

**MOTION BY SUPERVISORS HOLLY J. MITCHELL AND
HILDA L. SOLIS**

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Establishing a Fair Chance Ordinance in Los Angeles County

About 1 in 5 Californians have a criminal record, compared with about 1 in 3 Americans. Formerly incarcerated individuals in the United States have an average unemployment rate of over 27%, much higher than that of the general population during any historical period, including the Great Depression. Despite research finding that employment for formerly incarcerated individuals can enhance public safety outcomes, and that system-impacted individuals perform the same as or better than employees without criminal records and are more loyal to their employers than their counterparts, they continue to face tremendous barriers in finding gainful employment. The rate of employers conducting background checks has risen, which has impacted rates of employment for system-impacted individuals, and implicitly normalized the assumption that, despite known racial biases in policing and the criminal legal system, those convicted of a crime are to be viewed with suspicion even after returning from incarceration. Ensuring that system-impacted individuals have equitable access to opportunities for gainful employment is critical for making communities safer and enhancing quality of life.

In California, the Fair Chance Act (FCA) Assembly Bill 1008, codified in Government Code § 12952 was enacted in 2018 to level the playing field for applicants who may be qualified but are often overlooked due to a prior conviction. Under the FCA,

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SOLIS	_____
MITCHELL	_____
HORVATH	_____
BARGER	_____
HAHN	_____

it is illegal for most employers in California (with five or more employees) to ask about an applicant's criminal record before making a job offer. Employers cannot include questions about an applicant's criminal record in their recruitment ads, applications, or during a job interview.

Since the passage of the FCA, State and local jurisdictions have identified issues with its implementation and attempted to strengthen its enforcement. In October 2021, the California Civil Rights Department (CRD), which is the entity responsible for enforcing the FCA and formerly known as the Department of Fair Employment and Housing (DFEH), announced new efforts to conduct mass searches of online job advertisements for statements that violate the FCA. In a one-day review, for example, the CRD found over 500 job advertisements with unlawful statements that the employer will not consider any job applicant with a criminal record. Other jurisdictions complement these efforts by strengthening enforcement at the local level.

While some cities have ordinances that enhance the implementation of the FCA, the County of Los Angeles (County) does not have its own ordinance and must refer all alleged violations to either the City of Los Angeles (City) or the State of California, depending on jurisdiction. In contrast, in 2017, the City adopted a Fair Chance Initiative for Hiring Ordinance¹, which prohibits private employers and City contractors from inquiring about an applicant's criminal history until after a conditional offer of employment has been made, similar to the FCA. In February 2014, the San Francisco Board of Supervisors adopted a similar ordinance with its own set of protections and enforcement mechanisms.

The County has long engaged in work to educate and inform businesses and workers of the protections under the FCA. For example, in August 2019, the County launched a comprehensive education and outreach strategy known as the Fair Chance Hiring Campaign (FCHC) and Fair Chance Pledge to increase awareness of the FCA and reduce the stigma associated with hiring system-impacted individuals. The County's Department of Economic Opportunity (DEO) is relaunching the FCHC in the first quarter of 2023 to raise awareness among local businesses of their responsibilities under the FCA.

However, as employers continue to hire staff in the wake of the pandemic, violations of the FCA persist. On January 25, 2022, the County Board of Supervisors (Board) approved a motion requesting an evaluation of options for enhancing local enforcement. On April 25, 2022, the County's Chief Executive Office through its Legislative Affairs and Intergovernmental Relations (CEO-LAIR) division reported back with survey findings from community-based organizations and certain County Departments that shed light on gaps in the implementation and enforcement of the FCA. Survey respondents reported that, due to the absence of a specified "look back" period in the FCA within which convictions may be considered, employers can inconsistently apply FCA requirements and make unreasonable use of older convictions to justify rescinding a job offer. To address this problem, San Francisco's ordinance prohibits employers from considering, among other things, a conviction that is more than 7 years old (*unless the position being considered provides certain services to or supervises minors, dependent adults, or persons 65 years or older*); participation in a diversion or deferral of judgment program; and conviction for decriminalized conduct. Additionally, some research findings suggest that a more nuanced approach to look back periods is needed since the likelihood of committing certain offenses for those with a prior conviction falls to the same rate as for the general public in less time than the standard seven-year period that's commonly used for all offenses. Senate Bill 731 (Durazo) will soon require the automatic sealing of conviction records for non-violent and non-serious felonies upon completion of a sentence, probation and if four years have elapsed with no new felonies, with certain positions exempted. Stronger protections are needed to guard against consideration of old arrests and convictions with no reasonable nexus with job duties.

In addition, the FCA does not afford job applicants a full opportunity to defend themselves when a conditional job offer is rescinded following a review of their criminal history. When rescinding a conditional job offer, the FCA requires employers to assess whether the applicant's criminal history has a "direct and adverse relationship" with job duties. However, the assessment is not required to be provided in writing, which creates challenges for applicants in addressing claims regarding the adverse impact of their conviction on future job performance. Respondents to CEO-LAIR's survey noted the

importance of requiring employers to provide written assessments (required by the City's ordinance) so applicants can provide evidence of mitigating circumstances. In accordance with the FCA, applicants should also be provided with a copy of the background check to provide them an opportunity to address potentially incorrect information as well as the set of facts employers use to justify rescission of a job offer. While applicants have five days to respond to an employer's notice to revoke a conditional job offer, it does not specify a timeframe for employers to respond to an applicants' appeal of this decision. In some cases, applicants must seek other employment due to their inability to wait – often due to economic circumstances – for an employer's final decision.

Some survey respondents reported that FCA enforcement provisions may not effectively deter employers from violating its hiring procedures, creating a need for fines and penalties. Like the City and San Francisco ordinances, the District of Columbia's Fair Chance Hiring law establishes penalties and fines for ordinance violations, starting at \$1,000 per violation for employers with 11 to 30 employees with incremental increases for larger employers. Half of the penalty amount is awarded to the complainant who experienced the violation, with approximately \$500,000 having been awarded to complainants as of May 2019. Similar best practices could incentivize local compliance, including examples from the National Employment Law Project and the County's Department of Consumer and Business Affairs Local Minimum Wage Enforcement Ordinance and supporting program.

CEO-LAIR's report outlines legislative and policy options for enhancing enforcement of the FCA in the County, including the creation of a local fair chance ordinance to require written nexus assessments and establishing a penalty structure for violations. Additional options include limiting the "look back" period to seven years, with certain exceptions; prohibiting requests for self-disclosure of criminal records; and establishing specified timelines for employers to respond to a candidate's appeal of a revoked job offer and finalizing hiring determinations.

Moreover, as seen through the County's own program for individuals with barriers to employment – Preparing Los Angeles for County Employment (PLACE), individuals with a criminal record may lose out on gainful employment opportunities due to the length

of time an employer takes to complete a background check and nexus assessment. Instead of waiting several weeks, hiring managers may opt to fill positions with other qualified candidates due to urgent staffing needs, thereby disadvantaging otherwise qualified candidates who may have prior convictions.

Ensuring that individuals with criminal records have fair and equitable access to opportunities for gainful employment is critical to making communities safer and achieving rehabilitative outcomes. An ordinance with additional protections and enforcement mechanisms is an important step towards ensuring meaningful implementation of the FCA in the County and removing barriers to employment that undermine the County's efforts to realize the Care First vision.

WE THEREFORE MOVE THAT THE BOARD OF SUPERVISORS:

1. Direct the Interim County Counsel, in collaboration with the Director of the Department of Human Resources (DHR); Director of the Department of Youth Development (DYD); Chief Executive Officer (CEO); Interim Director of the Justice, Care, and Opportunities Department (JCOD); Director of the Department of Consumer and Business Affairs (DCBA); Director of the Department of Economic Opportunities (DEO); Worker Education and Resource Center (WERC); Public Defender (PD); Alternate Public Defender (APD); reentry partners; and other relevant County and community stakeholders, to report back in writing in 90 days with a draft Fair Chance Ordinance (Ordinance) that:
 - a. Applies to the following employers:
 - i. Employers with five or more employees operating in unincorporated areas of the County.
 - ii. Employers with five or more employees that receive County contracts and leases, including, but not limited to, County contractors and subcontractors.
 1. For contractors and subcontractors, this ordinance should apply to the portion of operations that would be or are performing work in furtherance of a contract with the County. This sub-directive should not be interpreted to exclude *any*

employees performing work in the unincorporated areas of the County that is not related to a contract with the County.

2. In accordance with State law, the ordinance should not apply to any position where an employer is required by another law or a licensing requirement to conduct background checks or restrict employment based on criminal history.
- b. Does **not** apply to non-County public agency employers.
 - c. Applies to employees whose positions involve or will involve working at least eight hours per week, including temporary, seasonal, part-time, contract, contingent, and commission-based work. It should also cover work performed through the services of a temporary or other employment agency, including non-profit organizations, and any form of vocational or educational training - with or without pay.
 - d. Requires employers to:
 - i. Specify in all job solicitations and advertisements that qualified applicants with arrest and conviction records will be considered for the position in accordance with the Ordinance and the Fair Chance Act (FCA).
 - ii. Conspicuously post the official Ordinance notice in every workplace, job site, and on the employer's website, with the notice to be provided in multiple languages to ensure accessibility.
 - e. Prohibits employers from asking, encouraging, or otherwise providing opportunities for applicants to voluntarily disclose information about their criminal history.
 - f. Prohibits employers from ever considering the following:
 - i. An arrest not leading to a conviction, except for unresolved arrests.
 - ii. Participation in a diversion or deferral of judgment program.
 - iii. A conviction that has been dismissed, expunged, otherwise invalidated, or inoperative.
 - iv. An adjudication in the juvenile justice system.

- v. An offense other than a felony and certain misdemeanors, except for infractions related to the driving of a vehicle.
 - vi. A conviction that is more than 7 years old (*unless the position being considered primarily provides services to or supervises minors, dependent adults, or persons 65 years of age or older*).
 - vii. A conviction for decriminalized conduct, including the non-commercial use and cultivation of cannabis.
- g. Requires employers, before taking adverse action such as refusing to hire, discharging, or not promoting an individual based on a conviction history or unresolved arrest, to perform a *written* assessment that effectively establishes a direct adverse relationship between the specific aspects of the applicant's criminal history with the inherent risks associated with the performance of one's duties in the employment position sought, and provide this written assessment to the applicant, along with a copy of the full background check results, with the notification of the preliminary decision to rescind a conditional job offer, to discharge, or to not promote, both in electronic and physical form.
 - i. Further require employers to keep a record of the assessment for a proscribed period that accounts for, among other things, a potential need for job applicants to pursue, and an employer's need to defend themselves from, litigation.
- h. Requires employers, before taking adverse action such as refusing to hire, discharging, or not promoting an individual based on a conviction history or unresolved arrest, to give the individual an opportunity to present evidence that the information is inaccurate, the individual has been rehabilitated, or other mitigating factors within specified timelines aligned with the FCA; and to account for any information submitted and re-evaluate whether a direct and adverse nexus between a conviction(s) and job duties continues to exist.
- i. Establishes reasonable and specified timelines within which employers

must respond to a job applicant's appeal, in both electronic and physical form, of a decision to rescind a conditional job offer, and within which employers must make final hiring determinations. This timeline should account for the need to respond to applicant(s) in a timely manner given their potential inability to wait for an unreasonably delayed notification.

- j. Prohibits the employer from filling the employment position sought by the applicant until *after* the minimum time period for the applicant to submit an appeal has elapsed or, if the applicant has submitted an appeal within that time, *after* the employer has responded to the appeal with a final decision.
 - i. Further, employers should be prohibited from rescinding a conditional job offer for any reason other than finding a direct and adverse nexus between one or more convictions and job duties.
- k. Establishes penalties and administrative fines for an employer violation of any provision of this ordinance, which shall:
 - i. Be up to \$500 for the first violation, up to \$1,000 for the second violation, and up to \$2,000 for the third and subsequent violations.
 - ii. Require that no less than half of the fine be awarded to the complainant.
- l. Further, Interim County Counsel should work with relevant departments, reentry partners, and community stakeholders to make recommendations, and report back in writing in 90 days with language for this draft Ordinance, for the following proposed provisions:
 - i. Prohibit employers from posting advertisements and job applications that contain phrases that inappropriately or unnecessarily deter job seekers from applying, such as "background check required" or "must have clean record".
 - ii. Stricter limits on employers' consideration of unresolved arrests, with consideration for the presumption of innocence.
 - iii. Identified misdemeanors and "wobblers" (offenses that can be charged as either a misdemeanor or felony) that employers should

not be allowed to consider.

- iv. “Look back” periods for any specific offenses shorter than the “ceiling” of seven years, as informed by evidence-based findings and any relevant requirements under State or Federal law to ensure that system-impacted individuals are not unnecessarily harmed by overly long look back periods.
- v. Prohibit employers from requesting additional documents, evidence, and other information from the applicant which may contain information that is prohibited (including charges that never became convictions); incorrect or unnecessarily inflammatory; and can be difficult to obtain.
- vi. A specific timeline within which employers would be required to complete and send the results of the individualized nexus assessment to a job applicant following the employer’s receipt of background check results.
- vii. Clarification of instances in which employers should be required to follow a rebuttable presumption that there is no link between the conviction history and risks associated with the performance of job duties, including whether this should generally apply to applicants not incarcerated or have completed a sentence.
- viii. The criteria used by employers to evaluate a candidate’s appeal, for the purpose of ensuring that such evaluations determine, upon consideration of the appeal, whether there is still a reasonable nexus between a candidate’s criminal history and job duties, with consideration for how to make such criteria public information to enhance transparency of the process.
- ix. A minimum amount of time, greater than five business days, for the candidate to appeal an employer’s preliminary decision to take an adverse action, with consideration for the amount of time it can take to prove that a background check is inaccurate.

- x. Information employers should be required to include in their response to an appeal, for the purpose of disclosing enough information to reasonably determine whether there is a direct nexus between criminal history and job duties.
 - xi. A requirement that employers submit annual compliance reports.
 - xii. Penalties and fines for any entities that conduct background checks or evaluate a conviction history on behalf of an employer for violations of this ordinance.
 - xiii. Protections for system-impacted individuals who work as unpaid interns, independent contractors, or otherwise provide services pursuant to a contract who face barriers in getting work, including, but not limited to, an inability to get information from employers on the reasons for this that may relate to their criminal history.
 - xiv. Provisions that would prohibit employers from conducting a background check for jobs where a background check is not necessary and required by law.
2. Instruct the Interim County Counsel, in collaboration with the Director of DCBA, and in consultation with other relevant County and community stakeholders, to report back to the Board in writing in 90 days on the feasibility of making all provisions of this proposed ordinance apply to entities that are solely part of County government (not to include entities that the County is only one part of, including, but not limited to, any joint powers authorities). This should include an analysis of how potential conflict of interest issues may be addressed.
3. Instruct the Director of DCBA, in collaboration with the CEO; the Director of DEO; the Director of DHR; Director of DYD; Interim Director of JCOD; Director of Internal Services Department; Auditor-Controller; Director of WERC; Director of PD; Director of APD; reentry partners; and other relevant County and community stakeholders, to report back to the Board in writing in 90 days with a plan to enforce this ordinance, including, but not limited to:
- a. Recommendations for how DCBA's Office of Labor Equity should enforce

the ordinance, including:

- i. Potentially collecting and receiving yearly compliance reports.
 - ii. Investigating alleged violations of this ordinance.
 - iii. Assessing and enforcing penalties and administrative fines.
 - iv. Creating and maintaining a list of employers who are found to have committed multiple violations of this Ordinance and the FCA, to be available, at minimum, on a public facing website. This list should serve to deter further violations by employers who have already been assessed the maximum fine allowed by the Ordinance.
 - v. Meaningfully aligning the ordinance enforcement approach with the Office of Labor Equity's proactive business outreach efforts and DEO's Fair Chance Hiring Program, including DEO's proactive outreach, education, and technical assistance for employers to assist in pre-compliance with the ordinance and access to Fair Chance hiring benefits as well as support for system-impacted individuals through America's Job Centers of California.
 - vi. Coordination with other departments to support on enforcement processes.
- b. Recommendations for data points that should be collected and publicly reported to inform the County's enforcement of this ordinance, and a plan for the collection and public reporting of this data.
- c. Recommendations, as informed by best practices, for processes, procedures, as well as documents (including forms and templates) and guidance for:
 - i. Businesses to follow when conducting a nexus assessment, for the purpose of assisting employers with complying with this ordinance.
 - ii. Job applicants to follow when appealing an employer's decision to revoke a job offer, discharge, or not promote based on an employer's finding of a direct and adverse relationship between the applicant's criminal history and job duties, for the purpose of ensuring that

applicants have a full opportunity to defend themselves.

- d. Recommendations for DEO to expand the current Fair Chance Hiring Campaign to include information about the ordinance, other worker rights, and relevant services and to continue to engage businesses located in unincorporated areas, including County contractors and subcontractors, and County leaseholders, to raise awareness about the provisions of this ordinance and share best practices and other resources to support their compliance.
 - e. An estimated yearly budget required to staff enforcement and administrative processes, and a projection of how much of the yearly budget could be covered through fine collection.
4. Instruct the Director of DHR, in collaboration with the CEO, the Director of DEO and the Director of WERC, and in consultation with relevant County departments, reentry partners, and community stakeholders, to do the following within 120 days:
- a. Report back in writing with an amended County policy to ensure alignment with the Ordinance as described in Directive #1. Policy amendments should include:
 - i. An internal process where job applicants who are currently in the job application process for a County position and/or who are engaged in the Fair Chance appeal process following the initial decision to rescind a conditional job offer can make a complaint or inquiry regarding a potential violation of Fair Chance policies. This would include complaints or concerns regarding undue delay in the background check process, delays in the provision of a written nexus assessment, and/or a lack of responsiveness by the hiring County department with regard to a job applicant's submission of mitigating evidence regarding conviction history and suitability for the County job position.
 - ii. A requirement for a strict seven-year look-back period for conviction history during a background check following a conditional job offer,

with consideration for shorter look back periods for convictions where the comparative risk of re-offending, as supported by evidence-based findings, is insignificant;

- iii. Policies and processes that help guard against the potential misuse or over-reliance on categoric rejections of applicants with certain types of convictions when not required by law.
 - iv. The mandatory use of a standardized County nexus evaluation form to be used by all departments and the elimination of all non-compliant department-specific forms.
 - v. Timeframes for hiring departments to review, communicate with candidates and issue decisions on nexus evaluations.
 - vi. Mandatory use by all departments of the Countywide Fair Chance tracking system.
 - vii. A requirement for departments to identify and report to DHR the appropriate departmental subject matter expert responsible for review and approval of nexus evaluations.
- b. Conduct a Countywide audit of departmental compliance with the County Fair Chance Policy and develop corrective action plans where non-compliance is found. This audit should include an analysis of how racial biases impact departmental compliance. Report the findings of the audit to the Board.
 - c. Establish a regular audit process for all County departments with regard to compliance with Fair Chance policies, and a process for regular reporting to the Board.
 - d. Conduct a review of Countywide positions requiring a background check to determine if a background check is necessary or required by law and report the findings to the Board.
 - e. Hold Department Heads accountable for compliance with the FCA and the County's Fair Chance policies, including, but not limited to, imposing Management Appraisal and Performance Plan requirements, and informing

hiring managers of the consequences of failing to adhere to Fair Chance policies, including potential negative performance evaluations and/or discipline for failing to comply with Fair Chance policies.

- f. Identify additional data points to collect and publicly report on County websites to allow the public to see and assess the County's compliance with the Fair Chance Policy, with consideration for:
 - i. Data points that help identify barriers to securing employment, including the amount of time it takes to complete and send the results of nexus assessments to applicants; and
 - ii. Breaking down the County's publicly reported data by department.

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(TW/CAS)