FILE NO. 131192

LEGISLATIVE DIGEST (REVISED)
(including amendments introduced in committee, 2/3/2014)

[Police and Administrative Codes - Considering Criminal History in Employment and Housing Decisions]

Ordinance amending the Police Code to require Employers and Housing Providers to limit the use of criminal history information and follow certain procedures and restrictions when inquiring about and using conviction history information to make decisions about employment and tenancy in San Francisco; and amending the Administrative Code to require City contractors and subcontractors to adhere to the same limits, procedures, and restrictions when making decisions regarding employment of persons for work on City contracts and subcontracts.

Existing Law

The City has no law regulating the use of criminal history in employment and housing decisions generally, or with respect to employment decisions of City contractors. There are a number of state and federal laws, including regulations of state and federal agencies, that address the use of criminal history information in the employment context, including in some circumstances requiring that it be considered or requiring that persons with certain criminal backgrounds not be hired in certain positions.

Amendments to Current Law

The proposed ordinance would place limits on and establish procedures for the use of criminal history information by employers, housing providers, and City contractors and subcontractors (this latter grouping collectively referred to here as "contractors").

Coverage

Employers. The ordinance would apply to employers with 20 or more employees regardless of location, but would only apply to employment situations located in whole or in substantial part in San Francisco. The ordinance would not apply to the City government or to other governmental entities, local, state, or federal.

Housing Providers. The ordinance would apply to an entity that owns, master leases, or develops affordable housing in the City. "Affordable housing" means any residential building in the City that has received funding from the City, connected in whole or in part to restricting rents, where the funding is provided directly, or indirectly through funding to another entity that owns, master leases, or develops the building. "Affordable housing" also includes "affordable units" as that term is defined in Article 4 of the Planning Code. Projects that are financed using City-issued tax exempt bonds but that receive no other funding from the City or are not otherwise restricted by the City are not considered "affordable housing."

Contractors. The ordinance would apply to a contractor's operations to the extent they are in furtherance of performing a contract or property contract. Certain types of contracts (for example, for a cumulative amount of $5,000 or less in a fiscal year) and property contracts (for example, for a duration of less than 30 days) are not covered by the ordinance.

Criminal History Matters That Are Off-Limits

Certain aspects of criminal history may not be considered in any manner or at any time by an employer, housing provider, or contractor. These are:

- an arrest not leading to a conviction (other than an arrest that is still the subject of a criminal investigation or trial)
- participation in or completion of a diversion or deferral of judgment program
- a conviction that has been expunged or otherwise made inoperative
- a conviction or other determination in the juvenile justice system
- a conviction that is more than 7 years old (measured from date of sentencing)
- criminal offenses other than felonies or misdemeanors, such as infractions

"Ban the Box"

For employers, housing providers, and contractors, there is a prohibition on premature inquiry into criminal history. An application form for a job or rental unit may not contain an inquiry regarding criminal history. Nor may the employer, housing provider, or contractor otherwise inquire about criminal history at the beginning of the hiring or rental process.

Considering Criminal History: The Process

Timing. For employers and contractors, inquiry into criminal history of applicants and employees is permissible only after the first live interview with the person or, at the employer's/contractor's discretion, after a conditional offer of employment. For housing providers, inquiry into the criminal history of applicants may only occur after it has been determined that the applicant is legally eligible to rent the unit and is qualified to do so under the housing provider's criteria, if any, for assessing rental history and credit history.

If the timing is proper, the employer, housing provider, or contractor may inquire about criminal history and may receive information through a background check report. The employer, housing provider, or contractor must follow a process that emphasizes relevance, inclusion, and accountability.

Relevance. Only those convictions and unresolved arrests that directly relate to the job or rental unit in question may be considered. And the employer, housing provider, or contractor must also consider the time that has elapsed since the occurrence giving

rise to the conviction or unresolved arrest, and any evidence of inaccuracy or of rehabilitation or other mitigating factors.

In the employment context, a conviction or unresolved arrest is "directly-related" if the underlying conduct has a direct and specific negative bearing on the person's ability to perform the duties of the job in question. In the housing context, a conviction or unresolved arrest is "directly-related" if the underlying conduct has a direct and specific negative bearing on the safety of persons or property, given the nature of the housing.

Inclusion. Before the employer, housing provider, or contractor takes adverse action against the person with a conviction or unresolved arrest, he or she must be given notice of the prospective adverse action and the information in a background check report on which it would be based, and an opportunity to present evidence that the criminal history information about them is inaccurate, and to present evidence of rehabilitation or other mitigating factors.

Accountability. If there then is a denial of employment or housing, the employer, housing provider, or contractor must notify the person.

Other Requirements

Posting of Notices. The ordinance would require employers, housing providers, and contractors to post a notice in appropriate locations (for example, offices and work sites) that would inform persons of their rights under the ordinance.

Limitation on Solicitations/Advertisements. The ordinance would prohibit employers and contractors from issuing solicitaions or advertisements that indicate that persons with an arrest or conviction will not be considered for employment. Housing providers must state that qualified applicants with criminal histories will be considered in a manner consistent with the ordinance.

Recordkeeping. The ordinance would require employers, housing providers, and contractors to maintain records of their employment or housing decisions that would be sufficient for the Office of Labor Standards Enforcement (OLSE) to monitor compliance as to employment decisions and the Human Rights Commission (HRC) to monitor compliance as to housing decisions.

Prohibition on Retaliation. The ordinance would prohibit employers, housing providers, and contractors from retaliating against persons for exercising their rights under the ordinance.

Implementation

Enforcement Authority. The ordinance would give OLSE enforcement authority regarding violations by employers and contractors. The HRC would have enforcement authority regarding violations by housing providers. Neither the OLSE nor the HRC could find a violation based on an employer's, housing provider's, or contractor's decision that a person's conviction history is "directly-related."

Rulemaking. The proposed ordinance would give the OLSE rulemaking authority as to its employment-related provisions. The HRC would have rulemaking authority as to the housing-related provisions of the ordinance. Where a rule would impact both the employment and housing dimensions of the ordinance (for example, elaboration on the definition of a term that applies in both contexts), the OLSE would have rulemaking authority but with an obligation to consult HRC. In addition, on rules that would impact the housing dimensions of the ordinance, the Mayor's Office of Housing and Community Development would have a consultative role.

Community Outreach. The proposed ordinance would give the OLSE and HRC authority (with a consultative role for the Mayor's Office of Housing and Community Development) to sponsor community outreach programs to familiarize the public, and particularly individuals with a criminal history, with the protections of the ordinance. This function may be delegated to or shared with community-based organizations.

Tracking Complaint Information. The proposed ordinance would require both the OLSE and the HRC to track the number and types of complaints of violations each agency receives, and the resolution of those complaints, and annually report this information to the Board of Supervisors. In addition, the Office of Contract Administration would be required to submit an annual report to the Board detailing those instances in which a department, in accordance with standards set forth in the ordinance has been allowed to waive its provisions.

Background Information

The definition of "housing providers" on page 1 of this digest includes changes made at the latest committee hearing. In addition, the paragraphs on page 4 concerning rulemaking, community outreach, and tracking complaint information have been modified to reflect changes made at the latest committee hearing.