

Fair Chance Hiring in San Francisco

Year One of the San Francisco Fair Chance Ordinance

Report to the Board Of Supervisors
January 29, 2016

STATUTORY AUTHORITY

In February 2014, the San Francisco Board of Supervisors unanimously passed the Fair Chance Ordinance (FCO) and Mayor Ed Lee signed it into law on March 4, 2014. The Ordinance is codified as Article 49 of the San Francisco Police Code and Chapter 12T of the San Francisco Administrative Code. The Ordinance became operative on August 13, 2014, on which date employers were required to begin complying with the law.

The FCO's provisions apply to affordable housing providers and to employers. The affordable housing provisions are enforced by the San Francisco Human Rights Commission. The employment provisions, including those that apply to City contractors and lessees on City property (Ch. 12T), and those that apply to City employers in general (Art. 49), are enforced by the San Francisco Office of Labor Standards Enforcement (OLSE).

This report focuses on the employment provisions enforced by OLSE.

BAN THE BOX BACKGROUND

In its findings, as enumerated in the FCO, the Board of Supervisors declared that the health, safety, and wellbeing of San Francisco's communities depend on increasing access to employment and housing opportunities for people with arrest or conviction records in order for them to effectively reintegrate into the community and provide for their families and themselves. Barriers to these opportunities for people with arrest or conviction records increase recidivism and thereby jeopardize the safety of the public, disrupt the financial and overall stability of affected families and of our communities, and impede the City's achieving its maximum potential of economic growth.

The Board reported that, in California, it has been estimated that almost one in four adults have arrest or conviction records. Thousands of people in our community are directly impacted by barriers to reintegration based on these records. In today's digital age, the use of criminal background checks has proliferated, with hundreds of companies offering low-cost criminal background checks over the internet. Surveys have shown that as many as ninety percent of employers conduct background checks.

The Board referenced one study that found that two thirds of employers surveyed in five major U.S. cities would not knowingly hire a person with a criminal record, regardless of the offense. Another study found that a criminal record reduces the likelihood of a job callback or offer by nearly fifty percent. Among those seeking assistance from the San Francisco Public Defender's Clean Slate program, a pool of individuals with criminal records, only about one third are employed, and the majority of those employed earn an annual income of \$3,000 or less.

The expansion of the criminal justice system and all of its attendant consequences, coupled with the growth of the for-profit criminal background check industry prompted the Board to regulate the use of arrest and conviction records. The Board pointed to over 100 cities and counties nationwide that have adopted what are widely known as "Ban the Box" ordinances that require certain employers to consider a job candidate's qualifications first, without the stigma of a conviction record. These initiatives provide

applicants a fair chance by removing the conviction history question on the job application and delaying the background check inquiry until later in the hiring process. San Francisco's Ordinance takes a step beyond most of the existing laws, which cover only city contractors; instead, the FCO covers employers across the City, as well as housing providers.

REQUIREMENTS OF THE FAIR CHANCE ORDINANCE

The distinctive components of San Francisco's Fair Chance Ordinance are:

- Questions about arrest or conviction records on job applications are prohibited.
- Employers may not ask about arrest and conviction inquiries until after a live interview.
- Certain areas of inquiry are off-limits at any point: arrests not leading to conviction; diversions and deferrals of judgement; dismissed or expunged convictions; juvenile adjudications; convictions older than 7 years; and infractions.
- The Ordinance specifies that the employer may only consider directly-related convictions.
- The employer must provide notice of rights and conduct an individual assessment prior to any denial; allow a specified time to correct or explain; and allow submission of evidence.
- Employers are required to maintain records documenting compliance.
- The law provides for graduated penalties and authorizes the enforcing agency to file a civil action.

SCOPE OF EMPLOYER PROVISIONS

The employer provisions of San Francisco's Fair Chance Ordinance apply to:

- a) Employees and job applicants at private employers with 20 or more employees worldwide;
- b) Employees and job applicants of City service contractors and leaseholders, regardless of company size.

The Ordinance covers employees who perform work for at least eight hours a week in the City and County of San Francisco – even if she or he is the only employee that works for that company in San Francisco. It does not cover public sector employers.

The Ordinance covers all forms of work, including temporary, seasonal, part-time, contract, contingent, vocational, job training, and commission-based work. It also covers work performed through the services of a temporary or other employment agency, and any form of vocational or educational training—with or without pay.

The FCO also applies to the San Francisco employees of all employers with City service contracts or leases, regardless of the size of the company or organization. The provisions of the law are directly incorporated into City contracts and leases.

THE ANNUAL REPORTING PROCESS

Since 2008, OLSE has been surveying San Francisco employers with 20 or more employees about their compliance with the SF Health Care Security Ordinance. Because the universe of employers that are covered under the HCSO is almost identical to those covered under Article 49 of the FCO, OLSE decided to include in the HCSO Annual Report the first annual report from employers on compliance with the FCO. The 2014 survey was conducted during the month of April 2015 and included six questions specifically about employers' compliance with the new Ordinance.

The survey questions referred to the period from August 13, 2014, the effective date of the FCO, to December 31, 2014. Because the first year of implementation of the FCO was intended to be an educational period, and OLSE was not authorized to impose any penalties on violators in that first year, employers had little incentive to provide inaccurate information on this survey.

4,732 employers responded to the survey. The responders include a range of company sizes, reflecting the diversity of San Francisco employers. Almost half of the covered employers that responded have between 20 and 100 total employees. Many of these are local small businesses. Very large companies, those with over 500 employees, represent 28% of the responses. The law applies equally to for-profit businesses and nonprofit organizations. 352 nonprofit organizations responded to the survey.

Size of Companies Responding to the Survey		
Company Size (Number of Employees Worldwide)	Number of Employers Responding	
Less than 50	1,409	29.8%
50-99	857	18.1%
100-499	1,148	24.3%
500-1999	551	11.6%
2000 or more	767	16.2%
Total	4,732	100.0%

The results of the survey are summarized in the following sections.

QUESTION 1: NUMBER OF HIRES

How many employees did your company hire to work in San Francisco between August 13, 2014 and December 31, 2014 (including telecommuters working in SF)?

The FCO covers jobs where the “physical location of the employment or prospective employment . . . must be at least eight (8) hours per week within the City.”

Of the 4,732 covered employers who reported, 3,324 reported hiring employees in San Francisco during the four and a half months the law was in effect. They reported hiring a total of 68,667 employees in

that period. A significant percentage of those reporting hiring were temporary staffing agencies and similar firms.

QUESTION 2: JOB APPLICATIONS

During that time, did your company’s employment application for jobs in San Francisco, including online applications, ask about arrest or conviction records?

The FCO prohibits an employer from asking on an employment application any information about an applicant’s arrest or conviction history. This prohibition includes online applications, which have become very common in the Bay Area. Many large companies have an online application that they use for job openings nationwide. In order to comply with the Fair Chance Ordinance, many national companies have had to consider whether to create a special FCO-compliant application for San Francisco, or modify their universal national application to comply with San Francisco law.

Nineteen percent of respondents reported asking employees about arrest or conviction records on the company’s employment applications for jobs in San Francisco (including online applications). Some of those employers may operate in “exempted” industries, i.e. industries regulated by State or Federal requirements to investigate criminal background before hiring.

Response	Number	Percent
No answer	338	7.1%
Yes	837	17.7%
No	3,557	75.2%
Total	4,732	100.0%

QUESTION 3: BACKGROUND CHECKS

During that time, did your company conduct criminal background checks for any applicants before you conducted a live interview with them?

The Fair Chance Ordinance prohibits employers from conducting a criminal background check, or inquiring into an applicant’s arrest or conviction history, until either after the first live interview, or after a conditional offer of employment has been made. Once a background check has been conducted, and before the employer takes any adverse action based on the applicant’s conviction history, the employer must give the employee a copy of the background report, and give the applicant seven days to provide evidence of inaccuracies in the report, or evidence of rehabilitation or other mitigating factors.

In response to this question, 182 employers indicated that they had conducted a criminal background check prior to a live interview. Some 4,212 employers (89%) said that they had not done so and 338 declined to respond.

Response	Count	Percent
No	4212	89.0%
Yes	182	3.9%
No Response	338	7.1%
Total	4,732	100.0%

QUESTION 4: PROHIBITED TOPICS

The FCO prohibits employers from inquiring about the following at any time:

- An arrest not leading to a conviction, except for unresolved arrests;
- A conviction that is more than 7 years old;
- Participation in a diversion or deferral of judgment program;
- A conviction that has been dismissed, expunged, or otherwise invalidated;
- A conviction in the juvenile justice system;
- An offense other than a felony or misdemeanor, such as an infraction.

Between August 13 and December 31, 2014, did your company inquire about any the above?

Response	Count	Percent
No	4246	89.7%
Yes	132	2.8%
No Response	354	7.5%
Total	4,732	100.0%

Employers may not ask about the six “off-limits areas” or take these issues into consideration at any point of the hiring process, or at any point once an employee is hired. In particular, the common question, “Have you ever been convicted of a felony?” would not be permitted because the word “ever” includes the period older than seven years. These six areas are off-limits even to a third-party background check company. This means that a Covered Employer has an obligation to specify what information it wants reported in its request to the third-party background check company.

QUESTION 5: CHANGES MADE TO COMPLY

Did you change your job application process to comply with the Fair Chance Ordinance? (multiple options)

About eighteen percent (18%) of the 4,732 employers said that they had changed their job application process to comply with the law.

Option	Number of Responses	Percentage
Yes, we changed our application and/or background check process.	845	17.9%
No, our existing application and/or background check process was already compliant with the law.	2,432	51.4%
No, we never considered arrest records or convictions, and we still do not.	728	15.4%
No, we have not yet changed our process to comply with the law.	99	2.0%
Total	4,104*	

* Due to a technical problem, 628 online surveys had no usable data in response to Question 5.

The FCO contains a preemption clause. During the reporting process, several employers called to report that because of preemption issues they had not changed their application or background check process. Those who called were advised to respond (truthfully) that their application was compliant. However, since there was no option on the survey for preemption, it cannot be determined what option other employers with preemption issues chose for their response. In future surveys, OLSE will include guidance on preemption issues.

QUESTION 6: HIRES WITH CONVICTION HISTORIES

Did you hire anyone with a conviction history between August 13, 2014 and December 31, 2014?

One hundred and thirty-five (135) employers reported hiring 398 employees with conviction histories in the period between August 13, 2014 (when the law became operative) and December 31, 2014.

<i>Did you hire anyone with a conviction history between August 13, 2014 and December 31, 2014?</i>		
Yes	135	(3%)
No	1,776	(38%)
Don't know	2,490	(53%)
No response	331	(7%)
Total	4,732	

The majority of employers (53%) reported that they did not know whether they had hired employees with conviction histories during that period. A response of “I don’t know” may indicate that the employer did not inquire into conviction histories at all and therefore was not able to answer the question.

Of the 398 employees with conviction histories that were hired, 345 were hired by for-profit companies and 53 were hired by nonprofit organizations.

	Number of Employees With Conviction Histories Hired
For-Profit	345
Nonprofit	53
Total	398

OLSE does not have comparative baseline data to determine whether this hiring pattern represents an increase in employment opportunities for individuals with criminal conviction histories. However, given that 18% of employers reported having changed their hiring processes to comply with the new law, it is likely that the law is helping individuals with criminal conviction histories better access stable employment.

OUTREACH AND EDUCATION

The FCO requires OLSE to “establish a community-based outreach program to conduct education and outreach to employees, applicants, and potential applicants for employment regarding rights and procedures under this Article.”

Before the FCO went into effect, OLSE mailed to approximately 6,500 Covered Employers multilingual notices that must be posted to inform workers of their rights under the FCO. OLSE also sent emails to nearly 6,000 employers and representatives.

Since the law went into effect, OLSE has made presentations to about 30 nonprofit organizations and government service provider agencies that serve people with arrest and/or conviction records. OLSE also maintains dedicated email and phone hotlines for FCO questions.

ENFORCEMENT

OLSE receives many inquiries from employees and job applicants who want to know whether an employer’s hiring practices are consistent with the FCO. Many of the applicants who contact OLSE are either not covered under the law or misunderstand the requirements of the law. In cases where OLSE verifies that both the employer and applicant/employee are covered under the law, and confirms that the employee’s allegation might constitute a violation of the law, OLSE launches an investigation. The worker’s inquiry is then treated as an official complaint. Since the law went into effect, 30 such complaints have been investigated. Twenty-four of those have been resolved and the remaining 6 are still under investigation.

The majority of employers that OLSE has investigated have been for-profit businesses. A smaller number have been nonprofit organizations. The FCO applies equally to both types of employers.

Chapter 12T of the Administrative Code extends the FCO to all City service contractors and leaseholders that operate within the City limits, regardless of company size. However, Article 49 of the Police Code,

which applies to all employers citywide with 20 or more employees, also covers most of the City contractors and leaseholders. OLSE tracks whether the employers that it investigates for FCO violations are City contractors covered under Chapter 12T, Article 49, or both. To date, only 13% of employers that OLSE investigated were City Contractors covered by Chapter 12T. However, all of those were also covered under Article 49.

Types of Employers Investigated		
For-Profit	25	83%
Nonprofit	5	17%
City Contractors	4	13%
Non-Contractors	26	87%

When complaints are filed, OLSE also tracks the employer’s industry. These companies represent a cross-section of San Francisco establishments. OLSE has received seven complaints regarding companies that may be exempt from the FCO because they are subject to state or Federal regulations, or because they are explicitly listed as exceptions to certain provisions in the FCO (e.g., financial institutions, transportation providers, or organizations providing services to vulnerable populations).

Employer Industries (Sectors that may be subject to preemption are highlighted)		
Background Check	1	3%
Business Services	1	3%
Driving	2	7%
Employment Agency	2	7%
Financial	3	10%
Hospitality	8	27%
Nonprofit	3	10%
Retail	4	13%
Services to Children/Seniors/Disabled	2	7%
Tech	4	13%

FCO complaints tend to fall into one of two general categories: 1) a potential applicant has seen a job application on the internet and reports that it contains a prohibited question; or 2) an individual with a criminal background has applied for a job and is concerned that the prospective employer might be using their background information inappropriately. OLSE has diligently and successfully resolved complaints in the first category. To date, every employer contacted about a non-compliant application has agreed to change the application to comply with the FCO.

Alleged Violation (Adds up to more than 100% because of multiple violations)		
No Posted Notice	3	10%
Question on Application	15	50%
Off-Limits Inquiry	11	37%
Procedures Not Followed	15	50%
Adverse Action	14	47%
Retaliation	0	0%

In cases in which an applicant complains that her or his background information has been used inappropriately, the procedure that OLSE follows depends on whether the applicant is willing to be identified. A high percentage prefer anonymity. In those cases, OLSE calls the employer to discuss FCO compliance. If the employer admits to deviations from the required procedures, OLSE counsels the employer to correct their practices. In some cases, OLSE asks employers to purge their records of inappropriate information collected on applicants or to solicit new applications from anyone inappropriately disqualified.

Violations Found (of all FCO Complaints)		
Violation	19	63%
No Violation	7	23%
Undetermined	4	13%

When the applicant is willing to be identified, OLSE asks the employer about that particular individual's hiring process, and where appropriate, requests that the employer reconsider the claimant's application.

The FCO does not permit OLSE to assess penalties during the first year of implementation of the law (8/13/14 – 8/13/15) or for any first offense. To date OLSE has not found a second offense and no penalties have been assessed.