

Ordinance No.: 10914 (N.S.)

Date: 09/10/2024 (9)

AN ORDINANCE TO ADD CHAPTER 27 TO DIVISION 1 BUSINESS REGULATIONS, OF TITLE 2 LICENSES, BUSINESS REGULATIONS, AND BUSINESS TAXES OF THE COUNTY CODE OF REGULATORY ORDINANCES RELATING TO PRIVATE EMPLOYERS' USE OF CRIMINAL HISTORY IN EMPLOYMENT DECISIONS

The Board of Supervisors of the County of San Diego ordains as follows:

Section 1. Chapter 27 is hereby added to Division 1 of Title 2 of the County Code of Regulatory Ordinances to read in its entirety as follows:

CHAPTER 27. FAIR CHANCE ORDINANCE.

SEC. 21.2701 FINDINGS AND PURPOSE

In California, one in five residents has a criminal record. In San Diego, data from the Alternatives to Incarceration (ATI) initiative highlighted a significant need for employment opportunities among justice-involved populations in our County. In an effort to address this barrier on a State level, the Fair Chance Act (FCA) was enacted in January 2018 to level the playing field for job candidates with past convictions seeking new employment upon reentry into the community. Although the FCA represents a step forward, both State and local jurisdictions have identified areas for improvement in its implementation and have worked to enhance its enforcement.

Ensuring individuals with criminal records have fair and equitable access to opportunities for gainful employment is critical to making communities safer and achieving rehabilitative outcomes. Further, research has found 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. However, the use of unlawful hiring methods surrounding criminal backgrounds persists.

In collaboration with community groups and business organizations supporting formerly incarcerated individuals, the Office of Labor Standards and Enforcement (OLSE) has identified a mechanism by which the County can expand support and dismantle employment barriers in our region. This includes establishing a local Fair Chance Ordinance (Ordinance) to complement the state FCA and clarify justice-involved worker rights. This Ordinance creates additional protections and enforcement mechanisms to ensure meaningful implementation. By creating a streamlined process for lodging complaints about discriminatory hiring practices, the County demonstrates its commitment to supporting those seeking to reintegrate into the workforce, reducing recidivism rates, and supporting the successful reintegration of justice-involved individuals into our community.

SEC 21.2702 DEFINITIONS.

(a) "Adverse action" means an Employer's action or decision that materially and adversely affects the terms, conditions, or privileges of Employment of an Applicant or Employee.

(b) "Applicant" means any individual applying for employment, transfer, or promotion whose employment position involves performing at least two (2) hours of work on average each week within the unincorporated areas of the County.

(c) "Conditional Offer of Employment" means an Employer's offer of Employment to an Applicant conditioned on the completion of certain specified requirements or conditions.

(d) "Conviction" means a record from any jurisdiction that includes information indicating that a person has been convicted of a felony or misdemeanor, provided the person was placed on probation, fined, imprisoned, or paroled because of the Conviction.

(e) "County" means the County of San Diego.

(f) "Criminal Background Check Report" means any Criminal History report or conviction history report.

(g) "Criminal History" means information regarding one or more Convictions or Arrests.

(h) "Employee" means an individual whose Employment position involves performing at least two (2) hours of work on average each week within the unincorporated areas of the County.

(i) "Employer" means an Employer located or doing business in the unincorporated areas of the County, with five or more employees. "Employer" includes any entity that evaluates an Applicant's or Employee's Criminal History on behalf of an Employer or acts as an agent of Employer. "Employer" does not include the County, its departments, any other local governmental agency or unit, or any unit of the state or federal government.

(j) "Employment" means any work provided in furtherance of an Employer's business enterprise within the unincorporated areas of the County, which includes remote work from a location within the unincorporated areas of the County.

(k) "OLSE" means the County of San Diego Office of Labor Standards and Enforcement.

(l) "Particular Conviction" means a conviction for specific criminal conduct, or a category of criminal offenses prescribed by any federal law, federal regulation, state law, or state regulation that contains requirements, exclusions, or both, expressly based on that specific criminal conduct or category of criminal offenses.

SEC 21.2703 UNLAWFUL EMPLOYMENT PRACTICES.

(a) Except as provided in subdivision (c), it is an unlawful employment practice for an Employer to do any of the following:

(1) Declare in a solicitation for Employment, transfer, or promotion any limitation due to Conviction or arrest, even if no Adverse action is taken against the individual seeking Employment, transfer, or promotion, except when such limitation is required by law.

(2) Include on any application for 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 Criminal History.

(3) Inquire into, ask about, or consider the Criminal History of the Applicant, directly or indirectly, until after the Employer has made a Conditional Offer of Employment.

(4) Take an Adverse action against the Applicant based on Criminal History information until after the Employer has made a Conditional Offer of Employment to the Applicant.

(5) Inquire into, consider, distribute, or disseminate information about any of the following while conducting a Criminal History background check in connection with any application for 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.

(6) Interfere with, restrain, or deny the exercise of, or the attempt to exercise, any right provided under this Chapter.

(b) Employer may require Applicant to complete necessary forms, before a Conditional Offer of Employment is made, so long as the information gathered is used solely for the purpose of applying for incentives to hire individuals with Conviction histories. The 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 incentives to hire individuals with a Conviction history.

(c) This section does not prohibit an Employer from asking an Applicant about, seeking from any source information regarding, or taking an Adverse action on the basis of, an Applicant's Particular Conviction if, pursuant to any federal or state laws or regulations, the Employer is prohibited by law from hiring an Applicant who has that Particular Conviction. However, the Employer is still required to adhere to Notice Requirements in section 21.2704.

SEC 21.2704 NOTICE AND DUTIES.

(a) An Employer that intends to deny an Applicant Employment, transfer, or promotion solely or in part because of the Applicant's Criminal History shall make a written individualized assessment of whether the Applicant's Criminal 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 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 and completion of the sentence.
- (3) The nature and duties of the job held or sought.

(b) An Employer shall commit the results of this individualized assessment to writing. To justify denying the Applicant Employment, 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 Criminal History have a direct and adverse relationship to one or more specific elements in the nature of the job held or sought.

(c) If the Employer makes a preliminary decision that the Applicant's Criminal History disqualifies the Applicant from Employment, transfer, or promotion, the Employer shall notify the Applicant of this preliminary decision in writing. The notification shall contain all of the following:

- (1) Notice of the disqualifying Conviction or Convictions that are the basis for the preliminary decision to rescind the offer.
- (2) A copy of the Criminal Background Check Report or other source of the information.
- (3) Notice of the Applicant's or Employee's right to file a complaint with OLSE for violation of the County's Fair Chance Ordinance, and with the state's Civil Rights Department for violation of the Fair Chance Act.
- (4) 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 the submission of evidence challenging the accuracy of the Criminal Background Check Report that is the basis for rescinding the offer, evidence of rehabilitation or mitigating circumstances, or both.

(d) Applicant Response.

- (1) The Applicant shall have at least five business days to respond to the notice provided to the Applicant under subdivision (c) before the Employer may make a final decision. If, within five business days, the Applicant notifies the Employer that the Applicant disputes the accuracy of the Criminal Background Check 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 (5) additional business days to respond to the notice.
- (2) Employer shall not fill the open position until either five (5) business days have concluded without a dispute from Applicant, or the additional five (5) business days have concluded as described in paragraph (1). This paragraph does not apply in exigent circumstances requiring the position to be filled immediately.

SEC 21.2705 RECORD KEEPING.

(a) Employers shall retain all records and documents related to an Applicant's Employment, transfer, or promotion applications and the written assessment and reassessment performed pursuant to this article for one (1) year following the receipt of an Applicant's Employment application.

(b) Notwithstanding any law, Employers shall, upon request, provide or provide access to the records and documents to OLSE in any administrative enforcement proceeding under this article or to the Applicant.

SEC 21.2706 PROMULGATION OF RULES AND REGULATIONS.

OLSE shall issue rules and regulations, in conformity with the provisions of this chapter, regarding when an Employer action constitutes a violation for purposes of imposing civil penalties set forth in this chapter.

SEC 21.2707 VIOLATIONS.

Violations of this chapter may be reported to OLSE.

- (a) OLSE is authorized to take appropriate steps to enforce this chapter, including conducting investigations of possible violations of this chapter by an Employer.
- (b) Complaint. An Applicant or Employee alleging that an Employer has violated any of the provisions of this chapter may, within one (1) year of the alleged violation, file a complaint with OLSE of the alleged violation, and OLSE shall investigate the complaint. The complaint should state sufficient facts supporting the alleged violation, including, but not limited to, a description of events, relevant dates, locations or addresses, and identification of involved persons or entities. OLSE shall provide the Employer notice of the alleged violation and the opportunity to respond to the notice.
- (c) Investigation and Access to Records. Upon receipt of a complaint under section 21.2703 or if OLSE has reason to believe that an Employer may be in violation of any provision of this chapter, OLSE will conduct an investigation into the alleged violation. OLSE shall have access to all workplaces subject to this chapter during business hours to inspect books and records, to interview persons, including employees, and to investigate such matters necessary or appropriate to determine whether an Employer has violated any provisions of section 21.2703.
- (d) Subpoenas. The Director of OLSE shall have the authority to issue subpoenas for documents and to conduct examinations of persons as witnesses under Government Code section 53060.4 for the purpose of enforcing this chapter. Each subpoena shall be prepared in consultation with County Counsel and the County Administrative Office.

- (e) Notices to Correct. If, during the course of an investigation, OLSE has determined a violation of this Chapter likely has occurred, OLSE may issue and serve a correction order on the Employer immediately. The correction order shall identify the violation to be corrected and a reasonable amount of time to correct the violation.
- (f) Findings and Determination. Upon completion of an investigation, if OLSE determines a violation of section 21.2703 has occurred, OLSE shall issue a written notice to the Employee and Employer of the violation and, if appropriate, require the Employer to immediately cure the violation, and impose an administrative penalty as set forth in this section and/or order any appropriate relief.
- (g) Penalties and Other Relief for Violation of this chapter. If OLSE determines that a violation of section 21.2703 has occurred, it, within its discretion, may issue a determination and order any appropriate relief.
 - (1) Beginning on July 1, 2025, OLSE may issue administrative penalties for violation of this chapter, with no less than half of the penalties collected by OLSE awarded to the aggrieved Applicant or Employee, as follows: For a first violation, a penalty of up to five thousand dollars (\$5,000) for each aggrieved Applicant or Employee; for a second violation, a penalty of up to ten thousand (\$10,000) for each aggrieved Applicant or Employee, and a penalty of up to twenty thousand (\$20,000) for the third and subsequent violations for each aggrieved Applicant or Employee.
 - (A) For purposes of determining the penalty or administrative fine to be imposed under this Ordinance, if multiple Applicants or Employees are impacted by the same violation at the same time, the violation shall be treated as one violation for each impacted Employee or Applicant; and
 - (B) OLSE shall assess the amount of civil penalties issued against an Employer based on the following factors: the severity of the violation; the existence of prior or contemporaneous violations of section 21.2703; the Employer's size, including both the total number of Employees and business revenue; and whether or not the Employer knew or should have known about this chapter.
 - (2) County Licenses. OLSE may recommend any license issued by the County or any departments thereof, or the application for, or renewal or transfer of, a license of an Employer determined to be in violation of section 21.2703 be suspended, revoked, or denied. In evaluating whether a license should be recommended for suspension, revocation, or denial, OLSE may take into consideration appropriate factors including, but not limited to, the seriousness of the violation, whether the Employer has timely cured the violation upon appropriate notice, whether the Employer has engaged in prior or contemporary violations of the Ordinance or similar statutes, and/or whether any amounts due to Applicants or Employees or the County as a result of the violation were timely paid. The decision to suspend, revoke, or deny a license based on a recommendation from OLSE shall be made

by the department issuing the license and done in accordance with applicable law.

- (3) Collections of Amounts Due. The failure of any Employer to pay amounts owed to the County under section 21.2703 when due shall constitute a debt to the County. The County may file a civil action or, to the extent permissible under state law, create and impose a lien against any property owned or operated by an Employer for violation of this chapter, or pursue any other legal remedy to collect amounts owed to the County.
 - (4) Successor Liability. If any Employer ceases its business operations, sells out, exchanges, or otherwise disposes of the Employer's business or stock of goods, then any person who becomes a successor to the business shall become liable for the unpaid amounts owed to the County for violation of section 21.2703 if, at the time of the conveyance of the business, the successor has actual knowledge or should have known of the fact and amounts owed to the County for violation of section 21.2703.
 - (5) Interest. In any administrative action brought for the amounts owed under this section, OLSE or the court shall award interest on all due and unpaid wages, backpay and penalties at the rate of interest specified in subdivision (b) of Section 3289 of the California Civil Code, which shall accrue from the date the amounts were due and payable.
- (h) County Contractors and Subcontractors. Compliance with this Ordinance shall be required in all contracts where services will be provided to County. Each contract shall include a term stating that a violation of this Ordinance shall constitute a material breach.
- (1) In addition to the administrative procedures and enforcement measures provided in this section, if appropriate, OLSE may notify the awarding authority.
- (i) Settlement Authority. OLSE is authorized to negotiate and approve settlements with Employers where OLSE determines settlement is in the best interest of the County and affected Applicants and Employees.
- (1) Settlement agreements must be in writing and signed by the Director of OLSE or an authorized designee and the Employer. Settlements authorized under this subsection may provide Employers with a repayment plan to be paid overtime. As part of the settlement, OLSE may waive any penalties or fines owed to the County imposed under this section, in whole or in part, if the violation was not willful or OLSE determines that enforcement of the additional fines would not further the purposes of this Chapter.
- (j) Appeals and Effect of Non-appeal of OLSE decision.
- (1) OLSE shall provide both the Employer and the Applicant or Employee the opportunity to appeal its determination to a hearing officer. The hearing officer's

decision shall constitute the County's final decision, and any review of that decision shall be made by the filing of: 1) an appeal regarding the imposition of any penalties under this Chapter pursuant to section 53069.4 of the Government Code; and/or 2) a petition for writ of mandate under section 1094.5 of the Code of Civil Procedure, in the Superior Court of the County of San Diego.

- (2) The failure to appeal OLSE's determination of a violation shall serve as a complete defense for failure to exhaust administrative remedies with regard to any petition, action or claim brought by the Employer against the County regarding the OLSE's determination of a violation.

- (k) Confidentiality. OLSE shall encourage reporting and cooperation with investigations by keeping confidential, to the maximum extent permitted by applicable laws, the name, address, and other identifying information of each Applicant or Employee, person reporting a violation, or person aiding an investigation by providing information to OLSE investigators. Provided, however, with the authorization of such person, OLSE may disclose their name and identifying information as necessary to enforce section 21.2703 or for other appropriate purposes. OLSE shall also protect proprietary business information to the greatest extent allowed by law.

- (l) Other Remedies Not Affected. The remedies, fines, penalties, and procedures provided under this section are cumulative and are not intended to be exclusive of any other available remedies, fines, penalties, and procedures. By filing a complaint with OLSE, an Applicant or Employee is not precluded from being able to recover remedies available to them under any other code, regulation, or law. The procedures established in this section shall be in addition to any other criminal, civil, or other remedy established by law which may be pursued to address violations of section 21.2703. An administrative citation issued pursuant to this section shall not prejudice or adversely affect any other action, civil or criminal, that may be brought to prosecute a violation or to seek compensation for damages suffered.

SEC 21.2708 SEVERABILITY.

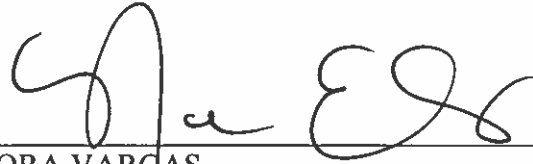
If any provision of Sections 21.2701 through 21.2708 or the application thereof is judged invalid, the invalidity shall not affect other provisions or applications of the sections that can be given effect without the invalid provision or application, and to this end any provision judged invalid is declared severable.

Section 4. This ordinance shall take effect and be in force thirty days after its passage, and before the expiration of fifteen days after its passage, a summary hereof shall be published once with the names of the members of this Board voting for and against it in The Daily Transcript, a newspaper of general circulation published in the County of San Diego.

APPROVED AS TO FORM AND LEGALITY
CLAUDIA G. SILVA, COUNTY COUNSEL

BY: Heather Murray, Senior Deputy County Counsel

PASSED, APPROVED, AND ADOPTED by the Board of Supervisors of the County of San Diego this 10th day of September 2024.



NORA VARGAS
Chair, Board of Supervisors
County of San Diego, State of California

The above Ordinance was adopted by the following vote:

AYES: Vargas, Anderson, Lawson-Remer, Montgomery Steppe

NOES: Desmond

ATTEST my hand and the seal of the Board of Supervisors this 10th day of September 2024.

ANDREW POTTER
Clerk of the Board of Supervisors

By


Nancy Vizcarra, Deputy

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