SENATE JUDICIARY COMMITTEE
Senator Thomas Umberg, Chair
2023-2024 Regular Session

SB 809 (Smallwood-Cuevas)
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Hearing Date: April 25, 2023
Fiscal: Yes
Urgency: No
TSG

SUBJECT

California Fair Employment and Housing Act: Fair Chance Act of 2023: conviction history

DIGEST

This bill: (1) prohibits inquiry into, and consideration of, criminal history information during hiring and employment unless required by law; (2) modifies the procedures employers have to follow when they must consider criminal history information; and (3) empowers the Civil Rights Department to impose civil penalties for violations.

EXECUTIVE SUMMARY

About one in five Californians has a criminal record of some kind. Having such a record can be a significant barrier to getting a job, making it harder for these Californians to move forward with their lives. Because people of color are disproportionately likely to be impacted in this way, the dynamic also exacerbates racial inequality. In 2017, California mandated new hiring procedures intended to ensure that job applicants with criminal records get a fair chance by: (1) requiring most employers to make conditional job offers before initiating background checks; (2) limiting the types of criminal history employers can consider; (3) obligating employers to identify a nexus between the criminal history and the job duties before rescinding an offer; and (4) giving applicants an opportunity to present mitigating information. The five subsequent years have revealed some shortcomings in these laws. This bill proposes numerous responsive adjustments. Highlights include: (1) a blanket prohibition on consideration of criminal history unless such consideration is required by law; (2) stricter procedural safeguards against improper consideration of criminal history when it is required; and (3) a new mechanism for administrative enforcement through civil penalties.

The bill is sponsored by the Fair Chance Act Coalition, which consists of: Root & Rebound, All of Us or None, Legal Aid at Work, Underground Scholars Initiative, Californians for Safety & Justice, Legal Services for Prisoners with Children, and the Center for Employment Opportunities. Support comes from other anti-recidivism, civil rights, and worker advocates who appreciate that the bill will increase opportunities for

people currently shut out of the job market and improve racial equity in the process. Opposition comes from employer advocacy organizations and trade associations who contend that consideration of criminal history is necessary and appropriate in at least some hiring contexts and who find the bill's requirements onerous. If the bill passes out of this Committee, it will next be heard in the Senate Appropriations Committee.

PROPOSED CHANGES TO THE LAW

Existing law:

1) Prohibits anyone from procuring an investigative consumer report, as defined, or causing an investigative consumer report to be prepared for employment purposes other than suspicion of wrongdoing or misconduct by the subject of the investigation only if:
   a) the person procuring or causing the report to be made has a permissible purpose, as defined;
   b) the person procuring or causing the report to be made provides a clear, conspicuous, and separate disclosure in writing to the consumer about the purpose, content, nature, and scope of the investigation as well as who will conduct the investigation, how to contact them, and what their privacy protocols are; and
   c) the consumer has authorized procurement of the report in writing. (Civ. Code §§ 1786.12 and 1786.16.)

2) Provides, pursuant to the Fair Employment and Housing Act (FEHA), that it is an unlawful employment practice for an employer with five or more employees[1] to:
   a) include on any application for employment any question that seeks the disclosure of an applicant's criminal history; or
   b) inquire into or consider the conviction history of an applicant until after that applicant has received a conditional offer. (Gov. Code § 12952(a)(1) and (2).)

3) Forbids employers to consider, distribute, or disseminate information about any of the following while conducting a criminal history background check:
   a) arrests not followed by conviction, with a specified exception;
   b) referral to, or participation in, a pre or post trial diversion program;
   c) convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law; or
   d) any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation. (Gov. Code § 12952(a)(3).)

4) Requires an employer who intends to rescind a conditional offer of employment solely or in part because of the applicant's prior conviction of a crime, to make an individualized assessment of whether the applicant's conviction history has a direct

[1] All subsequent references to "employer" means an employer with five or more employees.

and adverse relationship with the specific duties of the job including consideration of:
   a) the nature and gravity of the offense or conduct;
   b) the time that has passed since the offense or conduct and completion of the sentence; and
   c) the nature of the job held or sought. (Gov. Code § 12952(c)(1)(A).)

5) Does not oblige the employer to put the results of the individualized assessment pursuant to (4), above, in writing. (Gov. Code § 12952(c)(1)(B).)

6) Requires that if an employer makes a preliminary determination to rescind the conditional offer of employment based on the individualized assessment pursuant to (4), above, then the employer must notify the applicant of the decision in writing. (Gov. Code § 12952(c)(2).)

7) Specifies that a notice pursuant to (6), above, need not justify or explain the employer's reasoning but must include:
   a) the identity of the conviction item that is the basis for the decision to rescind the offer;
   b) a copy of the conviction history report, if any; and
   c) an explanation of the applicant's right to respond; including to challenge the accuracy of any information provided in the notice, or to submit evidence of rehabilitation or mitigating circumstances. (Gov. Code § 12952(c)(2).)

8) Provides an applicant with at least five business days to respond to the notice of preliminary decisions before an employer makes a final decision and specifies that if the applicant responds by disputing the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and specifying the steps that the applicant is taking to obtain evidence supporting that assertion, then the employer must give the applicant five additional business days to respond to the notice. (Gov. Code § 12952(c)(3).)

9) Requires an employer to consider information submitted by the applicant pursuant to (7)(c), above, before making a final decision. (Gov. Code § 12952(c)(4).)

10) Obligates an employer who has made a final decision to rescind the conditional offer of employment based solely or in part because of the conviction history, to notify the applicant in writing about:
   a) the final decision, which does not have to be accompanied by a written explanation or justification;
   b) any procedure the employer has for the applicant to challenge the decision or request reconsideration; and
   c) the applicant's right to file a complaint with the Department of Fair Employment and Housing. (Gov. Code § 12952(c)(5).)

11) Exempts the following jobs from the requirements of (2) through (10), above:
    a) positions for which a state or local agency is otherwise required by law to conduct a conviction history background check;
    b) positions with a criminal justice agency, as defined;
    c) Farm Labor Contractors, as described; and
    d) positions where an employer is required by any federal, state, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. (Gov. Code 12952(d).)

12) Specifies that (2) through (10), above, are in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law, including any applicable local ordinance.

This bill:

1) Makes a series of findings and declarations about:
    a) the promise of an existing statute to reduce barriers to employment for people with conviction histories;
    b) reports of common violations of the existing statute;
    c) ongoing harm to job-seekers with conviction history; and
    d) the economic and public health benefits associated with greater access to job opportunities for people with conviction history.

2) Repeals the existing statute and replaces it with the Fair Chance Act of 2023, as summarized in (3) through (13) below.

3) Defines the following terms for purposes of (3) through (X), below:
    a) "applicant" means any individual applying for employment or promotion;
    b) "conviction" includes a plea, verdict, or finding of guilt, regardless of whether a sentence is imposed by the court, but does not include information concerning an arrest or detention that did not result in conviction, or information concerning a referral to, and participation in, any pretrial or post trial diversion program, or concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law;
    c) "conviction history" includes an arrest not resulting in conviction except in the specific, limited circumstances related to employment at a health facility, as defined, and an arrest for which an individual is out on bail or their own recognizance pending trial;
    d) "employee" means an employee, unpaid intern or volunteer, independent contractor or any other individual providing services pursuant to a contract, and freelancer;
    e) "employer" means a person who employs five or more persons to perform services for a wage or salary as well the state and any political or civil subdivision of the state, including, but not limited to, cities and counties, and

includes any direct and joint employer, any entity that evaluates the applicant's conviction history on behalf of an employer, any staffing agency, and any entity that selects, obtains, or is provided workers from a pool or availability list.

4) Prohibits an employer from asking about or considering an applicant's criminal history information unless required by law, as specified.

5) Requires an employer who is legally obligated to ask about or consider an applicant's criminal history to do so according to the following procedure:
   a) the employer must include in any job posting, solicitation, advertisement, and application a list of all specific job duties of the position with which a conviction may have a direct and adverse relationship potentially resulting in an adverse action; a statement that the employer is considering arrest or conviction history because it is required to do so by law; and a list of all laws and regulations that impose restrictions or prohibitions for the job on the basis of a conviction;
   b) the employer may not inquire about or consider the applicant's criminal history information until after a conditional offer of employment is made;
   c) in order to rescind the conditional offer of employment based on the applicant's criminal history information, the employer must notify the applicant of the proposed rescission in writing, including the direct and adverse nexus between the conviction and the job duties on which the employer has made the decision to rescind;
   d) the employer must give the applicant an opportunity, as specified, to provide evidence of mitigation or evidence that the criminal history information on which the employer relied is inaccurate; and
   e) the employer must consider the evidence submitted by the applicant and provide notice of its final decision, with specified content.

6) Makes it an unlawful employment practice for an employer to do any of the following, in addition to existing prohibitions on consideration of criminal history information in hiring:
   a) include any limitation or specification regarding conviction history in job announcements, such as "no felonies" or "must have clean record";
   b) indirectly ask the applicant about or otherwise seek disclosure of an applicant's conviction history;
   c) end an interview, reject an application or otherwise terminate the employment or promotion process based on criminal history information provided by the applicant or learned from any other source;
   d) fail to immediately notify an applicant who volunteers conviction history information of their right not to disclose this information;
   e) fail to take reasonable steps to prevent further disclosure and dissemination of the applicant's conviction history if the applicant volunteers this information;

   f) make an adverse decision based on an applicant's response, including denial of conviction history to a question, inquiry, or voluntary disclosure regarding the applicant's conviction history;
   g) require self-disclosure of an applicant's conviction history at the time of, or any time after, a conditional offer of employment or promotion;
   h) require or request that an applicant share any personal social media;
   i) inquire into, consider, distribute, disseminate, obtain, or use any arrest or conviction history information from social media, the internet, or any other source; or
   j) take adverse action on the basis of a delay in obtaining, or failure to obtain, any criminal history information when collection or consideration of such information is required by law.

5) Makes it an unlawful employment practice for an employer to take or threaten to take adverse action against an employee or discriminate against an employee in the terms, conditions, or privileges of their employment based on their arrest or conviction history, unless required by law.

6) Requires an employer to post, as specified, a clear and conspicuous notice informing applicants and employees of their rights regarding consideration of criminal history information pursuant to this bill.

7) Obligates employers to state in all solicitations or advertisements seeking applicants for employment that the employer will consider for employment qualified applicants with conviction histories in a manner consistent with this bill and other federal, state, and local laws.

8) Requires employers and their agents to retain all records and documents related to an applicant's employment or promotion applications and the written assessment and reassessment performed pursuant to this bill for a period of four years following the receipt of an applicant's employment application.

9) Requires employers and their agents, upon request, to provide CRD or the applicant with access to the records and documents in any administrative enforcement proceeding.

10) Provides that any record or document retained or received by a local agency employer or the department pursuant to this section shall be confidential and not subject to disclosure under the California Public Records Act.

11) Directs CRD to promulgate regulations establishing a regime for imposing mandatory training and civil penalties for violations of this bill, as specified, including but not limited to, the following components:
   a) scaled penalties that increase with employer size;

b) award of 50 percent of the civil penalties to the complainants in any case brought by complainants; and
c) notice, opportunity for a hearing, and the right for an employer assessed with penalties to appeal to the courts through petition for a writ of mandate, subject to the posting of a bond.

12) Directs CRD to publish an annual statistical report on the total number of penalties issued pursuant to this bill and the demographic composition of complainants.

13) Requires an employer who intends to seek an investigative consumer report about an applicant for a job to provide advance notice to the application of one of the following:
a) all the specific job duties of the position for which a conviction may have a direct and adverse relationship and therefore the potential to result in an adverse employment action; or
b) all laws and regulations that impose restrictions or prohibitions on employment on the basis of a conviction.

COMMENTS

1. Background

According the federal Department of Health and Human Services, there are approximately 6.9 million Americans on probation, in jail, in prison, or on parole in the United Sates at any one time. Every year over 600,000 inmates are released from federal and state prisons while another nine million individuals pass through local jails.[2] Around 70 million Americans, including around eight million Californians, have some sort of criminal record. This amounts to almost one-in-three working-age Americans.[3]

Getting a job with a criminal record can be very difficult. A Society for Human Resources Management survey from 2010 found that as many as 92 percent of employers subject their applicants to criminal background checks.[4] In the past, some employers would include a box on their job application forms and ask applicants to check the box if they have ever been convicted of a crime. Many of these employers then summarily rejected any applicants who checked the box.

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[2] *Incarceration & Reentry.* Office of the Assistant Secretary for Planning and Evaluation, U.S. Department of Health and Human Services. https://aspe.hhs.gov/topics/human-services/incarceration-reentry-0 (as of Apr. 17, 2023).
[3] Vallas and Dietrich. *One Strike and You're Out: How We Can Eliminate Barriers to Economic Security and Mobility for People with Criminal Records* (Dec. 2, 2014) Center for American Progress https://www.americanprogress.org/article/one-strike-and-youre-out/ (as of Apr. 17, 2023).
[4] *Background Checking: Conducting Criminal Background Checks* (Jan. 22, 2010) Society for Human Resources Management http://www.slideshare.net/shrm/background-check-criminal?from=share_email (as of Apr. 17, 2023) at slide 3.

The blanket refusal to consider job applicants with a criminal history perpetuates a vicious cycle: people who have been involved in criminal activity seek to come clean and refocus their lives on productive, non-criminal endeavors, but find it nearly impossible to land employment. Unable to earn a steady income and excluded from the dignity and social inclusion that a job confers, people with criminal histories sometimes drift back toward criminal endeavors, resulting in increased recidivism.

Since the criminal justice system disproportionately affects men and people of color, the barriers to employment caused by criminal history also impact men and people of color disproportionately. The EEOC reports that one in every 17 white men will be incarcerated at some point in their lifetimes. That figure for Latino men is one in six; for African-American men it is one in three.[5]

In addition, the use of criminal background checks to exclude job applicants can sometimes cause problems for people with no actual criminal history at all. This is because criminal background checks sometimes produce "false" positives in which criminal history is associated with the applicant erroneously. For example, a 1999 study found that in a sample of 82,601 employment applicants, 4,562 of them were inaccurately flagged as having criminal history by a basic criminal background check.[6]

2. California bans the box with AB 1008 in 2017

Six years ago, California took a major step toward disrupting the links between criminal history, lack of access to employment, and recidivism when it enacted AB 1008 (McCarty, Ch. 789, Stats. 2017). AB 1008 only modestly altered the sorts of criminal history information that employers are allowed to take into account during the hiring process. Instead, AB 1008's primary innovation was to establish certain procedural safeguards in the hiring process intended to focus the employer on the true merits of the candidate for the job, rather than on any criminal history the candidate may possess.

Specifically, in broad strokes and subject to exceptions for specified jobs demanding additional security protocols, AB 1008: (1) prohibited public and private employers from inquiring about or checking into a job applicant's criminal history until after a conditional job offer is made; (2) prohibited employers from considering specified aspects of a criminal history, including minor offenses, older offenses, expunged convictions, and arrests not leading to a conviction, among other things; (3) required

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[5] *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act* (Apr. 25, 2012) Office of Legal Counsel, U.S. Equal Employment Opportunity Commission. https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions#sdendnote49anc (as of Apr. 17, 2023).

[6] *Interstate Identification Name Check Efficacy: Report of the National Task Force to the U.S. Attorney General* (Jul. 1999) SEARCH: The National Consortium for Justice Information and Statistics www.search.org/files/pdf/III_Name_Check.pdf (as of Apr. 18, 2023) at p. 7.

employers who decide to rescind a conditional offer based on criminal history to make an individualized assessment of the nexus between that criminal history and the job duties in question; and (4) provided applicants rejected on the basis of criminal history with an opportunity to challenge that determination and provide mitigating evidence.

3. Remaining barriers to employment

While AB 1008 broke important ground toward for greater employment opportunity, the author and sponsors of this bill report that in the five years since its passage, several shortcomings have been revealed.

a. Job announcements too often dissuade candidates with criminal history from applying

While AB 1008 set forth clear procedures for employers to follow when taking criminal history information into account during the hiring process, it was silent about the content of job announcements. Through its interpretation of other workplace civil rights laws, the California Civil Rights Department has concluded that it is unlawful for an employer to include phrases like "no felonies," "must have clean record," and "no criminals" when advertising a job opening.[7] According to the author and sponsors, however, such language remains common and has the effect of dissuading people who have a criminal record of some kind from applying in the first place, even though they would be entitled to the individual assessment promised to them by AB 1008 if they did.

b. There are still too many ways for criminal history information to come out

AB 1008 banned inquiry into criminal history information during the initial phase of the hiring process. The idea was to give everyone a chance to be evaluated for employment based before introducing any of the stigma sometimes associated with having a criminal history of some kind. In practice, the author and sponsors report, employers are frequently able to ascertain criminal history information about an applicant without having to inquire – at least not directly. The subject comes up during interviews, for example, or employers seek out information about an applicant's criminal history online. However the information surfaces, it allows the stigma to influence initial consideration of the candidate, thus undermining the purpose behind AB 1008.

c. It is too easy for employers to invent a nexus after learning the applicant's criminal history

AB 1008's nexus requirement was intended to ensure that employers would thoughtfully contemplate whether or not an applicant's prior involvement with the

[7] *See Report Discriminatory Applications and Advertisements to CRD*. California Civil Rights Department https://calcivilrights.my.site.com/rdaa/s/

criminal justice system was truly relevant to the job at issue. The idea was to overcome snap prejudicial responses in favor of calmer, more rational consideration of what the job entails and what the conviction really means. In some cases, that thoughtful calculus may be taking place. What too often actually happens instead, the author and sponsors report, is that employers have an initial negative reaction to the discovery that their chosen candidate has some history of criminal involvement and immediately invoke whatever tangential aspect of the job they can think of to justify rescinding the offer. In this way, the nexus requirement becomes more of an exercise in creative association than a genuine evaluation of whether someone's particular conviction actual represents a risk of some kind given the context of the work they will be performing.

d. Continued overreliance on criminal history information to reject applicants

Overall, the author and sponsor believe that AB 1008 has not been successful in breaking down what they perceive to be widespread overreliance on criminal background checks. They contend that the promise of AB 1008 was a dramatic reduction in the use of criminal background checks to filter out candidates to just those narrow and relatively rare circumstances in which the specific details of the conviction and the specific duties of the job are truly in tension. Instead, the author and sponsors argue, too many employers continue to treat essentially any criminal history as an absolute bar to further consideration.

4. Solutions proposed by this bill and how the proposed amendments revise them

The bill contains a multitude of changes to existing law all intended to try to address the issues set forth in Comment 3, above. For simplicity's sake, these changes can be grouped into three overarching components: (a) a blanket ban on consideration of criminal history during hiring except when required by law; (b) a series of measures designed to strengthen the individualized nexus assessment process that employers would have to follow when legally required to consider criminal history information; and (c) a hybrid public/private administrative enforcements system in which the Civil Rights Department would be responsible for assessing civil penalties when violations are found, but complainants who brought the violation to CRD would be eligible to receive part of any amount recovered. Each of these components is discussed below, together with a description of how it would be altered by amendments that the author proposes to take in Committee.

a. Blanket ban on consideration of criminal history information unless required by law.

For all those jobs for which the employer is not required by law to reject candidates with certain criminal convictions, this bill would simply ban the consideration of criminal history information in the hiring process altogether. The rationale behind this proposal is that lawmakers are capable of regulating access to certain jobs; where they have not done so, it should be taken as an indication that criminal history information is

not truly relevant to the position. Accordingly, no individualized assessment is really needed for these positions; they should simply be open to everyone regardless of criminal record.

For most opponents, this aspect of the bill is the primary concern. To these opponents, completely banning consideration of criminal history information unless required by law goes too far. Jobs for which criminal history could be relevant are sometimes governed by laws requiring criminal background checks, but not always. As a coalition of opponents led by the California Chamber of Commerce puts it:

> SB 809's flaw is that many of the same rationales that served as the impetus for laws directing certain industries to conduct background checks, such as interacting with children or access to consumer financial information, apply to businesses not covered by those laws. For example, youth sports/organizations operated through a park & recreation league or school district qualify for an exception, but private youth sports organizations do not.

Moreover, the Chamber and its coalition-mates argue, some types of criminal activity may be directly and adversely relevant to pretty much any job. For these reason, most of the opponents are far more comfortable with the existing, nexus-based approach instead of the blanket prohibition proposed by the bill in print. As the Chamber led coalition puts it:

> […] [T]he existing California Fair Chance Act strikes the correct balance in our view: it allows employers to become aware of these prior offenses but puts guardrails on when they are permitted to know and when they can use such an offense as a reason to deny employment.

The author acknowledges these concerns and has agreed to accept amendments in Committee that remove the bill in print's blanket prohibition on consideration of criminal history information. Instead, the bill amendments revert back to the nexus-based approach. However, rather than merely returning to existing law, the amendments incorporate some of the concepts for closing loopholes and tightening up procedures described next. In this way, the amendments set forth a strengthened nexus process that should help to avoid some of the problems described in Comment 3 without requiring employers to turn a blind eye to criminal history information even when there may be a genuine nexus between that information and the job in question.

b. Closing loopholes and tightening up procedures to ensure greater compliance

AB 1008 largely exempts regulated employers – that is, employers who are obligated by law to take criminal history information into consideration – from its requirement to

conduct individualized assessments and identify a nexus before rescinding a conditional offer. The bill in print, by contrast, would now require even regulated employers to go through the individualized assessment process. The individualized assessment retains value, even in the context of a regulated employer for two reasons. First, even if the employer is required to conduct a background check, the employer may still retain some discretion to hire candidates with criminal records. Second, even if the employer is absolutely prohibited from hiring a candidate whose background check comes back showing a particular conviction, it remains possible that the information in the background check is erroneous. The individualized assessment process guarantees the applicant an opportunity correct any such errors and salvage their employment offer.

The bill in print does not merely shift the individualized assessment and nexus procedure onto regulated employers. It also significantly strengthens that process through series of modifications.

The first set of modifications are designed to make it harder for employers to try to obtain criminal history information from a candidate without asking for it directly. The bill prohibits indirect inquiries about criminal history, permits candidates to falsely deny that they have a criminal history if asked, and bans employers from searching an applicant's online activity for evidence of a criminal record. If a candidate reveals criminal history information during an interview, the bill directs the employer to halt the interview, prevent further dissemination of the criminal history information, and notify the applicant about the applicant's right not to discuss criminal history information until after a conditional offer has been made.

The second set of modifications are intended to make it harder for employers to skirt the requirement for there to be a nexus between the candidates criminal record and the job duties in order for the employer to rescind the job offer based on the conviction. The bill in print requires employers commit the nexus they are relying upon to writing, making it harder for employers to claim a nexus without truly being able to articulate it. This is an added protection that was contemplated for AB 1008 but was ultimately amended out. The bill in print also obligates employers to notify the applicant, in advance of conducting a criminal background check, what the job duties are that could form the basis for a nexus to any criminal record that is revealed. This should help to prevent scenarios in which employers dream up a nexus post hoc in response to learning of a conviction.

Finally, the bill in print explicitly prohibits employers from including language in their job announcements that states or implies that the employer will not hire someone with a criminal record under any circumstance.

Although the proposed amendments to the bill revert back to existing law regarding the procedure for considering criminal history information in hiring for all job types, the

amendments also fold in many of the procedural enhancements described here. The result is designed to retain AB 1008's system of individualized assessment and the nexus requirement while adopting several provisions in the bill in print that serve to make that process stronger, more transparent, and more difficult to game.

c. Strengthening enforcement to encourage greater compliance

Finally, the bill establishes a new administrative enforcement component to back the entire system governing consideration of criminal history information in the hiring process.

As proposed, this new administrative enforcement component operates as a sort of hybrid public/private model. The Civil Rights Department (CRD) would have the authority to bring enforcement actions on its own initiative or in response to a complaint. Upon finding that a violation has occurred, CRD would have the power to impose civil penalties against the employer in question, subject to requirements for notice, a hearing, and the option for the employer to seek review in the courts in order to protect due process.

The bill sets forth a formula for the upper limit on the civil penalties. The fines increase with the size of the employer and how often the employer has violated the law, topping out at $20,000 after a third violation committed by an employer with over 100 employees.

Of the proceeds collected from the imposition of these civil penalties, the Civil Rights Department keeps half for the purposes of further enforcement and collections activities, while the bill directs CRD to distribute the other half to the person whose complaint triggered the investigation. In this sense, the bill's enforcement component operates almost like a qui tam action in that the complainant is rewarded for reporting the violation, though unlike a qui tam action, the CRD would retain responsibility for investigating and prosecuting the violation.

The amendments that the author proposes to take in Committee do not alter this enforcement regime. Should the bill advance further into the legislative process, some technical revisions to how the penalties are assessed may be necessary in order to make the process viable for CRD. CRD has not previously had the authority to impose civil penalties and for that reason, does not have pre-existing structures and system in place for assessing, processing, and collecting such penalties. The author may also wish to consider revising the fraction of the proceeds from the collection of civil penalties that go to the complainant. From a policy perspective, there is a balance to be struck between compensating complainants for taking the time and trouble to help enforce the state's civil rights laws and avoiding the creation of an enforcement industry.

5. Proposed amendments

In order to address the issues set forth in the Comments, above, the author proposes to incorporate amendments into the bill that would:

- strike out the blanket prohibition on consideration of criminal history information and revert to the nexus requirement in existing law;
- strengthen the procedural guardrails around the nexus requirement; and
- maintain the civil penalty enforcement mechanism through the Civil Rights Department.

A mock-up of the amendments in context is attached to this analysis.

6. Arguments in support of the bill

According to the author:

> SB 809 would build on the Fair Chance Act (McCarty, 2017) to ensure that conviction history does not prevent qualified candidates from attaining and maintaining employment. This bill eliminates an unnecessary and costly barrier to employment and reduces recidivism by ensuring Californians reentering the workforce are able to find employment and contribute to their community. SB 809 helps to ensure that individuals applying for a job are judged solely on their relevant qualifications to do the work and not on the mistakes of their past.

As sponsors of the bill, Californians for Safety and Justice, the Center for Employment Opportunities, Legal Aid at Work, Root & Rebound, and the Underground Scholars Initiative, Berkeley jointly write:

> As organizations representing people with criminal records from all across the state, we have seen countless numbers of our clients and community-members receive a conditional job offer—sometimes even begin working—only to have the offer rescinded and be set back months in their job search. […] By limiting the use of conviction history in employment decisions, this legislation will not only help California reduce recidivism and ensure that formerly incarcerated people are better able to reintegrate into our workforce, but will support California's economy as a whole by expanding the number of eligible and driven employees ready to work.

In support of the bill, the Prosecutors Alliance of California writes:

> Employment is a vital component to reentry success. Studies regularly show that employment after incarceration is key in preventing recidivism and rebuilding stability and social networks that deter criminal activity. Hiring people with convictions offer a significant return on investment for employers, both from a performance and retention perspective.

7. Arguments in opposition to the bill

In opposition to the bill, a coalition of 66 business and trade associations led by the California Chamber of Commerce writes:

> SB 809 undermines the years of negotiations that culminated in the existing California Fair Chance Act, which struck a careful balance between removing barriers to the workforce and the need to consider conviction history for certain job positions. SB 809 would eliminate employers' ability to consider conviction history unless they meet one of the narrow exceptions, even if that conviction history is voluntarily disclosed to them or widely publicized. Further, provisions causing delays in hiring and excessive penalties would exacerbate the rising costs of doing business in California and further impact affordability. While we appreciate the intent behind SB 809, the potential unintended consequences will have a significant impact on employees and customers.

Additional concerns raised by these opponents are discussed in connection with the corresponding comments, above.

In further opposition to the bill, the California Bankers Association, California Community Banking Network, the California Credit Union League, and the California Mortgage Bankers Association jointly write:

> It is also worth noting that the trade associations represented in this letter spent countless hours negotiating the AB 1008 (McCarty) from 2017. That measure acknowledges and reflects the complex federal compliance restrictions that our institutions must abide by, to unwind that language in its entirety does not benefit the financial institution nor, and most importantly for this measure, the applicant. We have provided amendments to ensure that SB 809 does not apply to employer actions taken pursuant to state and federal law that requires criminal background checks for employment purposes or restricts employment based on criminal

> history. However, we believe a more prudent approach would be to revert to the language set forth in AB 1008 […].

SUPPORT

All of Us or None (sponsor)
Californians for Safety & Justice (sponsor)
Center for Employment Opportunities (sponsor)
Fair Chance Coalition (sponsor)
Legal Aid at Work (sponsor)
Legal Services for Prisoners with Children (sponsor)
Root & Rebound (sponsor)
Underground Scholars Initiative (sponsor)
Aouon Orange County
Blameless and Forever Free Ministries
California Families Against Solitary Confinement
Californians United for a Responsible Budget
Coleman Advocates for Youth and Children
Communities United for Restorative Youth Justice
Community Health Councils
Community Legal Services in East Palo Alto
East Bay Community Law Center
Equal Justice Society
Faith in Action East Bay
Felony Murder Elimination Project
Grid Alternatives, Greater Los Angeles
Indivisible Marin
Initiate Justice
Lawyers Committee for Civil Rights of the San Francisco Bay Area
Mental Health Advocacy Services
Motivating Individual Leadership for Public Advancement
National Association of Social Workers – California Chapter
Oakland Privacy
Prosecutors Alliance California
Rubicon Programs
Safe Return Project
Santa Cruz Barrios Unidos, Inc.
Showing Up for Racial Justice East Bay
Smart Justice California
Starting Over, Inc.
United Core Alliance
Universidad Popular

OPPOSITION

Acclamation Insurance Management Services
Allied Managed Care
American Staffing Association
Anaheim Chamber of Commerce
Association of California Healthcare Districts
California Apartment Association
California Assisted Living Association
California Association of Licensed Investigators
California Association of Sheet Metal and Air Conditioning Contractors National Association
California Attractions and Parks Association
California Bankers Association
California Business Properties Association
California Chamber of Commerce
California Community Banking Network
California Credit Union League
California Employment Law Council
California Farm Bureau
California Hotel & Lodging Association
California League of Food Producers
California Lodging Industry Association
California Mortgage Bankers Association
California Restaurant Association
California Retailers Association
California Staffing Professionals
California State Council of the Society for Human Resource Management
Checkr, Inc.
Chino Valley Chamber of Commerce
Coalition of Small and Disabled Veteran Businesses
Coalition of California Chambers – Orange County
Consumer Data Industry Association
Corona Chamber of Commerce
Dana Point Chamber of Commerce
Flasher Barricade Association
Fontana Chamber of Commerce
Gilroy Chamber of Commerce
Greater Coachella Valley Chamber of Commerce
Greater High Desert Chamber of Commerce
Greater Riverside Chambers of Commerce
Greater San Fernando Valley Chamber of Commerce
Hollywood Chamber of Commerce
Independent Lodging Industry Association

La Cañada Flintridge Chamber of Commerce
La Verne Chamber of Commerce
Long Beach Area Chamber of Commerce
Motion Picture Association
Murrieta/Wildomar Chamber of Commerce
National Federation for Independent Business
North San Diego Business Chamber
Norwalk Chamber of Commerce
Official Police Garages Association of Los Angeles
Palos Verdes Peninsula Chamber of Commerce
Paso Robles Chamber of Commerce
Rancho Cordova Area Chamber of Commerce
Roseville Area Chamber of Commerce
Sacramento Metropolitan Chamber of Commerce
San Juan Capistrano Chamber of Commerce
San Manuel Board of Mission Indians
Santa Barbara South Coast Chamber of Commerce
Santa Clarita Valley Chamber of Commerce
Santa Maria Valley Chamber of Commerce
Santee Chamber of Commerce
Simi Valley Chamber of Commerce
South County Chambers of Commerce
Templeton Chamber of Commerce
Tri County Chamber Alliance
Tulare Chamber of Commerce
Valley Industry & Commerce Association
Vista Chamber of Commerce
Walnut Creek Chamber of Commerce
West Ventura County Business Alliance
Western Carwash Association
Western Electrical Contractors Association

RELATED LEGISLATION

Pending Legislation: SB 460 (Wahab, 2023) prohibits consideration of criminal history in the tenant screening process, except where required by law and subject to specified procedural requirement, including making a conditional offer before running criminal background check. SB 460 is currently pending consideration before this Committee.

Prior Legislation:

SB 731 (Durazo, Ch. 814, Stats. 2022) expanded avenues for expungement of various specified criminal records.

AB 1076 (Ting, Ch. 678, Stats. 2019) required the Department of Justice to review the records in the statewide criminal justice databases on a monthly basis and to identify persons who are eligible for relief by having their arrest records, or their criminal conviction records, withheld from disclosure, as specified. The bill required the department to grant relief to an eligible person, without requiring a petition or motion.

SB 393 (Lara, Ch. 680, Stats. 2017) empowered people to petition to have arrests that did not lead to a conviction sealed from public view on their criminal records, with specified exceptions.

AB 1008 (McCarty, Ch. 789, Stats. 2017) required employers, with specified exceptions, to: (1) make a conditional offer of employment before conducting a criminal background check; (2) rescind on offer of employment based on a criminal background check only based on a nexus between the job duties and the criminal history; and (3) provide the applicant with an opportunity to challenge the accuracy of the criminal history information that the employer relied upon or to present mitigating evidence or evidence of rehabilitation.

AB 1650 (Jones-Sawyer, Ch. 880, Stats. 2014) required construction contractors bidding for state contracts to certify that they will not ask applicants for onsite construction-related employment to disclose information concerning the applicant's conviction history on or at the time of an initial employment application, with specified exceptions.

AB 218 (Dickinson, Ch. 699, Stats. 2013) prohibited a state or local agency from asking an applicant to disclose information regarding a criminal conviction, except as specified, until the agency has determined the applicant meets the minimum employment qualifications for the position.

AB 870 (Jones-Sawyer, 2013) would have prohibited the state from contracting with a person or entity that asks an applicant for employment to disclose, orally or in writing, information concerning the conviction history of the applicant, including an inquiry about conviction history on an employment application, until the employer has determined that the applicant meets the minimum employment qualifications, subject to specified exceptions. AB 870 died on the Appropriations suspense file.

SB 530 (Wright, Ch. 721, Stats. 2013) provided that a potential employer may not ask for, seek, or utilize as a factor in determining any condition of employment, information about a conviction that has been judicially dismissed or ordered sealed.

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MOCKUP OF PROPOSED AMENDMENTS IN CONTEXT

SECTION 1. The Legislature finds and declares all of the following:

(a) In 2018, California passed the Fair Chance Act (Assembly Bill 1008 (Chapter 789 of the Statutes of 2017)), which was historic legislation to reduce barriers to employment for people with conviction histories and enable people to support themselves and their families.

(b) Since the passage of the Fair Chance Act, formerly incarcerated persons in California continue to face discrimination and have struggled to hold employers accountable for violations of the Fair Chance Act. For example, in a one-day review in 2021, the Civil Rights Department (formerly the Department of Fair Employment and Housing) found "over 500 job advertisements with unlawful statements that the employer will not consider any job applicant with a criminal record."

(c) Other common violations reported by formerly incarcerated job seekers include:

(1) Unlawful questions or required disclosure of a conviction history prior to a conditional job offer.

(2) Lack of opportunity to review the background check report, provide evidence of rehabilitation or mitigation after a conditional job offer.

(3) Lack of individualized assessment of conviction history prior to withdrawal of a conditional job offer.

(4) Discrimination in the form of wage-theft, limited promotion opportunities, high risk of termination, and poor treatment even after being hired.

(d) There are more than 7,000,000 people in California with conviction histories of some kind, including 2,000,000 working-age Californians living with a felony record.

(e) Research conducted by the Prison Policy Initiative in 2018 established:

(1) The unemployment rate for formerly incarcerated people (27.3 percent) is nearly five times higher than the unemployment rate for the general United States population (5.8 percent), and substantially higher than even the worst years of the Great Depression (24.9 percent).

(2) Though unemployment among formerly incarcerated people is five times higher than the general population, formerly incarcerated people want to work. Among formerly incarcerated people aged 25 to 44 years of age, 93.3 percent are either employed or actively looking for work, compared to 83.8 percent among their general population peers of similar ages.

(3) Both race and gender shape the economic stability of criminalized people, with formerly incarcerated Black women experiencing especially ~~severe~~ *high* levels of unemployment.

(f) Early 2022 labor force data demonstrates that unemployment rates were disproportionately higher for Black, Hispanic, Asian and Pacific Islander, and Native American workers than for White workers.

(g) An analysis conducted by the Prison Policy Initiative on data released by the Bureau of Justice Statistics (BJS) in 2021 showed that:

(1) Approximately 60 percent of formerly incarcerated people are jobless (i.e., without a job, regardless of whether they were actively looking for a new job) at any given time across the country.

(2) Formerly incarcerated people are often forced into the least desirable jobs, subject to more harmful working conditions, and earn less than the general population for several years following release.

(3) Earnings for Black and Native American people released from federal prison were lower than for any other racial or ethnic group, and racial and ethnic disparities in earnings grew over time.

(h) Numerous studies have found that having an arrest record makes it much harder for formerly incarcerated individuals to secure employment. An American Civil Liberties Union report found that there was a 4-percentage point reduction in employer callbacks for people with only a minor arrest record. This effect is 40 percent larger for formerly incarcerated Black people than it is for formerly incarcerated White people.

(i) There are also benefits to states and businesses when formerly incarcerated people are able to find employment. Experts have found that California loses $20,000,000,000 in state gross domestic product each year due to the many barriers that formerly incarcerated people with felony records must ~~face~~ *overcome* to be fully employed, that states could save an average of $635,000,000 annually through a 10-percent reduction in recidivism rates, and that employees with conviction histories have higher retention rates, lower turnover, and higher loyalty than the general population.

(j) It has been the intent of the Legislature (see Assembly Bill 1008 (Chapter 789 of the Statutes of 2017), Senate Bill 731 (Chapter 814 of the Statutes of 2022), and Assembly Bill 1076 (Chapter 578 of the Statutes of 2019)) and the mission of the Civil Rights Department to protect the people of California from unlawful discrimination in employment and business, to reduce barriers to employment for people with conviction histories, and to decrease unemployment in communities with concentrated numbers of people with conviction histories.

(k) The United States Office of Disease Prevention and Health Promotion states that unemployment can also have negative health consequences.

(l) Therefore, it is the intent of the Legislature to improve the public health of communities receiving people who have conviction histories, remove persistent barriers to employment for these individuals, and support the economic health of the State of California by strengthening legal provisions governing fair chance employment for formerly incarcerated persons.

SEC. 2. Section 1786.16 of the Civil Code is amended to read:

1786.16. (a) Any person described in subdivision (d) of Section 1786.12 shall not procure or cause to be prepared an investigative consumer report unless the following applicable conditions are met:

(1) If an investigative consumer report is sought in connection with the underwriting of insurance, it shall be clearly and accurately disclosed in writing at the time the application form, medical form, binder, or similar document is signed by the consumer that an investigative consumer report regarding the consumer's character, general reputation, personal characteristics, and mode of living may be made. If no signed application form, medical form, binder, or similar document is involved in the underwriting transaction, the disclosure shall be made to the consumer in writing and mailed or otherwise delivered to the consumer not later than three days after the report was first requested. The disclosure shall include the name and address of any investigative consumer reporting agency conducting an investigation, plus the nature

and scope of the investigation requested, and a summary of the provisions of Section 1786.22.

(2) If, at any time, an investigative consumer report is sought for employment purposes other than suspicion of wrongdoing or misconduct by the subject of the investigation, the person seeking the investigative consumer report may procure the report, or cause the report to be made, only if all of the following apply:

(A) The person procuring or causing the report to be made has a permissible purpose, as defined in Section 1786.12.

(B) The person procuring or causing the report to be made provides a clear and conspicuous disclosure in writing to the consumer, at any time before the report is procured or caused to be made in a document that consists solely of the disclosure, that:

(i) An investigative consumer report may be obtained.

(ii) The permissible purpose of the report is identified.

(iii) The disclosure may include information on the consumer's character, general reputation, personal characteristics, and mode of living.

(iv) Identifies the name, address, and telephone number of the investigative consumer reporting agency conducting the investigation.

(v) Notifies the consumer in writing of the nature and scope of the investigation requested, including a summary of the provisions of Section 1786.22.

(vi) Notifies the consumer of the internet website of the investigative consumer reporting agency identified in clause (iv), or, if the agency has no internet website, the telephone number of the agency, where the consumer may find information about the investigative reporting agency's privacy practices, including whether the consumer's personal information will be sent outside the United States or its territories and information that complies with subdivision (d) of Section 1786.20. This clause shall become operative on January 1, 2012.

(vii) Includes either of the following:

(I) All the specific job duties of the position for which a conviction may have a direct and adverse relationship that has the potential to result in an adverse employment action, as described in subdivision (c) of Section 12954.2.06 of the Government Code.

(II) All laws and regulations that impose restrictions or prohibitions for employment on the basis of a conviction, if any.

(C) The consumer has authorized in writing the procurement of the report.

(3) If an investigative consumer report is sought in connection with the hiring of a dwelling unit, as defined in subdivision (c) of Section 1940, the person procuring or causing the request to be made shall, not later than three days after the date on which the report was first requested, notify the consumer in writing that an investigative consumer report will be made regarding the consumer's character, general reputation, personal characteristics, and mode of living. The notification shall also include the name and address of the investigative consumer reporting agency that will prepare the report and a summary of the provisions of Section 1786.22.

(4) The person procuring or causing the request to be made shall certify to the investigative consumer reporting agency that the person has made the applicable disclosures to the consumer required by this subdivision and that the person will comply with subdivision (b).

(5) The person procuring the report or causing it to be prepared agrees to provide a copy of the report to the subject of the investigation, as provided in subdivision (b).

(b) Any person described in subdivision (d) of Section 1786.12 who requests an investigative consumer report, in accordance with subdivision (a) regarding that consumer, shall do the following:

(1) Provide the consumer a means by which the consumer may indicate on a written form, by means of a box to check, that the consumer wishes to receive a copy of any report that is prepared. If the consumer wishes to receive a copy of the report, the recipient of the report shall send a copy of the report to the consumer within three business days of the date that the report is provided to the recipient, who may contract with any other entity to send a copy to the consumer. The notice to request the report may be contained on either the disclosure form, as required by subdivision (a), or a separate consent form. The copy of the report shall contain the name, address, and telephone number of the person who issued the report and how to contact them.

(2) Comply with Section 1786.40, if the taking of adverse action is a consideration.

(c) Subdivisions (a) and (b) do not apply to an investigative consumer report procured or caused to be prepared by an employer, if the report is sought for employment purposes due to suspicion held by an employer of wrongdoing or misconduct by the subject of the investigation.

(d) Those persons described in subdivision (d) of Section 1786.12 constitute the sole and exclusive class of persons who may cause an investigative consumer report to be prepared.

(PU Amended by Stats. 2010, Ch. 481, Sec. 1. (SB 909) Effective January 1, 2011.)

~~SEC. 3. Section 12952 of the Government Code is repealed.~~

~~(PU (Amended by Stats. 2018, Ch. 824, Sec. 2. (AB 2845) Effective January 1, 2019.))~~

SEC. 3. Section 12952 of the Government Code is amended and renumbered to read:

~~12952.~~

12954.2.01.5 (a) Except as provided in subdivision (d), it is an unlawful employment practice for an employer with five or more employees to do any of the following:

(1) To include on any application for employment, before the employer makes a conditional offer of employment to the applicant, any question that seeks the disclosure of an applicant's conviction history.

(2) To inquire into or consider the conviction history of the applicant, including any inquiry about conviction history on any employment application, until after the employer has made a conditional offer of employment to the applicant.

(3) To consider, distribute, or disseminate information about any of the following while conducting a conviction history background check in connection with any application for employment:

(A) Arrest not followed by conviction, except in the circumstances as permitted in paragraph (1) of subdivision (a) and subdivision (f) of Section 432.7 of the Labor Code.

(B) Referral to or participation in a pretrial or posttrial diversion program.

(C) Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law, or any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation.

(4) To interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this section.

(b) This section shall not be construed to prevent an employer from conducting a conviction history background check not in conflict with the provisions of subdivision (a).

(c) (1) (A) An employer that intends to deny an applicant a position of employment solely or in part because of the applicant's conviction history shall make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the position. In making the assessment described in this paragraph, the employer shall consider all of the following:

(i) The nature and gravity of the offense or conduct.

(ii) The time that has passed since the offense or conduct and completion of the sentence.

(iii) The nature of the job held or sought.

(B) An employer may, but is not required to, commit the results of this individualized assessment to writing.

(2) If the employer makes a preliminary decision that the applicant's conviction history disqualifies the applicant from employment, the employer shall notify the applicant of this preliminary decision in writing. That notification may, but is not required to, justify or explain the employer's reasoning for making the preliminary decision. The notification shall contain all of the following:

(A) Notice of the disqualifying conviction or convictions that are the basis for the preliminary decision to rescind the offer.

(B) A copy of the conviction history report, if any.

(C) An explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline by which to respond. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

(3) The applicant shall have at least five business days to respond to the notice provided to the applicant under paragraph (2) before the employer may make a final decision. If, within the five business days, the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and that the applicant is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have five additional business days to respond to the notice.

(4) The employer shall consider information submitted by the applicant pursuant to paragraph (3) before making a final decision.

(5) If an employer makes a final decision to deny an application solely or in part because of the applicant's conviction history, the employer shall notify the applicant in writing of all the following:

(A) The final denial or disqualification. The employer may, but is not required to, justify or explain the employer's reasoning for making the final denial or disqualification.

(B) Any existing procedure the employer has for the applicant to challenge the decision or request reconsideration.

(C) The right to file a complaint with the department.

(d) This section does not apply in any of the following circumstances:

(1) To a position for which a state or local agency is otherwise required by law to conduct a conviction history background check.

(2) To a position with a criminal justice agency, as defined in Section 13101 of the Penal Code.

(3) To a position as a Farm Labor Contractor, as described in Section 1685 of the Labor Code.

(4) To a position where an employer or agent thereof is required by any state, federal, or local law to conduct criminal background checks for employment purposes or to restrict employment based on criminal history. For purposes of this paragraph, federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as amended by 124 Stat. 1652 (Public Law 111-203), pursuant to the authority in Section 19(b) of the Securities Exchange Act of 1934, as amended by 124 Stat. 1652 (Public Law 111-203).

(e) The remedies under this section shall be in addition to and not in derogation of all other rights and remedies that an applicant may have under any other law, including any local ordinance.

(f) For purposes of this section:

(1) "Conviction" has the same meaning as defined in paragraphs (1) and (3) of subdivision (a) of Section 432.7 of the Labor Code.

(2) Notwithstanding paragraph (1), the term "conviction history" includes:

(A) An arrest not resulting in conviction only in the specific, limited circumstances described in subdivision (f) of Section 432.7 of the Labor Code, when an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, may ask an applicant for certain positions about specified types of arrests.

(B) An arrest for which an individual is out on bail or ~~his or her~~ *their* own recognizance pending trial.

(g) The prohibitions and requirements of this section shall be operative only through December 31, 2023. However, violations of this section arising from actions prior to January 1, 2024, shall continue to be enforced pursuant to this section.

(PU Amended by Stats. 2018, Ch. 824, Sec. 2. (AB 2845) Effective January 1, 2019.)

SEC. 4. Article 1.1 (commencing with Section 12954.2) is added to Chapter 6 of Part 2.8 of Division 3 of Title 2 of the Government Code, to read:

Article 1.1. Unlawful Practices, Conviction History

12954.2. This article shall be referred to, and may be cited, as the Fair Chance ~~Act of 2023.~~ *Act.*

12954.2.01. For purposes of this article, *except for Section 12954.2.01.5,* the following definitions apply:

(a) "Adverse action" includes, but is not limited to, adverse employment action.

(b) "Applicant" means any individual applying for ~~employment~~ *employment, transfer,* or promotion.

(c) "Arrest history" means any document or record that discloses or includes any information regarding a prior arrest or arrests, regardless of whether the arrest or arrests led to a formal charge or conviction.

(d) (1) "Conviction" has the same meaning as defined in paragraphs (1) and (3) of subdivision (a) of Section 432.7 of the Labor Code.

(2) Notwithstanding paragraph (1), "conviction history" includes:

(A) An arrest not resulting in conviction except in the specific, limited circumstances described in subdivision (f) of Section 432.7 of the Labor Code, when an employer at a health facility, as defined in Section 1250 of the Health and Safety Code, may ask an applicant for certain positions about specified types of arrests.

(B) An arrest for which an individual is out on bail or their own recognizance pending trial.

~~(e) "Employee" means an employee, unpaid intern or volunteer, independent contractor or any other individual providing services pursuant to a contract, and freelancer.~~

~~(f) "Employer" has the same meaning as in paragraph (2) of subdivision (a) of Section 12945.7, as that section read on January 1, 2023, and includes any direct and joint employer, any entity that evaluates the applicant's conviction history on behalf of an employer, any staffing agency, and any entity that selects, obtains, or is provided workers from a pool or availability list.~~

~~(g) "Unlawful employment practice" has the same meaning as provided in subdivision (a) of Section 12940.~~

(e) "Employer" means an employer with five or more employees and includes the agent of an employer with five or more employees.

12954.2.02. (a) ~~It~~ *Except as provided in subdivision (c), it* is an unlawful employment practice for an employer to do any of the following:

(1) *(A)* Declare, print, or circulate, or cause the declaration, printing, or circulation of, any solicitation, advertisement, or publication for ~~employment~~ *employment, transfer,* or promotion that states any limitation or specification regarding conviction history, even if no adverse action is taken against the individual seeking ~~employment~~ *employment, transfer,* or promotion. This includes, but is not limited to, advertisements and employment applications containing phrases such as "no felonies," "background check required," and "must have clean record."

(B) Subparagraph (A) does not prohibit an employer from stating a limitation or specification regarding conviction history if that limitation or specification is required by law and the employer has no legal discretion to ignore or modify that limitation or specification.

(2) Include on any application for ~~employment or promotion, or directly or indirectly ask the applicant~~ *employment, transfer, or promotion, before the employer makes a conditional offer of employment, transfer, or promotion to the applicant,* any question that *directly or indirectly* seeks the disclosure of an applicant's conviction history.

(3) Inquire into, ~~directly or indirectly~~ ask ~~the applicant,~~ *about,* or consider the conviction history of the applicant, ~~including any inquiry about conviction history on any employment or promotion application, except as provided in subdivision (b).~~ *directly or indirectly, until after the employer has made a conditional offer of employment, transfer, or promotion to the applicant.*

(4) ~~(A)~~ End an interview, reject an application, or otherwise terminate the ~~employment~~ *employment, transfer,* or promotion application process based on conviction history information provided by the applicant or learned from any other ~~source.~~ *source, until after the employer has made a conditional offer of employment, transfer, or promotion to the applicant.*

~~(B) An applicant volunteering conviction history information shall be immediately notified, in writing, by the employer of their rights not to disclose conviction history information under this article. An employer shall disregard conviction history information learned about the applicant and shall take reasonable steps to prevent further disclosure or dissemination of the applicant's conviction history.~~

~~(5) Make an adverse decision based on the applicant's response, including denial of conviction history, to a question, inquiry, or voluntary disclosure regarding the applicant's conviction history in paragraphs (2) to (4), inclusive.~~

~~(6)~~

(5) Require self-disclosure of an applicant's conviction history at the time of, or any time after, a conditional offer of ~~employment~~ *employment, transfer,* or promotion.

~~(7)~~

(6) ~~Require or request that an applicant share any personal social media. The employer shall not inquire~~ *Inquire* into, consider, distribute, disseminate, obtain, or use any arrest or conviction history information from social media, the internet, or any other source. *This paragraph shall not be construed to restrict an employer from requiring or requesting an applicant to share any personal social media in order to comply with other state or federal law or regulations.*

~~(8)~~

(7) Inquire into, directly or indirectly ask the ~~applicant,~~ *applicant about,* consider, distribute, or disseminate information about any of the following while conducting a conviction history background check in connection with any application for ~~employment~~ *employment, transfer,* or promotion:

(A) Arrest not followed by conviction, except in the circumstances as permitted in paragraph (1) of subdivision (a) and subdivision (f) of Section 432.7 of the Labor Code.

(B) Referral to or participation in a pretrial or posttrial diversion program.

(C) Convictions that have been sealed, dismissed, expunged, or statutorily eradicated pursuant to law, or any conviction for which the convicted person has received a full pardon or has been issued a certificate of rehabilitation.

~~(9)~~

(8) ~~To interfere~~ *Interfere* with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this article.

~~(10) Take adverse action on the basis of a delay in obtaining, or failure to obtain, any information described in subdivision (b).~~

~~(b) (1) (A) Subject to the requirements of this subdivision, paragraph (3) of subdivision (a) shall not be construed to prohibit an employer from conducting a conviction history background check in the following circumstances only:~~

~~(i) The employer is required to obtain, pursuant to Section 1829 of Title 12 of the United States Code or pursuant to any other federal law, federal regulation, or state law, information regarding the particular conviction of the applicant.~~

~~(ii) An individual with a particular conviction history is prohibited by federal or state law from holding the position sought by the applicant, regardless of whether that~~

~~conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.~~

~~(iii) The employer is prohibited by federal or state law from hiring an applicant who has that particular conviction, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.~~

~~(B) For purposes of this subdivision, "particular conviction" means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or other state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.~~

~~(2) This article shall not be construed to prohibit any employer that is required by federal or state law to conduct conviction history background checks for employment purposes or to restrict employment based on conviction history from complying with those requirements, or to prohibit the employer from seeking or receiving an applicant's conviction history report that has been obtained pursuant to procedures otherwise provided for under federal or other state law.~~

~~(3) An employer that conducts a background check under the circumstances described in paragraph (1) or (2) shall not inquire into, directly or indirectly ask the applicant, or consider the conviction history of the applicant until after the employer has made a conditional offer of employment to the applicant, unless the employer is required by federal law, federal regulation, or other state law to make the inquiry prior to making the conditional offer of employment.~~

~~(4) Any background screening process conducted as required in paragraph (1) shall be done in compliance with the individualized assessment, notification, and other requirements described in Section 12954.2.03.~~

(b) (1) An employer that seeks to claim the federal Work Opportunity Tax Credit (WOTC) (Section 51 of the Internal Revenue Code) or other incentive to hire individuals with conviction histories provided for under federal law is not exempt from this section.

(2) An employer may require an applicant to complete IRS form 8850 ("Pre-Screening Notice and Certification Request for the Work Opportunity Credit"), as revised March 2016, or its equivalent, before a conditional offer is made, so long as the information gathered is used solely for the purpose of applying for the WOTC. In particular, an applicant shall not be asked the basis of their qualification for the WOTC other than in the form of questions that do not encourage or force an applicant to identify themselves as a person who has been convicted of a felony or released from prison following a felony conviction. Instead, an applicant shall only be asked the basis of their qualification for the WOTC under one of the several bases listed in Question 2 on form 8850. Information regarding an applicant's conviction history obtained from the applicant's form 8850 shall only be considered as provided by law.

(3) An employer may require an applicant to complete United States Department of Labor Employment and Training Administration form 9061 ("Individual Characteristics Form (ICF) Work Opportunity Tax Credit"), as revised November 2016, or its equivalent, only after a conditional offer has been made. Information regarding an applicant's conviction history obtained from the applicant's form 9061 shall only be considered as provided by law.

(4) An employer shall maintain any forms, documents, or information used to complete the forms described in this paragraph in confidential files separate from the

applicant's general personnel file and shall not use or disseminate these forms, documents, or information for any purpose other than applying for the WOTC or other federal incentive.

(c) (1) This section does not prohibit an employer from asking an applicant about, seeking from any source information regarding, or taking an adverse employment action on the basis of, an applicant's particular conviction if, pursuant to Section 1829 of Title 12 of the United States Code or any other federal law or regulation or state law, the employer is prohibited by law from hiring an applicant who has that particular conviction.

(2) The employer taking an adverse employment action pursuant to paragraph (1) is not subject to this article with respect to the positions described in paragraph (1). However, if the applicant notifies, within five business days of the applicant being informed of their rejection based on their particular conviction, the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the employer's decision to reject the applicant and that the applicant is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have 10 additional business days to respond with additional documents and information that would demonstrate the applicant is eligible for the position.

(3) For purposes of this subdivision, "particular conviction" means a conviction for specific criminal conduct or a category of criminal offenses prescribed by any federal law, federal regulation, or state law that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.

(4) For purposes of this subdivision, "federal law or regulations" shall include rules or regulations promulgated by a registered national securities association under Section 15A of the Securities Exchange Act of 1934 (15 U.S.C. Section 78o-3), as amended, pursuant to its lawful regulatory authority under that act.

12954.2.03. (a) An employer ~~authorized to conduct a conviction history background check pursuant to subdivision (b)~~that intends to deny an applicant a position of ~~employment~~ *employment, transfer,* or promotion solely or in part because of the applicant's conviction history shall make an individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with ~~one or more~~ *the* specific duties of the job ~~documented pursuant to paragraph (1) of subdivision (c) of Section 12954.2.06~~ that justify denying the applicant the position. In making the assessment described in this subdivision, the employer shall consider all of the following:

(1) The nature and gravity of the offense or conduct.

(2) The time that has passed since the offense or ~~conduct.~~ *conduct and completion of the sentence.*

(3) The nature *and duties* of the job held or sought.

(b) There shall be a rebuttable presumption that there is no direct and adverse relationship between the applicant's conviction and the position if any of the following apply:

(1) The applicant has completed a sentence for the conviction of a crime. For purposes of this clause, "completion of a sentence" shall not include parole, probation, supervised release, and any other form of supervision.

(2) The applicant a license, certificate, authorization, or any other similar credential from a licensing, regulatory, or other government agency or board that is required for the position to which the applicant is applying.

~~(b)~~

(c) An employer shall commit the results of this individualized assessment to writing and shall provide a written copy of the assessment to the applicant with *notice of* the preliminary decision *described* in subdivision (d). To justify denying the applicant the ~~position~~ *position, transfer,* or promotion, the individualized assessment shall demonstrate that one or more specific elements in the nature and gravity of the offense or conduct in the applicant's conviction history have a direct and adverse relationship to one or more specific elements in the nature of the job held or sought.

~~(c) (1) Where the applicant is currently not incarcerated or has completed a sentence for the conviction of a crime, a rebuttable presumption is established that there is no direct and adverse relationship between the applicant's conviction and the position and that the applicant does not pose a risk to public safety in ordinary circumstances.~~

~~(2) The receipt or possession of a benefit, privilege, or right, including, but not limited to, a license, certificate, authorization, or any other similar credential, or the grant of a criminal record exemption for the type of position offered by the employer, from a licensing, regulatory, or other government agency or board establishes that there is no direct and adverse relationship between the applicant's conviction history and the position.~~

~~(3) For purposes of this subdivision, "completion of a sentence" shall not include parole, probation, supervised release, and any other form of supervision.~~

(d) (1) If the employer makes a preliminary decision that the applicant's conviction history ~~disqualified~~ *disqualifies* the applicant from~~employment~~ *employment, transfer,* or promotion, the employer shall notify the applicant of this preliminary decision in writing. ~~That notification shall justify or explain the employer's reasoning for making the preliminary decision.~~

(2) The notification shall contain all of the following:

(A) Notice of the disqualifying conviction or convictions ~~and the specific duty or duties~~ that are the basis for the preliminary decision to rescind the offer.

(B) A copy of the conviction history report or other source of the information.

(C) The written individualized assessment stating the direct and adverse relationship between the applicant's conviction history with the specific duties of the job, as described in subdivision (a).

(D) An explanation of the applicant's right to respond to the notice of the employer's preliminary decision before that decision becomes final and the deadline to respond. The explanation shall inform the applicant that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

(e) (1) The applicant shall have at least ~~10~~ *five* business days to respond to the notice provided to the applicant under subdivision (d) before the employer may make ~~its~~ *a* final decision. If, within the~~10~~ *five* business days, the applicant notifies the employer in writing that the applicant disputes the accuracy of the conviction history report that was the basis for the preliminary decision to rescind the offer and that the applicant is taking specific steps to obtain evidence supporting that assertion, then the applicant shall have~~5~~ *10* additional business days to respond to the notice.

~~(2) The employer shall not request specific documents or evidence, including, but not limited to, police reports or other court documents, from the applicant in response to the~~

~~notice of preliminary decision or at any other time. The employer shall not require, and it is an unlawful employment practice for the employer to require, that the applicant disclose their status as a survivor of domestic or dating violence, sexual assault, stalking, or other comparable statuses, or of the existence of a disability or disabilities.~~

~~(3)~~

(2) ~~It shall be the applicant's discretion~~ *The applicant shall have the choice whether* to provide any documentation or information. An employer shall not disqualify an applicant from the~~employment~~ *employment, transfer,* or promotion conditionally offered for failing to provide any specific type of evidence or documents.

(f) ~~(1) The employer shall consider information submitted by~~ *If* the applicant*submits documentation or information* pursuant to subdivision (e)~~ before making a final decision.~~

~~(2) The~~ *the* employer shall conduct a second individualized assessment of whether the applicant's conviction history has a direct and adverse relationship with the specific duties of the job that justify denying the applicant the~~ position, assuming the information provided by the applicant is true and accurate. The employer shall not dispute the truth and accuracy of the new information provided by the applicant unless substantially inconsistent with other information obtained from a third party pursuant to this article or voluntarily provided by the applicant.~~ *position, taking into account all such documents and information submitted by the applicant.*

~~(3) The employer shall complete the second individualized assessment in writing.~~

(g) If an employer makes a final decision to deny an application~~for employment or promotion~~ solely or in part because of the applicant's conviction history, the employer shall notify the applicant in writing of all the following:

(1) The final denial or~~ disqualification shall include~~ *disqualification, including* the employer's reasoning for making the final denial or~~ disqualification pursuant to subdivision (f).~~ *disqualification.*

(2) Any existing procedure the employer has for the applicant to challenge the decision or request~~ consideration.~~ *reconsideration.*

(3) The right to file a complaint with the department.

~~(h) The employer shall not take an adverse action, disadvantage the applicant, or fill the position during the process described in this section.~~

~~(i) The employer shall not revoke a conditional offer of employment or promotion on the basis of a delay in obtaining information necessary to comply with the requirements of this section.~~

~~12954.2.04. Except as provided in subdivision (b) of Section 12954.2.02 for applications for employment or promotion, it is an unlawful employment practice for an employer to discriminate against or take adverse action against employees on the basis of their arrest or conviction history.~~

12954.2.05. (a) It is an unlawful employment practice for an employer to take adverse action against an employee or discriminate against an employee~~ in the terms, conditions, or privileges of their employment based on~~ *on the basis of* their *preemployment* arrest or conviction~~history.~~ *history unless the employer provides all of the following to the employee:*

~~(b) It is an unlawful employment practice for an employer to take adverse action against any employee by reason of the employee's conviction of one or more criminal offenses, or by reason of finding the employee lacks good moral character based on the employee's conviction of one or more criminal offenses.~~

~~(c) It is an unlawful employment practice for an employer to threaten an employee with any adverse action based on the employee's arrest or conviction history.~~

(1) Notice of the disqualifying arrest or conviction history that is the basis for the adverse action.

(2) A copy of the arrest or conviction history report, if any.

(3) A written individualized assessment stating the direct and adverse relationship between the employee's arrest or conviction history and specific duties of the job.

(4) An explanation of the employee's right to respond to the notice and the deadline by which to respond. The explanation shall inform the employee that the response may include submission of evidence challenging the accuracy of the conviction history report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

(b) (1) The employee shall have at least five business days to respond to the notice provided to the employee under subdivision (a) before the employer may finalize the decision to take adverse action against the employee. If, within the five business days, the employee notifies the employer in writing that the employee disputes the accuracy of the conviction history report that was the basis for the proposed adverse action and that the employee is taking specific steps to obtain evidence supporting that assertion, then the employee shall have ten additional business days to respond to the notice.

(2) The employee shall have the choice whether to provide any documentation or information.

(c) (1) If the employee submits documentation or information pursuant to subdivision (b), the employer shall conduct a second individualized assessment of whether the employee's conviction history has a direct and adverse relationship with the specific duties of the job that justify taking the adverse action.

(2) If an employer makes a final decision to take adverse action against the employee solely or in part because of the employee's conviction history, the employer shall notify the employee in writing of all the following:

(A) The final decision, including the employer's reasoning for taking the adverse action.

(B) Any existing procedure the employer has for the employee to challenge the decision or request reconsideration.

(C) The right to file a complaint with the department.

(d) For purposes of this section, it shall not be considered an adverse action for an employer to temporarily suspend, with pay, an employee while the employer is complying with the requirements of this section.

12954.2.06. (a) An employer shall post a clear and conspicuous notice informing applicants and employees of this article and Section 432.7 of the Labor Code. The notice shall be posted in a conspicuous place at every workplace, jobsite, and other location under the employer's control and visited by applicants or employees, and included in any job posting, solicitation, or advertisement seeking applicants for employment. The notice shall be posted in English, Spanish, and any language spoken by at least 10 percent of the employees at the workplace, jobsite, or other location at which it is posted.

(b) An employer shall state in all solicitations or advertisements seeking applicants for employment that the employer will consider for employment qualified applicants with

conviction histories in a manner consistent with this article and other federal, state, and local laws.

(c) (1) An employer intending to conduct a conviction history background check for employment~~ purposes, pursuant to the exception in subdivision (b) of Section 12954.2.02,~~ *purposes* shall do both of the following:

(A) Include in any job posting, solicitation, advertisement, and application a list of all specific job duties of the position with which a conviction may have a direct and adverse relationship potentially resulting in an adverse action.

(B) Include in any job posting, solicitation, advertisement, and application~~ a statement that the employer is considering arrest or conviction history pursuant to the exception in subdivision (b) of Section 12954.2.02, and~~ a list of all laws and regulations that impose restrictions or prohibitions for employment on the basis of a conviction, if any.

(2) The materials required by this subdivision shall also comply with the notice and certification requirements in Section 1786.16 of the Civil Code.

12954.2.07. (a) Employers~~ and their agents~~ shall retain all records and documents related to an applicant's~~ employment~~ *employment, transfer,* or promotion applications and the written assessment and reassessment performed pursuant to this article for a period of four years following the receipt of an applicant's employment application.

(b) Notwithstanding any law, employers~~ and their agents~~ shall, upon request, provide or provide access to the records and documents to the department in any administrative enforcement proceeding under this article or to the applicant.

(c) Any record or document retained or received by a local agency employer or the department pursuant to this section shall be confidential and not subject to disclosure under the California Public Records Act (Division 10 (commencing with Section 7920.000) of Title 1). Nonidentifying information, however, may be used by the department for purposes of the annual report described in Section 12954.2.10.

12954.2.08. (a) (1) The department shall issue rules and regulations, in conformity with the provisions of this article, regarding when an employer action constitutes a violation for purposes of imposing civil penalties set forth in this chapter and for purposes of the additional remedies and penalties set forth in Chapter 7 (commencing with Section 12960). These rules and regulations shall set forth whether each civil penalty, under paragraph (2) of subdivision (b), shall be issued on a per policy, per practice, or per applicant or employee basis.

(2) The civil penalties provided for in this section are in addition to any other penalty or remedy provided by law, including additional remedies and penalties provided in this part, and do not affect the right of an individual to file an action to recover damages and seek other remedies for a violation of any provision of this article.

(3) Notwithstanding other law, including Section 12954.2.09, an individual may also file an action to recover the civil penalties provided for in this article.

(b) For each violation, the following shall apply:

(1) The employer shall undergo mandatory training on the provisions of this article.

(2) The following civil penalties shall apply:

(A) For the first violation:

(i) For employers that employ 5 to 19 employees, a fine of up to one thousand dollars ($1,000).

(ii) For employers that employ 20 to 50 employees, a fine of up to two thousand dollars ($2,000).

(iii) For employers that employ 51 to 99 employees, a fine of up to three thousand five hundred dollars ($3,500).

(iv) For employers that employ 100 or more employees, a fine of up to five thousand dollars ($5,000).

(B) For the second violation:

(i) For employers that employ 5 to 19 employees, a fine of up to five thousand dollars ($5,000).

(ii) For employers that employ 20 to 50 employees, a fine of up to seven thousand dollars ($7,000).

(iii) For employers that employ 51 to 99 employees, a fine of up to eight thousand five hundred dollars ($8,500).

(iv) For employers that employ 100 or more employees, a fine of up to ten thousand dollars ($10,000).

(C) For the third and subsequent violations:

(i) For employers that employ 5 to 19 employees, a fine of up to ten thousand dollars ($10,000).

(ii) For employers that employ 20 to 50 employees, a fine of up to fourteen thousand dollars ($14,000).

(iii) For employers that employ 51 to 99 employees, a fine of up to seventeen thousand dollars ($17,000).

(iv) For employers that employ 100 or more employees, a fine of up to twenty thousand dollars ($20,000).

(c) (1) (A) The Fair Chance Act Enforcement Fund is hereby established in the State Treasury. Moneys in the fund shall be available to the department, upon appropriation by the Legislature, for purposes of administering and enforcing this article.

(B) The Fair Chance Act Recovery Fund is hereby established in the State Treasury. Moneys in the fund shall be available to the department upon appropriation by the Legislature for purposes of paying claims made by complainants under this article.

(2) The civil penalties described in subdivision (b) shall be collected by the department. The department shall remit any civil penalties awarded to the complainant pursuant to this subdivision.

(3) (A) Forty-six percent of the penalties shall be deposited in the Fair Chance Act Enforcement Fund and shall be used by the department for purposes of enforcing this article.

(B) Four percent of the penalties shall be placed in the Fair Chance Act Enforcement Fund for purposes of ensuring the employer pays the civil penalties to the department.

(C) The remaining 50 percent of the penalties shall be deposited in the Fair Chance Act Recovery Fund for purposes of making awards to the complainant or complainants, if any. Moneys in the fund shall only be used for paying a complainant’s claim and shall not be used for the department’s administrative costs to process and award claims. If there are no complainants, the remaining 50 percent shall be deposited in the Fair Chance Act Enforcement Fund for the purposes described in subparagraphs (A) and (B).

(4) Civil penalties shall be assessed and recovered pursuant to the procedures in Section 12954.2.09.

12954.2.09. (a) (1) To impose a civil penalty pursuant to this article, the department shall serve a citation on the employer. The citation shall include findings from the investigation that resulted in a determination that the employer violated the provisions of this article. The citation and findings may be served personally, in the same manner as provided for service of a summons, as described in Chapter 4 (commencing with Section 413.10) of Title 5 of Part 2 of the Code of Civil Procedure, by certified mail with return receipt requested, or by registered mail in accordance with subdivision (c) of Section 11505 of the Government Code or pursuant to Section 1013 of the Code of Civil Procedure. Each citation shall be in writing and shall describe the nature of the violation and findings of the department, including reference to the statutory provision alleged to have been violated. The department shall promptly take all appropriate action, in accordance with this section, to enforce the citation and to recover the civil penalty assessed.

(2) Any amount found due by the department as a result of a hearing shall become due and payable 45 days after written notice of findings, citation, and findings have been mailed to the party assessed. A writ of mandate may be taken from the findings and citations to the appropriate superior court within 45 days of service. The assessed party shall pay any judgment and costs ultimately rendered by the court against the party for the assessment. Notwithstanding other law, a court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, brought pursuant to this section, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing petitioner shall not be awarded fees and costs pursuant to the previous sentence, unless the court finds that defending against the action was frivolous, unreasonable, or without merit when the petition was brought, or the department continued to litigate after it clearly became so.

(3) As a condition to filing a petition for a writ of mandate, the petitioner seeking the writ shall first post a bond with the department equal to the total amount of the penalty assessed. The bond shall be issued by a surety duly authorized to do business in this state and shall ensure that the petitioner makes payments as set forth in this paragraph. If a decision is entered which affirms or modifies the amounts for civil penalties, the petitioner shall pay the amounts owed for the specified items included in a clerk's judgment based on the decision, or pursuant to a court judgment in a writ of mandate proceeding under paragraph (2). If the request for a writ is withdrawn or dismissed without entry of judgment, the petitioner shall pay the amounts owed for the specified items pursuant to the citation, unless the parties have executed a settlement agreement for payment of some other amount. In the case of a settlement agreement, the petitioner shall pay the amount they are obligated to pay under the terms of the settlement.

(4) If the employer fails to pay the amount owed within 10 days of the entry of judgment, dismissal or withdrawal of writ, or the execution of a settlement agreement, a portion of the undertaking, equal to the amount owed, or the entire undertaking if the amount owed exceeds the undertaking, shall be forfeited to the department for appropriate distribution.

(5) A person to whom a citation has been issued shall, in lieu of contesting a citation pursuant to this section, transmit to the office of the department designated on the citation the amount specified for the violation within 45 business days after issuance of the citation.

(6) When no petition objecting to a citation or the proposed assessment of a civil penalty is filed, a certified copy of the citation or proposed civil penalty, may be filed by the department in the office of the clerk of the superior court in any county in which the person assessed has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the citation or proposed assessment of a civil penalty.

(7) When findings and the order thereon are made affirming or modifying a citation or proposed assessment of a civil penalty after hearing, a certified copy of these findings and the order entered thereon may be entered by the department in the office of the clerk of the superior court in any county in which the person assessed has property or in which the person assessed has or had a place of business. The clerk, immediately upon the filing, shall enter judgment for the state against the person assessed in the amount shown on the certified order as well as any reasonable attorneys' fees and costs incurred by the department as determined by the court.

(8) A judgment entered pursuant to this section shall bear the same rate of interest and shall have the same effect as other judgments and be given the same preference allowed by the law on other judgments rendered for claims for taxes. The clerk shall make no charge for the service provided by this section to be performed by them.

(b) (1) A complainant entitled to an award of civil penalties under this section shall file a claim with the department within three years after the civil penalty assessment on the employer becomes final.

(2) The department shall serve a copy of the complainant's claim on the employer who was assessed the civil penalty.

(3) Following the submission of the claim, the department shall review the claim to determine if it has sufficient information to determine whether the complainant is entitled to recovery of civil penalties under this article.

(4) The department shall notify, in writing, the complainant of any deficiencies in the claim within 60 days of the department's receipt of the claim.

(5) If the claim is granted, the complainant shall be paid up to 50 percent of the assessed civil penalty. If the application is denied, the complainant shall have the right to refile the claim with any corrections and the original filing date shall serve as the operative filing date.

(6) Civil penalties shall be awarded and paid to a complainant who is granted a claim within 180 days of the department's final review and determination of all claims related to the relevant civil penalty assessment.

12954.2.10. The department shall annually publish a report containing statistics regarding the total number of penalties issued pursuant to this article. This report shall include information about the complainant's demographics, including, but not limited to, race, national origin, gender, and disability status, employer size and type, and type of violation. The report shall ensure the report is published in a manner confidentiality of the complainants.

12954.2.11. The department shall adopt rules and regulations necessary to implement this article.

12954.2.12. The remedies under this section shall be in addition to, and not in derogation of, all other rights and remedies that an applicant or employee may have under any other law, including, but not limited to, any local ordinance, state, or federal law.

SEC. 5. Section 12960 of the Government Code is amended to read:

12960. (a) This article governs the procedure for the prevention and elimination of practices made unlawful pursuant to Article 1 (commencing with Section 12940) and Article 1.1 (commencing with Section 12954.2) of Chapter 6.

(b) For purposes of this section, filing a complaint means filing an intake form with the department and the operative date of the verified complaint relates back to the filing of the intake form.

(c) Any person claiming to be aggrieved by an alleged unlawful practice may file with the department a verified complaint, in writing, that shall state the name and address of the person, employer, labor organization, or employment agency alleged to have committed the unlawful practice complained of, and that shall set forth the particulars thereof and contain other information as may be required by the department. The director or the director's authorized representative may in like manner, on that person's own motion, make, sign, and file a complaint.

(d) Any employer whose employees, or some of them, refuse or threaten to refuse to cooperate with this part may file with the department a verified complaint asking for assistance by conciliation or other remedial action.

(e) (1) A complaint alleging a violation of Section 51, 51.5, 51.7, 54, 54.1, or 54.2 of the Civil Code shall not be filed pursuant to this article after the expiration of one year from the date that the alleged unlawful practice or refusal to cooperate occurred.

(2) A complaint alleging a violation of Section 52.5 of the Civil Code shall not be filed pursuant to this article after the expiration of the applicable period of time for commencing a civil action pursuant to that section.

(3) A complaint alleging a violation of Article 9.5 (commencing with Section 11135) of Chapter 1 of Part 1 shall not be filed pursuant to this article after the expiration of three years from the date that the alleged unlawful practice occurred or refusal to cooperate occurred.

(4) A complaint alleging a violation of Section 1197.5 of the Labor Code shall not be filed pursuant to this article after the expiration of the applicable period of time for commencing a civil action pursuant to that section.

(5) A complaint alleging a violation of Section 51.9 of the Civil Code or any other violation of Article 1 (commencing with Section 12940) or Article 1.1 (commencing with Section 12954.2) of Chapter 6 shall not be filed after the expiration of three years from the date upon which the unlawful practice or refusal to cooperate occurred.

(6) Notwithstanding paragraphs (1) through (5), inclusive, the filing periods set forth by this section may be extended as follows:

(A) For a period of time not to exceed 90 days following the expiration of the applicable filing deadline, if a person allegedly aggrieved by an unlawful practice first obtained knowledge of the facts of the alleged unlawful practice during the 90 days following the expiration of the applicable filing deadline.

(B) For a period of time not to exceed one year following a rebutted presumption of the identity of the person's employer under Section 12928, in order to allow a person allegedly aggrieved by an unlawful practice to make a substitute identification of the actual employer.

(C) For a period of time, not to exceed one year from the date the person aggrieved by an alleged violation of Section 51.7 of the Civil Code becomes aware of the identity of a person liable for the alleged violation, but in no case exceeding three years from

the date of the alleged violation if during that period the aggrieved person is unaware of the identity of any person liable for the alleged violation.

(D) For a period of time not to exceed one year from the date that a person allegedly aggrieved by an unlawful practice attains the age of majority.

(E) For the periods of time specified in Section 52.5 of the Civil Code for complaints alleging a violation of that section.

(f) (1) Notwithstanding any tolling or limitations period under any other law, the time for a complainant to file a civil action under a statute referenced in this section shall be tolled during the period commencing with the filing of a complaint with the department for an alleged violation of that statute until either of the following:

(A) The department files a civil action for the alleged violation under this part.

(B) One year after the department issues written notice to a complainant that it has closed its investigation without electing to file a civil action for the alleged violation.

(2) The tolling provided under this subdivision shall apply retroactively.

(3) This subdivision is not intended to revive claims that have already lapsed.

(PU Amended by Stats. 2021, Ch. 278, Sec. 3. (SB 807) Effective January 1, 2022.)

SEC. 6. Section 12965 of the Government Code is amended to read:

12965. (a) (1) In the case of failure to eliminate an unlawful practice under this part through conference, conciliation, mediation or persuasion, or in advance thereof if circumstances warrant, the director in the director's discretion may bring a civil action in the name of the department, acting in the public interest, on behalf of the person claiming to be aggrieved.

(2) Prior to filing a civil action, the department shall require all parties to participate in mandatory dispute resolution in the department's internal dispute resolution division free of charge to the parties in an effort to resolve the dispute without litigation.

(3) In a civil action, the person claiming to be aggrieved shall be the real party in interest and shall have the right to participate as a party and be represented by that person's own counsel.

(4) A civil action under this subdivision shall be brought in a county in which the department has an office, in a county in which unlawful practices are alleged to have been committed, in the county in which records relevant to the alleged unlawful practices are maintained and administered, in the county in which the person claiming to be aggrieved would have worked or would have had access to public accommodation, but for the alleged unlawful practices, in the county of the defendant's residence or principal office, or, if the civil action includes class or group allegations on behalf of the department, in any county in the state.

(5) (A) A complaint treated by the director as a group or class complaint for purposes of investigation, conciliation, mediation or civil action pursuant to Section 12961, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(B) For a complaint alleging a violation of Section 51.7 of the Civil Code, a civil action shall be brought, if at all, within two years after the filing of the complaint.

(C) For a complaint other than those specified in subparagraphs (A) and (B), a civil action shall be brought, if at all, within one year after the filing of a complaint.

(D) The deadlines specified in subparagraphs (A), (B), and (C), shall be tolled during a mandatory or voluntary dispute resolution proceeding commencing on the date the department refers the case to its dispute resolution division and ending on the date the

department's dispute resolution division closes its mediation record and returns the case to the division that referred it.

(b) For purposes of this section, filing a complaint means filing a verified complaint.

(c) (1) (A) Except as specified in subparagraph (B), if a civil action is not brought by the department pursuant to subdivision (a) within 150 days after the filing of a complaint, or if the department earlier determines that no civil action will be brought pursuant to subdivision (a), the department shall promptly notify, in writing, the person claiming to be aggrieved that the department shall issue, on request, the right-to-sue notice. If the person claiming to be aggrieved does not request a right-to-sue notice, the department shall issue the notice upon completion of its investigation, and not later than one year after the filing of the complaint.

(B) For a complaint treated as a group or class complaint for purposes of investigation, conciliation, mediation or civil action pursuant to subdivision (b) of Section 12961, the department shall issue a right-to-sue notice upon completion of its investigation, and not later than two years after the filing of the complaint.

(C) The notices specified in subparagraphs (A) and (B) shall indicate that the person claiming to be aggrieved may bring a civil action under this part against the person, employer, labor organization, or employment agency named in the verified complaint within one year from the date of that notice.

(D) This paragraph applies only to complaints alleging unlawful employment practices under Article 1 (commencing with Section 12940) and Article 1.1 (commencing with Section 12954.2) of Chapter 6.

(E) The deadlines specified in subparagraphs (A) and (B) shall be tolled during a mandatory or voluntary dispute resolution proceeding commencing on the date the department refers the case to its dispute resolution division and ending on the date the department's dispute resolution division closes its mediation record and returns the case to the division that referred it.

(2) A city, county, or district attorney in a location having an enforcement unit established on or before March 1, 1991, pursuant to a local ordinance enacted for the purpose of prosecuting HIV/AIDS discrimination claims, acting on behalf of any person claiming to be aggrieved due to HIV/AIDS discrimination, may also bring a civil action under this part against the person, employer, labor organization, or employment agency named in the notice.

(3) The superior courts of the State of California shall have jurisdiction of actions brought pursuant to this section, and the aggrieved person may file in these courts. An action may be brought in any county in the state in which the unlawful practice is alleged to have been committed, in the county in which the records relevant to the practice are maintained and administered, or in the county in which the aggrieved person would have worked or would have had access to the public accommodation but for the alleged unlawful practice, but if the defendant is not found within any of these counties, an action may be brought within the county of the defendant's residence or principal office.

(4) A copy of any complaint filed pursuant to this part shall be served on the principal offices of the department. The remedy for failure to send a copy of a complaint is an order to do so.

(5) A civil action brought pursuant to this section shall not be filed as class actions and shall not be maintained as class actions by the person or persons claiming to be

aggrieved if those persons have filed a civil class action in the federal courts alleging a comparable claim of employment discrimination against the same defendant or defendants.

(6) In civil actions brought under this section, the court, in its discretion, may award to the prevailing party, including the department, reasonable attorney's fees and costs, including expert witness fees, except that, notwithstanding Section 998 of the Code of Civil Procedure, a prevailing defendant shall not be awarded fees and costs unless the court finds the action was frivolous, unreasonable, or groundless when brought, or the plaintiff continued to litigate after it clearly became so.

(d) A court may grant as relief in any action filed pursuant to subdivision (a) any relief a court is empowered to grant in a civil action brought pursuant to subdivision (c), in addition to any other relief that, in the judgment of the court, will effectuate the purpose of this part. This relief may include a requirement that the employer conduct training for all employees, supervisors, and management on the requirements of this part, the rights and remedies of those who allege a violation of this part, and the employer's internal grievance procedures. In addition, in order to vindicate the purposes and policies of this part, a court may assess against the defendant, if the civil complaint or amended civil complaint so prays, a civil penalty of up to twenty-five thousand dollars ($25,000) to be awarded to a person denied any right provided for by Section 51.7 of the Civil Code, as an unlawful practice prohibited under this part.

(e) (1) Notwithstanding subdivision (c), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the department to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the department.

(B) The investigation of the charge is deferred by the department to the Equal Employment Opportunity Commission.

(C) A right-to-sue notice is issued to the person claiming to be aggrieved upon deferral of the charge by the department to the Equal Employment Opportunity Commission.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) expires when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the department, whichever is later.

(3) This subdivision is intended to codify the holding in Downs v. Department of Water and Power of City of Los Angeles (1997) 58 Cal.App.4th 1093.

(f) (1) Notwithstanding subdivision (c), the one-year statute of limitations, commencing from the date of the right-to-sue notice by the department, to the person claiming to be aggrieved, shall be tolled when all of the following requirements have been met:

(A) A charge of discrimination or harassment is timely filed concurrently with the Equal Employment Opportunity Commission and the department.

(B) The investigation of the charge is deferred by the Equal Employment Opportunity Commission to the Civil Rights Department.

(C) After investigation and determination by the department, the Equal Employment Opportunity Commission agrees to perform a substantial weight review of the

determination of the department or conducts its own investigation of the claim filed by the aggrieved person.

(2) The time for commencing an action for which the statute of limitations is tolled under paragraph (1) shall expire when the federal right-to-sue period to commence a civil action expires, or one year from the date of the right-to-sue notice by the department, whichever is later.

(PU Amended by Stats. 2022, Ch. 420, Sec. 25. (AB 2960) Effective January 1, 2023.)

SEC. 7. The Legislature finds and declares that Section 4 of this act, which adds Section 12954.2.07 to the Government Code, furthers, within the meaning of paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the purposes of that constitutional section as it relates to the right of public access to the meetings of local public bodies or the writings of local public officials and local agencies. Pursuant to paragraph (7) of subdivision (b) of Section 3 of Article I of the California Constitution, the Legislature makes the following findings:

This act balances the right of the public to access relevant information regarding fair employment practices while protecting the privacy rights of persons with a conviction history for purposes of encouraging their application for ~~employment~~ *employment, transfer,* or promotion.

The Legislature finds and declares that Section 4 of this act, which adds Section 12954.2.07 to the Government Code, imposes a limitation on the public's right of access to the meetings of public bodies or the writings of public officials and agencies within the meaning of Section 3 of Article I of the California Constitution. Pursuant to that constitutional provision, the Legislature makes the following findings to demonstrate the interest protected by this limitation and the need for protecting that interest:

In order to protect the privacy of persons with a conviction history and encourage their application for ~~employment~~ *employment, transfer,* or promotion, it is necessary to limit the public's right of access to their personal information.

SEC. 8. If the Commission on State Mandates determines that this act contains costs mandated by the state, reimbursement to local agencies and school districts for those costs shall be made pursuant to Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code.