not self-employed or an owner/operator.<sup>70</sup>

#### **To secure a fidelity bond through the FBP:**

- STEP 1:** A job seeker must visit his/her local EDD Workforce Services location or an American Job Center (formerly known as a One-Stop Career Center) to show that the eligibility requirements are satisfied;
- STEP 2:** The EDD staff person certifies the bond; and
- STEP 3:** The job applicant is fully eligible once he/she begins work.<sup>71</sup>

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### **Summary**

As a California employer, you are taking an important first step by learning from this guide how to conduct a legally sound and fair hiring process. By abiding by local, state, and federal laws and regulations and taking reasonable care in your hiring process to protect against risk, you are reducing your liability and protecting the legal rights of job applicants. We hope this guide has helped you learn about protecting job applicants' federal and state **civil rights** and **privacy rights**, consider how to take reasonable steps and practice **due diligence** in your hiring, understand the important of **business insurance** for any company to mitigate its risks, and finally, take advantage of the **incentives** for hiring people with records.

We hope that, after reading this guide, you understand that federal and state law generally promotes the hiring of people with criminal records and encourages employers to hire from this traditionally underemployed and discriminated-against group. *Thank you for being a responsible employer!*

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<sup>69</sup> See *The Federal Bonding Program: Program Background*, U.S. DEPT OF LABOR, <http://www.bonds4jobs.com/program-background.html>.

<sup>70</sup> *EDD Fidelity Bonding Program—An Employment Incentive*, CALIF. EMPLOYER ADVISORY COUNCIL, [http://ceac.org/employers/ask\\_the\\_edd\\_expert/edd\\_fidelity\\_bonding\\_program/](http://ceac.org/employers/ask_the_edd_expert/edd_fidelity_bonding_program/).

<sup>71</sup> *Id.* There is an EDD office locator available online. See *Office Locator*, CALIF. EMPLOYMENT DEVELOPMENT DEPT, [http://www.edd.ca.gov/office\\_locator/](http://www.edd.ca.gov/office_locator/).