

California Law: Asking Potential Employees About Arrests and Convictions

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Business leaders often ask whether pre-employment tests and matrices are better for employers than face-to-face interviews at predicting a job candidate's success. This month, at my quarterly breakfast seminar, I spoke about how interviews of a certain type are as strong as the best tests. (Contact me for details.) One issue, however, recurs among employers in California interviewing job candidates. To what extent may an employer ask the candidate about arrests and convictions?

What A Public Or Private Employer May Not Do

An employer may not do any of the following:

- Ask an applicant to take a polygraph test. (Labor Code Section 432.2)
- Ask an applicant to provide information "concerning an arrest or detention that did not result in conviction." (Labor Code Section 432.7)
- Ask an applicant to provide information "concerning a referral to, and participation in, any pretrial or post-trial diversion program." (Labor Code Section 432.7)
- Ask an applicant to provide information "concerning a conviction that has been judicially dismissed or ordered sealed pursuant to law." (Labor Code Section 432.7)
- Ask an applicant to provide information about certain marijuana-related offenses (such as convictions of possession of less than 28.5 grams). (Labor Code Section 432.7)
- Obtain a criminal-background investigation report that includes information relating to an arrest that did not result in a conviction. (Labor Code Section 432.7)
- If the business is in San Francisco and employing 20 or more employees, an employer may not ask jobseekers to disclose their criminal history on the initial job application.

Exceptions exist. For example, health care facilities may ask job applicants with regular access to patients to disclose whether they are convicted sex offenders. Job applicants who, if hired, will have access to drugs and medication, may be asked about convictions involving narcotics.

What A State Or Local Agency May Not Ask An Applicant

A government agency may not do the following:



- Ask an applicant to disclose information concerning his or her conviction history until the agency has determined that the applicant meets the standards for employment. (Labor Code Section 432.9)

What A Private Employer May Do

A private employer may do the following:

- Request information about felonies that resulted in a conviction—if no more than seven years have passed since "disposition."
- Inquire about an arrest for which the employee or applicant is on bail or has been released on his or her own recognizance pending trial. (Labor Code Section 432.7(a))

Summary And Conclusion

Many commentators believe that employers should request criminal history information only when the categories of crimes are related to the position for which an applicant is applying (i.e., if the applicant will be handling money, the inquiry should focus on theft and embezzlement). While such inquiries are easier to justify, they exclude inquiries that employers may wish to make, and which the law permits. Asking an applicant whether s/he has been convicted of a felony - that has not been expunged - within the past seven years may catch violent crimes about which the employer may wish to know, and in some instances may have a duty to know.

This is intended for general information. Call me if you have questions or want to analyze how these restrictions apply to your business.