

CALIFORNIA EMPLOYERS' FAIR CHANCE HIRING TOOLKIT

Maximize your talent pool; minimize your exposure.



ABOUT THE AUTHORS

TOOLKIT PARTNERS:

ROOT & REBOUND is a nonprofit reentry legal education and resource center, and the primary drafter of this Toolkit. Its mission is to transfer power and information from the policy and legal communities to the people most impacted by our criminal justice system through public education, direct legal services, and policy advocacy, so that the law serves, rather than harms, low income communities and communities of color in the United States. Its model combines the creation of public education tools, legal training, direct legal assistance, and systemic reform.

THE LOS ANGELES MAYOR'S OFFICE OF REENTRY established in the Fall of 2015 under the leadership of Mayor Eric Garcetti and managed by Kimberley Guillemet, dedicates city government resources and services to supporting the formerly incarcerated population. Through partnerships, the Office of Reentry intends to make a positive impact on the lives of the formerly incarcerated, and in doing so, make Los Angeles safer and improve economic opportunity for all.

THE LOS ANGELES METRO EMPLOYER ADVISORY COUNCIL (EAC) is the LA regional member of the statewide California Employer Advisory Council (CEAC), a professional consortium of employers and employees who work in partnership with California's Employment Development Department (EDD) to support California businesses and their employees, and produce and share employment and workforce development information and resources. The LA EAC has a local board of business development leaders and experts, and a strong membership base of LA-area businesses. The EAC has further provided input on state employment programs for three decades, and leads 3-4 training seminars each year for LA-area employers to network and understand changes in law and best practices affecting the private sector.

THE CITY OF LOS ANGELES WORKFORCE DEVELOPMENT BOARD, in conjunction with the City Council and Mayor, provides policy guidance, governance, and program oversight of the City of Los Angeles Workforce Development System. Through the development of the Annual Plan, these entities establish the service strategies, activities, and budget of the City's Workforce Development System. Priorities include promoting good jobs for Angelenos all across Los Angeles; creating a more livable and sustainable city; and ensuring our communities are the safest in the nation.

DAVE'S KILLER BREAD FOUNDATION informs and inspires businesses to adopt employment of those with criminal backgrounds. By collaborating with subject matter experts, the foundation offers practical tools and expertise to assist employers in galvanizing Second Chance Employment within their organization. DKBF is a nonprofit founded by Dave's Killer Bread, the #1 selling sliced organic bread in the country, where one third of the employees at their Milwaukie headquarters have a criminal background.

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THANK YOU!

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EXECUTIVE SUMMARY

Today, one in three Americans has a criminal record,¹ and over 60,000 Californians will likely return home from prison this year alone.² This presents California employers with a new and challenging environment, as there is a growing pool of job applicants with criminal histories looking for employment in California. This Toolkit refers to these potential new hires as “Fair Chance workers.”

Fair Chance employment raises competing concerns for employers: banning all people with records makes it almost impossible to meet the growing need for capable employees and exposes employers to serious liability under the new CA Fair Chance Act and risks liability under federal laws as well, but hiring people with records may expose employers to risks that warrant assessment. There are also great potential rewards and incentives to hiring people with records, but how do employers access them?

This Toolkit is designed to help employers navigate this new environment successfully. It contains valuable information on:

1. LEGAL COMPLIANCE & MINIMIZING RISKS

How can employers meet their competing legal obligations under federal and state equal employment laws, background check laws, and negligent hiring risks?

Refusing to hire anyone with a record likely violates federal and state law, but turning down an applicant with a record can be lawful if the employer asks about their record after extending a conditional offer of employment, bases their decision on permissible information, and has made an individualized assessment of the nature of a person’s offense, whether it was recent enough in time to create significant risk, the nature of the job duties as it relates to the person’s background, and any evidence of rehabilitation (i.e., evidence of change, including education, training, and successfully completed programs) and mitigation (i.e., circumstances surrounding the offense that demonstrate it was less serious than it appears).

In this section, employers will learn basic procedures to virtually eliminate the associated risks of liability.

2. CHOOSING A RELIABLE BACKGROUND CHECK COMPANY

There are hundreds of background check companies offering cheap, quick results to employers—but which ones will offer employers the most reliable information? Many online background check companies offer convenience, but use databases that frequently contain errors and outdated information.

By following the tips in this section and asking a few basic questions, employers can avoid untrustworthy companies, and work with screening partners that will help them comply with the law.

3. REWARDS OF HIRING FAIR CHANCE WORKERS

In this section, hear from both large and small employers such as Koch Industries, Dave’s Killer Bread, and Johns Hopkins Hospital, who highlight the benefits that Fair Chance workers’ loyalty and hard work have brought to their businesses and operations.

Because hiring people with records is so beneficial to the community and economy, the federal government and state of California also offer employers financial benefits and tax breaks. Employment of people with records decreases crime, reduces taxes, and contributes to a stronger economy. As part of the community, employers share in these benefits.

4. BEST PRACTICES FOR ONBOARDING & TRAINING FAIR CHANCE WORKERS

Onboarding, training, and retaining any employee is tough, and requires a serious investment of employers’ time and resources. Fortunately, the best practices that apply to any employee can also be applied to workers with records who join the team. Choose the best practices that will help your business identify, onboard, and train these potential new hires to meet your business needs.

CONCLUSION

California employers face challenges from the rapidly expanding number of job applicants with records and changes in law governing how and when an employer can consider an applicant’s background.

For employers interested in follow-up support and continued engagement, we have included “**Action Steps**” throughout the Toolkit that were designed for employers to translate this written resource into successful next steps that they can bring back to their company. If you have any questions, please feel free to contact Root & Rebound at (510) 279-4662.

FOLLOW-UP WITH ROOT & REBOUND

For follow-up support, questions, or to request a training for your business or community:

CALL

Please call Root & Rebound's Reentry Legal Hotline any Friday (except Holiday closures) at phone number (510) 279-4662.

EMAIL

E-mail Root & Rebound's legal team at info@rootandrebound.org, with subject line: CA EMPLOYER TOOLKIT.

WRITE

Write by postal mail to Root & Rebound's office at 1730 Franklin Street, Suite 300, Oakland, CA 94612.

INTRODUCTION

HOW WE GOT HERE

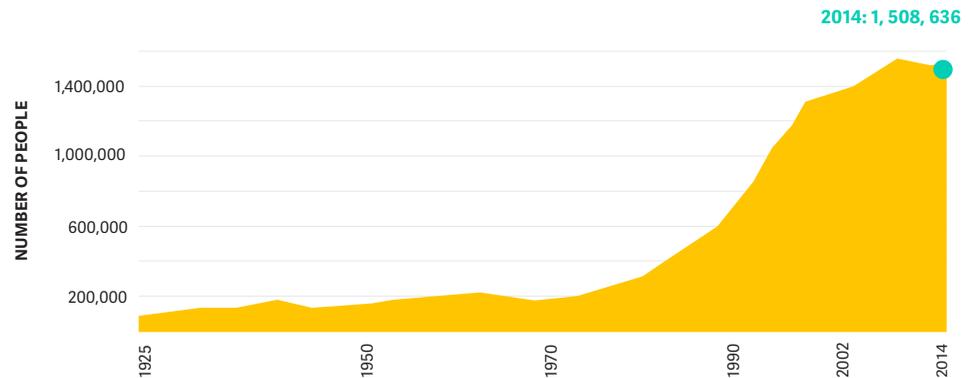
Over the past four decades, the number of Americans with criminal records has soared. In 1980, only one out of every 20 Americans had a criminal record. Today, the number is approaching one in 3. In California in particular, we saw drastic sentencing measures like the Three Strikes Law overwhelm our prison infrastructure. The state of California also added more than 1,000 crime laws to the California Penal Code over the last three decades, furthering mass incarceration across the state.

“The growth in incarceration rates in the United States over the past 40 years is historically unprecedented and internationally unique.”¹³

- National Academy of Sciences, *The Growth of Incarceration in the United States: Exploring Causes and Consequences*

- CALIFORNIA'S PRISON POPULATION HAS GROWN BY MORE THAN 600% SINCE 1978.
- CALIFORNIA BUILT MORE THAN 22 PRISONS AND ONLY ONE UNIVERSITY IN THE LAST 20 YEARS.
- SINCE 1995, THE COST TO CALIFORNIA TAXPAYERS TO IMPRISON ONE PERSON FOR A YEAR HAS INCREASED 82% TO \$60,032 PER PERSON. DURING THAT SAME PERIOD, K-12 PER STUDENT SPENDING ONLY INCREASED 18% TO \$8,210 PER STUDENT.

U.S. STATE AND FEDERAL PRISON POPULATION, 1925-2014



SOURCE: BUREAU OF JUSTICE STATISTICS PRISONERS SERIES

This unprecedented change in our criminal justice system has profound implications for California employers. As our prison and jail population has grown, so has the cost. Today, California spends nearly 10% of its general fund on our prison system, reducing resources available for education and employment support. Furthermore, mass incarceration has largely impacted our most disadvantaged communities and families: people of color, the poor, people with disabilities, and people lacking formal education.

“There’s little doubt that the current system is dysfunctional. . . . We have a two-tiered system, with the wealthy and the well-connected experiencing a much better system than the poor, oftentimes regardless of guilt or innocence. A growing number of Americans recognize this — nearly 80 percent of the country supports reform.”¹⁴

- Mark Holden, General Counsel at Koch Industries

WHERE DO WE GO FROM HERE?

Criminal justice reform is an increasingly relevant and bipartisan effort, with organizations like the American Civil Liberties Union and Koch Industries working together to reduce unnecessary incarceration. While criminal justice reform is a complex issue requiring cross-sector collaboration and dedicated resources, there are ways that each of us can contribute to change.

Businesses that are looking for loyal workers can help by hiring from this untapped pool of talent. Employment is a key factor in reducing recidivism and decreasing crime. Employment helps build confidence and self-worth, reunite families, and allows individuals to contribute to their local economies. This Toolkit has the information businesses need to improve their policies and practices, protect themselves, and positively impact their communities.

- ON ANY GIVEN DAY, ABOUT 9,000 PEOPLE NATIONWIDE ARE IN PRISON OR JAIL FOR VIOLATING THE PROBATION OR PAROLE REQUIREMENT TO HOLD A JOB.⁵
- POST-INCARCERATION EMPLOYMENT SIGNIFICANTLY LOWERS THE CHANCES OF RECIDIVISM.⁶

“Don’t look at this as a social program, and don’t look at this as being altruistic. Look at it as a business decision.... These are good, loyal, solid workers.”

– Vice President of Human Resources at John Hopkins Health System

THE U.S. ECONOMY AS A WHOLE LOST AS MUCH AS \$87 BILLION IN GROSS DOMESTIC PRODUCT BECAUSE OF THE BARRIERS TO EMPLOYMENT FACING FORMERLY INCARCERATED PEOPLE AND PEOPLE WITH FELONY CONVICTIONS.⁷

After reading the Toolkit, we encourage you to use this Checklist of Action Steps to improve your business's "Fair Chance" policies and practices and better protect your company from liability. Look for the orange arrow icon throughout the toolkit to learn about an Action Step, which are summarized below for your reference.

CHECKLIST OF ACTION STEPS

- ❑ **KNOW & SHARE THE FACTS – KNOW & SHARE THIS TOOLKIT!** California's Fair Chance Act, which went into effect on January 1, 2018, places significant limitations on an employer's use of an applicant's conviction history in the hiring process. Read through this Toolkit to ensure you are complying with the new law!

- ❑ **FOLLOW UP WITH ROOT & REBOUND FOR QUESTIONS AND SUPPORT USING THE TOOLKIT.**
Call Root & Rebound's Legal Hotline any Friday, 9 a.m. – 5 p.m. PST, at phone number (510) 279-4662, to receive consultation from a member of its legal team.

- ❑ **FOLLOW THE E.E.O.C. GUIDANCE ON THE CONSIDERATION OF CONVICTIONS AND ARRESTS.**
(This is regulatory guidance to help employers comply with Title VII law.) Read more on [Toolkit page 9](#).

STEP 1- Apply the "Nature-Time-Nature" Test to focus background checks on relevant conviction history that is "consistent with business necessity."

STEP 2- Individually assess those applicants with relevant conviction history.

STEP 3- Apply hiring policies uniformly (regardless of job applicants' race, ethnicity, age, gender, disability, and the like).

- ❑ **CREATE A "RELEVANCY SCREEN" to limit irrelevant information you could receive from a background check company (also called a "consumer reporting agency" or CRA).**
For free consultation, contact expert Lew Maltby, President of the National Workrights Institute, by e-mail at: LMaltby@workrights.org. Read more about developing a relevancy screen in APPENDIX C.
- ❑ **DO NOT CONSIDER OR ASK ABOUT AN APPLICANT'S CONVICTION HISTORY until after making a conditional offer of employment.** As of January 1, 2018, this is required of all California employers with five or more employees (with the exception of certain employers required by law to run background checks on all job applicants). Read more on [Toolkit page 9](#).

- ❑ **CONSIDER EVIDENCE OF REHABILITATION as you assess job applicants.**
See APPENDIX A for a sample list of items your company may wish to consider.

- ❑ **FOLLOW STATE AND FEDERAL BACKGROUND CHECK LAWS** (required by law). Read more on [Toolkit page 13](#).
 - Don't run a background check until after you have extended a conditional offer of employment. This means that the applicant is offered the job subject to consideration of the background check report.
 - Notify a candidate in writing if you plan to run a background check.
 - Get the job candidate's written permission to run a background check.
 - Give the candidate a copy of the report.
 - Give candidates at least five business days to correct errors and provide context to information found in the report.
 - Consider evidence of rehabilitation and mitigation.

- ❑ **CHOOSE A RELIABLE BACKGROUND CHECK COMPANY** (called a "consumer reporting agency" or CRA). Read more on [Toolkit page 14](#).

STEP 1- Go online to the National Association of Professional Background Screeners (NAPBS), the trade association for background check companies, at <https://www.napbs.com/>. Click "Find a Screening Partner" to find an NAPBS-accredited CRA.

STEP 2- Ask a potential CRA the following questions to ensure it is reliable:

- Do you confirm all of the information you obtain with the original criminal justice source? CRA should answer yes.
- Are "matches" reported only when a full name (including middle name) and at least one additional identifier are the same? CRA should answer yes.
- Are "matches" reported only when all the identifiers the CRA has in its possession match? CRA should answer yes.
- How do you maintain the quality and accuracy of your information?
- Do you perform regular independent audits of your research agents and processes?
- Do you make sure your background information is

up-to-date at the time you report it out, OR do you send out a “contemporaneous notice” to the requester of the background check report?

· NOTE: An up-to-date report is far better than the contemporaneous-notice option for ensuring that the CRA is reporting accurate and current information.

- Do you have an attorney on staff to provide legal guidance? CRA should answer yes.

□ **ENGAGE YOUR OWN LEGAL COUNSEL**

(if possible).

Lawyers can help employers develop lawful screening procedures that respect applicants’ rights and help employers collect relevant conviction history information to the job at hand. Additionally, special types of jobs—like those with access to vulnerable populations, law enforcement, health care jobs, etc.—may require a heightened background check. Some background check companies also have legal counsel that will provide such guidance to their clients.

□ **FOLLOW INDUSTRY BEST PRACTICES FOR ONBOARDING & RETAINING FAIR CHANCE WORKERS.**

Read more on [Toolkit page 22](#).

- See the whole person, not just the record.
- Offer a well-structured orientation and onboarding program.
- Offer mentorship.
- Provide ongoing training for all staff, especially human resources personnel.
- Keep records confidential.
- Engage legal counsel.
- Have a Diversity Policy.
- Connect with Workforce Readiness Agencies who do the hard work for your company!



ADDITIONAL FAIR CHANCE EMPLOYMENT ACTION STEPS:

- **VISIT DAVE’S KILLER BREAD FOUNDATION’S “SECOND CHANCE PLAYBOOK”** for educational videos and interviews with Fair Chance employers here: <http://www.dkbfoundation.org/second-chance-playbook.html> (create a user name and password, and the content is free!).

- **SIGN ON TO A FAIR CHANCE BUSINESS PLEDGE.**

- Participate in a local “Blue Ribbon Commission on Employment Equity” (BRC). To participate in the Los Angeles Mayor’s BRC, email the Los Angeles Mayor’s Office at mayor.garcetti@lacity.org, or by calling its main office at (213) 978-0642. To participate in the Bay Area BRC and learn about BRCs in other areas, email Root & Rebound at info@rootandrebounce.org or call (510) 279-4662.

- **ATTEND OR REQUEST A ROOT & REBOUND TRAINING ON FAIR CHANCE EMPLOYMENT.**

Email Root & Rebound at info@rootandrebounce.org or call (510) 279-4662 for more information.

I. LEGAL COMPLIANCE & MINIMIZING RISKS

In Section 1, learn about complex federal, state, and local laws and regulations on hiring people with records in California, so your company can stay compliant and plan for areas of potential risk.

In California, there are federal, state, and sometimes municipal laws that affect how employers screen and hire people with criminal records, who we refer to as “Fair Chance workers” in this Toolkit. While employers can consider prior convictions, the business practices described in this section will help employers comply with the relevant laws and minimize their exposure to liability. In other words, this section explains the **WHAT, WHEN and HOW** for employers to lawfully consider and collect job applicants’ criminal history information.

“ IF YOUR CANDIDATE HAS A CRIMINAL BACKGROUND, THE FIRST STEP IS TO EDUCATE YOURSELF ON THE TOP LEGAL ISSUES. . . . YOUR FOCUS SHOULD BE ON COMPLIANCE WITH [BACKGROUND CHECK LAWS] AND ANTI-DISCRIMINATION LAWS.”⁸

– Angela Preston, vice president of compliance and general counsel at background screening firm EmployeeScreenIQ⁸

WHEN CONSIDERING RECORDS: HOW TO COMPLY WITH ANTI-DISCRIMINATION LAWS — CALIFORNIA & FEDERAL LAW

The **Fair Chance Act** (also called “Ban the Box”) went into effect in California on January 1, 2018.⁹ This new law provides important protections for people with arrest and conviction records from being discriminated against in employment and in the hiring process. Most importantly, the new law prevents a California employer from considering a job applicant’s conviction history *until after the applicant has received a conditional offer of employment*. In other words, *it is illegal to ask about or consider an applicant’s conviction history before a job offer is given* (with a few exceptions, explained below). This means you **cannot ask about an applicant’s conviction history on a job application**, and cannot ask about someone’s conviction history just because you made a determination that the applicant meets the minimum qualifications for the job.

Most—but not all—employers have to follow this new law. It applies to **both public and private employers with 5 or more employees**. The new law does NOT apply to certain types of employers, including employers for which a government agency requires the employer to run a background check on all job applicants, such as law enforcement agencies, and certain jobs where the employer is required by law to run a background check.

The Fair Chance Act replaces an earlier statewide “Ban the Box” law in California. Here is a chart comparing the

Old CA State Law	New CA State Law (“Fair Chance Act”)
<p>Public (Government) Employers: Before Jan. 1, 2018, public employers in CA could <i>not</i> ask about an applicant’s conviction history until <i>after</i> the employer decided the <i>applicant met the minimum job qualifications</i>.</p> <p>Private Employers: Before Jan. 1, 2018, most private employers in CA could ask about a person’s conviction history in the initial job application (written or verbal).</p> <p>Local ordinances in places like Los Angeles County and San Francisco County have stronger protections for job applicants.</p>	<p>Public AND Private Employers (with 5+ Employees): Beginning Jan. 1, 2018, both public and private employers cannot run a background check or inquire into a job applicant’s conviction history until AFTER MAKING A CONDITIONAL OFFER OF EMPLOYMENT TO THE APPLICANT.</p> <p>Local ordinances in places like Los Angeles and San Francisco County that offer additional protections remain in effect.</p>

Once you have offered an applicant a job, you can consider someone’s criminal record in a very limited way. That is, you must make an **“individualized assessment”** to determine **whether the candidate’s conviction history has a direct and adverse relationship to the duties of the job**. This individualized assessment must

consider the nature of the offense, the time since the conviction, and the nature of the job. The individualized assessment originated from the Employment Opportunity Commission (EEOC) guidelines (explained more fully below). If the employer determines that any convictions relate to the duties of the job and decides to take negative action against the applicant, the CA Fair Chance Act requires that the employer notify the applicant of the right to submit evidence of rehabilitation and mitigating circumstances⁴, and requires that the employer consider any such evidence that was submitted.

In 2012, the EEOC issued legal guidance on the consideration of applicants’ prior arrest and conviction history as it relates to Title VII. While the guidance is not federal law, the EEOC’s recommendations were issued to help employers comply with Title VII and relevant federal case law. The EEOC concluded that because African Americans and Latinos are arrested and convicted in numbers far greater than their representation in the general U.S. population, employment policies that exclude all people with prior criminal justice system involvement have an unfair or **“disparate impact”** on racial minorities, likely violating Title VII.

The EEOC developed the following guidance for employers to make sure that: (1) criminal history screening policies are consistent with business necessity and (2) applicants are individually assessed—which is referred to in the Fair Chance Act as the **“Nature-Time-Nature test”** (explained more fully below). As mentioned above, this individualized assessment is now required of California employers who are subject to the Fair Chance Act.

THE INDIVIDUALIZED ASSESSMENT: REQUIRED STEPS TO SELECTING THE RIGHT FAIR CHANCE CANDIDATE

STEP 1 - THE “NATURE-TIME-NATURE” TEST:

To be in compliance with the Fair Chance Act, California employers must apply the Nature-Time-Nature test when considering an applicant’s conviction history after the employer provides a conditional offer of employment in order to first determine whether the conviction history is relevant to the hiring decision and has a direct and adverse relationship to the duties of the job position:

1. Consider the NATURE of the OFFENSE for which the applicant was convicted. This includes things like the type of harm caused, the seriousness of the crime, and whether the offense occurred at work.

Consider Only Convictions That Are Relevant to the Job in Question. Employers should identify the risks presented by the job and screen for convictions whose nature is related to

those risks (e.g., screening Chief Financial Officers for embezzlement convictions; drivers for DUI convictions; or pharmacists for drug trafficking convictions for a certain amount of time following the conviction may make sense). The connection between certain jobs and risks may be obvious, but other times will require judgment calls. Also, it is important to remember that even where an applicant has convictions relevant to the job, that does not mean the applicant should be automatically disqualified from the job, but instead, that further inquiry into their individual circumstances should be made.

2. Consider the TIME that has passed since the applicant committed the offense or conduct, and/or completion of their sentence.

Consider Only Convictions Recent Enough to Indicate a Present Risk. The risk of recidivism decreases over time.¹⁰ Employers should set a cut-off time that reflects available evidence; one study found the risk of repeat offending is negligible after 3, 5, or 7 years, depending on the offense.¹¹ As explained more below, California's consumer protection law prohibits background check companies (called "consumer reporting agencies" or CRAs) from reporting negative information, including convictions, that are more than 7 years old.

3. Consider the NATURE of the JOB held or sought, including:

- The nature of the duties;
- The job's essential and most important functions; and
- The circumstances under which the job is performed (e.g., the level of supervision, oversight and the amount of agency or autonomy the employee has, and the level of access to drugs or personal information, and the environment, such as a home)¹²

Applying this test is important for employers to comply with fair hiring laws and regulations. It also helps employers get **the information they actually need** to make informed hiring decisions about **relevant criminal history**. An employer should not deny an applicant for any conviction that passes this "Nature-Time-Nature" test!



ACTION STEP

Create a "Relevancy Screen" to limit irrelevant information that you could receive from a background check company (also called a consumer reporting agency or "CRA"). Relevancy screens not only help employers comply with the law, they also reduce administrative burdens by weeding out records that are irrelevant to the job. For free consultation on developing relevancy screens, contact expert Lew Maltby, President of the National Workrights Institute, by e-mail at: LMaltby@workrights.org. Read more in APPENDIX C.

STEP 2 - CONSIDER ADDITIONAL FACTORS DURING THE INDIVIDUALIZED ASSESSMENT

Once an employer decides that an applicant's conviction

relates to the duties of the job under the "Nature-Time-Nature" test, the CA Fair Chance Act requires that the employer consider any evidence of rehabilitation or mitigation provided by the applicant. Furthermore, the EEOC guidelines provide other important considerations to determine whether the applicant's conviction history is relevant to the duties of the job and consistent with business necessity.¹³

When making a hiring or employment decision that relies upon conviction history, a Fair Chance employer should consider the following factors:

- The number of offenses for which the individual was convicted;
- The age at the time of conviction, or release from prison;
- Evidence that the individual performed the same type of work, post-conviction, with the same or a different employer, with no known incidents of criminal conduct;
- The length and consistency of employment history before and after the offense or conduct;
- Evidence of rehabilitation and efforts to change, e.g., education/training;
- Mitigating facts or circumstances surrounding the offense or conduct;
- Employment or character references, and any other information regarding fitness for the particular position; and
- Whether the individual is bonded under a federal, state, or local bonding program.¹⁴

Note: If you work in a city or county with local ordinances that provide additional legal protections for job applicants with conviction histories, these additional rights are still in effect. For instance, a Los Angeles City ordinance requires that employers make a written record of their individualized assessments about an applicant's conviction history in writing.



ACTION STEP

Consider evidence of rehabilitation as you assess job applicants. See APPENDIX A for a sample list of items your company may wish to consider.

STEP 3 - APPLY HIRING POLICIES UNIFORMLY:

To comply with anti-discrimination laws, employers must apply hiring policies uniformly to all applicants across all backgrounds—regardless of race, gender, religion, age, disability, and so on.¹⁵



ACTION STEP

To limit exposure to liability under Title VII, employers should follow these steps:

- STEP 1 – Apply the "Nature-Time-Nature" Test to get conviction information that is relevant to the job you're hiring for and "consistent with business necessity."
- STEP 2 – Individually assess applicants with relevant criminal backgrounds.
- STEP 3 – Apply employment policies uniformly.

WHEN **COLLECTING** RECORDS: HOW TO COMPLY WITH BACKGROUND CHECK & “BAN-THE-BOX” LAWS

Not only are there laws and regulations governing **WHAT** criminal records an employer can consider; there are also laws that govern **HOW & WHEN** an employer can collect criminal records.

TIMING UNDER THE FAIR CHANCE ACT

Under California’s new Fair Chance Act, employers must wait to run a background check until after giving the applicant a job offer that can be taken back only if the individual’s conviction history is directly and adversely related to the duties of the job.

STEPS A CALIFORNIA EMPLOYER MUST TAKE IN RUNNING BACKGROUND CHECKS

California background check laws require employers to take the following steps if collecting conviction history information from a background check company (also called a “consumer reporting agency” or CRA):

- **Notice to and Written Permission by the Applicant:** A California employer must provide the job applicant clear written notice that it will be conducting a criminal background check and get the applicant’s written permission before running the check.
- **A Copy of the Background Report:** Within 3 days of receiving the background report, an employer must provide a copy to the job applicant if requested or if the employer is taking an adverse action.
- If an employer is going to take a **negative action** against the job applicant or an employee based on information in a background report (e.g., not hiring the applicant), it must follow these steps:
 - **STEP 1 - Before taking any negative action, provide the applicant a “pre-adverse action notice” which must:**
 - Explain that the employer is taking an adverse action against the applicant;
 - Identify the conviction(s) which the adverse action is based on;
 - Provide a copy of the report that was generated;
 - Provide contact information for the credit agency, and notice that the applicant will have access to their background check from the company for 60 days;¹⁶ and Provide a copy of the Federal Trade Commission document “A Summary of Your Rights under FCRA” before the negative action is taken—giving the applicant a reasonable opportunity to clear up any inaccuracies in the report.¹⁷
 - Inform the applicant that they have the right to respond within 5 business days by correcting information in the report, providing evidence of rehabilitation or other mitigating circumstances.¹⁸
 - **STEP 2 - If the applicant responds with information of errors, or evidence of rehabilitation and mitigating circumstances, the employer must consider that information when make a final decision about whether to take the adverse action.**
 - Additionally, if the applicant notifies the employer within those 5 business days in writing that they dispute the accuracy of the information in the report, the applicant will receive an additional 5 business days (10 business days total) to respond to the notice.
 - **STEP 3 - If the applicant does not respond within the time limit or the employer decides to take the adverse action after considering the supplemental information, then the employer must provide the applicant with a written “Adverse Action Notice.” This notice must include the following:**
 - Information that the consumer reporting agency did not make the determination to take an adverse action against the applicant;
 - Any procedure the employer has to challenge the final disqualification; and
 - The applicant’s rights to file a complaint with the California Department of Fair Housing and Employment.



ACTION STEP

See an example of an “Adverse Action” letter and a copy of the document “A Summary of Your Rights under FCRA” in APPENDIX B.

WHAT’S UNLAWFUL TO REPORT AND/OR CONSIDER

Under state and federal law, CRAs cannot report certain records to most employers, and employers cannot ask about certain records. Thus, it is critical to find and use a company that is reliable and lawful in its reporting methods.

- **MORE THAN 150 CITIES AND COUNTIES, 32 STATES, AND THE DISTRICT OF COLUMBIA HAVE NOW ADOPTED “BAN-THE-BOX” LAWS THAT POSTPONE QUESTIONS ABOUT CONVICTION HISTORIES UNTIL AFTER THE EMPLOYER HAS DETERMINED THE APPLICANT MEETS MINIMUM JOB QUALIFICATIONS.**¹⁹
- **THERE ARE STRONGER PROTECTIONS IN CERTAIN CITIES & COUNTIES: FOR A DETAILED BREAKDOWN OF BAN-THE-BOX LAWS ACROSS CITIES AND COUNTIES IN CALIFORNIA, SEE THE CHART IN APPENDIX D, ADAPTED FROM THE NATIONAL EMPLOYMENT LAW PROJECT.**

DURING THE BACKGROUND CHECK AND HIRING PROCESS, EMPLOYERS CANNOT ASK ABOUT THE FOLLOWING:

- **Arrests not leading to a conviction** – unless the arrest is still pending – and if this is the case, the CRA must have verified the pending arrest within 30 days before the report.²⁰ Otherwise, CRAs are forbidden from reporting this information.²¹
- **Arrests, convictions, or juvenile adjudications that have been sealed, dismissed, expunged, or statutorily eradicated.** Note: When applying to most private employers, applicants can lawfully report they have never been convicted of an offense that was later sealed, dismissed, or otherwise disposed of.²²
- **Convictions for minor marijuana-related offenses, if the conviction is over 2 years old.**²³
- **Arrests that led to the completion of a diversion program.**²⁴

CRAs are also forbidden from reporting the following information in California:

- **Negative information, including convictions, older than 7 years** (from the date of sentencing) – unless another law requires employers to look deeper into the job applicant’s background.²⁵

IMPORTANT EXCEPTION Many public employers, law enforcement, health facilities, and licensing agencies can see much more or often full conviction and arrest history information. Such employers should **consult with a lawyer** to ensure their policies are meeting all relevant requirements for background screens.

To find a reliable background check company, or CRA, see [Toolkit page 14](#).

ARE THERE LEGAL RISKS TO HIRING FAIR CHANCE WORKERS?

Employers have a legitimate concern for the care and safety of their company and staff, and for minimizing their exposure to lawsuits. When hiring someone with a record, employers may worry:

- *Is the employee going to steal from the company?*
- *Is the employee going to harm someone on the job?*
- *Can someone sue me if an employee with a record does something wrong on the job?*

NEGLIGENT HIRING LIABILITY: LOW RISK AND LOW COST TO EMPLOYERS

Employers can only be found liable for hiring an employee with a criminal record if the employer: (1) knew or had reason to know of a specific risk posed by the employee’s record (so that the harm was foreseeable) and (2) that specific risk caused the victim’s injuries while the employee was on duty. This kind of liability is called **negligent hiring**. However, negligent hiring liability can be nearly eliminated by putting in place fair and lawful screening procedures, as outlined in this Toolkit.

Furthermore, courts have been hesitant to find an employer at fault for hiring someone with a conviction history who later causes harm, particularly where the employer made reasonable efforts to check a person’s background for red flags. This is another reason why individual assessments are critical, because they help show a court that an employer made reasonable efforts to

identify any obvious risks under the “Nature-Time-Nature Test,” described above on [Toolkit pages 9-10](#).

TYPES OF JOBS WITH INCREASED NEGLIGENT HIRING RISK

The few cases of negligent hiring that are filed—approximately 300 per year across the country—almost always involve one of the following types of jobs:

- Access to a vulnerable population (e.g., patients, children or elderly people)
- Access to cash
- Operating a motor vehicle
- Law enforcement
- Use of firearms

For all other jobs, negligent hiring cases are virtually non-existent.

In a recent study of negligent hiring cases, there was none in which an employer was found at fault when they followed the best practices for considering criminal history information, as outlined in this Toolkit.²⁶ In sum, the risk of exposure for negligent hiring is extremely low, and employers can virtually eliminate that risk by implementing fair and lawful hiring and screening practices, especially for job positions with access to sensitive populations, cash, or weapons.



ACTION STEP

Engage your own legal counsel (if possible). Lawyers can help employers develop lawful screening procedures that respect applicants’ rights and help employers collect relevant criminal history information to the job at hand. Additionally, special types of jobs—like those with access to vulnerable populations, law enforcement, health care jobs, etc.—may require a heightened background check. Some background check companies also have legal counsel that will provide such guidance to their clients.



ACTION STEP

For an insider perspective on “Second Chance” employment, visit the Dave’s Killer Bread Foundation website dedicated to educating employers through videos and interviews on best practices of Second Chance employment. In particular, see the “Risk Mitigation” video. Sign-up and content is free online at: <http://www.dkbfoundation.org/second-chance-play-book.html>.

NEGLIGENT HIRING LIABILITY: LOW RISK, LOW COST

- **OVER THE LAST DECADE, THE AVERAGE COST TO AN EMPLOYER RELATED TO DEFENDING NEGLIGENCE CLAIMS FOR HIRING A PERSON WITH A RECORD WAS ONLY \$5 PER WORKER.**²⁷
- **ONLY ABOUT 1% OF EMPLOYERS HAVE EVER BEEN SUED FOR NEGLIGENT HIRING OF A PERSON WITH A CRIMINAL RECORD—AND THE PERCENT IS SIGNIFICANTLY LOWER FOR THE CASES WHERE EMPLOYERS WERE ACTUALLY FOUND LIABLE.**²⁸

II. CHOOSING A RELIABLE BACKGROUND CHECK COMPANY

In Section 2, learn best practices for choosing the right background check company for your business so employers can both meet their business needs and satisfy their legal obligations.

While there is no law requiring the majority of employers to conduct criminal background checks on prospective employees, most employers feel it is important to do so, especially for jobs with access to sensitive populations or items. For employers who do choose to screen their job applicants—or in some cases, are required by law to screen them—it is vitally important that background check companies provide accurate and reliable reports.

Erroneous reports can result in:

- Employers turning away the most qualified applicant for the job.
- Hiring people whose records may make them unsuitable for certain jobs.
- Liability for employers who rely on information they cannot legally view or use.

“WITH THE ADVENT OF THE INTERNET, AND THE MANY TOOLS AVAILABLE, YOU ENTER IN “BACKGROUND CHECKS” IN ANY SEARCH ENGINE AND ALL OF A SUDDEN YOU HAVE 55 OPPORTUNITIES TO SPEND \$29.95. BUT THESE TEND TO BE HORRIBLE BACKGROUND CHECKS. ...BACKGROUND CHECKS AREN’T A COMMODITY; THERE IS NO SUCH THING AS AN INSTANT-BACKGROUND-CHECK.”

– Fred Giles, Senior Executive at CARCO, a Qualified Consumer Reporting Agency

Not all Consumer Reporting Agencies (CRAs) are created equal. Even the FBI estimates that an astonishing 50% of its criminal records contain errors.²⁹ Employers need to evaluate prospective CRAs carefully so they get reliable information and avoid violating the rights of job applicants. Many CRAs try to attract business by offering results cheaply and quickly online. But these reports are not reliable. An accurate criminal background check requires using multiple criminal justice sources, some of them in person, which cannot be done through the Internet alone. **Employers should work with experienced, reputable CRAs in order to conduct background screening.**

WHAT ARE SOME COMMON MISTAKES IN BACKGROUND CHECKS?

- Information about a different person.
- Dismissed, sealed or expunged records are reported.
- Incomplete records (e.g., ones that have no disposition).
- Misleading displays of information (e.g., report a single charge multiple times or in multiple sections of the report).
- Reporting inactive, “quashed” warrants.
- Misclassifications of the type of offense.³⁰

To better avoid the pitfalls and liability that comes with erroneous background checks, employers can follow the “best practices” steps below for choosing a reliable, qualified background check company.

BEST PRACTICES FOR CHOOSING A RELIABLE, QUALIFIED BACKGROUND CHECK COMPANY

STEP 1 - FIND AN ACCREDITED CRA.

An employer should verify that any prospective CRA is accredited with the National Association of Professional Background Screeners (NAPBS), the trade association for background check companies.

A CRA without NAPBS accreditation is unlikely to have written policies and procedures that ensure accurate and legally compliant reports, putting both potential employees and employers at risk.

NAPBS accreditation alone, however, is not enough. It represents minimum standards that all reputable CRAs should meet. The best CRAs can and do exceed this standard.



ACTION STEP

Go online to <https://www.napbs.com/>, and click “Find a Screening Partner” to find an NAPBS-accredited CRA. Ask any potential CRA the questions listed under Step 2 of this section.

STEP 2 - ASK THE RIGHT QUESTIONS OF THE CRA TO DETERMINE IF IT IS RELIABLE.

As recommended by industry experts, employers should ask a potential CRA the following questions to determine if it is producing reliable, accurate reports.³¹



ACTION STEP

Ask a potential CRA the following questions:

- Do you confirm all of the information you obtain with the original criminal justice source? CRA should answer yes.
- Are “matches” reported only when a full name (including middle name) and at least one additional identifier are the same? CRA should answer yes.
- Are “matches” reported only when all the identifiers the CRA has in its possession match? CRA should answer yes.
- How do you maintain the quality and accuracy of your information?
- Do you perform regular independent audits of your research agents and processes?
- Do you make sure your background information is up-to-date at the time you report it out, OR do you send out a “contemporaneous notice” to the requester of the background check report? (NOTE: An up-to-date report is far better than the contemporaneous-notice option for ensuring that the CRA is reporting accurate and current information.)
- Do you have an attorney on staff to provide legal guidance? CRA should answer yes.

REMEMBER: Employers should not select a CRA based on price alone. There is no single database that contains all the information that is needed to create an accurate, legally compliant report on a person’s background. Choose an NAPBS-accredited CRA that follows the best practices in this section to minimize your company’s exposure, and get reliable information about job applicants.

III. REWARDS OF HIRING FAIR CHANCE WORKERS

In Section 3, learn about the enormous rewards—increasing the pool of talented, loyal workers and financial incentives—of hiring Fair Chance workers.

The success of any business depends on hiring the right people. When more than 1 in 4 Californians has a criminal record, employers severely limit their talent pool if they don't carefully consider Fair Chance job candidates. By hiring and recruiting such workers, employers create more opportunities to hire talented, loyal employees.

Fair Chance employment does not require an employer to hire someone unfit for a particular job—rather, it opens opportunities to workers who are often wrongly overlooked, increasing the talent pool as well as boosting the economic growth of California and its businesses.

Still, many fear that someone with a criminal record may be dangerous, unreliable, or untrustworthy. In fact, many Fair Chance workers have experiences and characteristics that make them ideal employees, and available data shows that they perform equal to or better at work than their counterparts without records.

This section will share some of the rewards and incentives for hiring talented employees through Fair Chance policies.

**“WE AS A BUSINESS COMMUNITY NEED TO UNDERSTAND THAT
UNLESS WE CULTIVATE A SUCCESSFUL POOL OF CANDIDATES, WE
WON'T HAVE ENOUGH TALENT TO MANAGE OUR BUSINESSES.”¹³²**

– Kenyatta Brame, Executive Vice President at Cascade Engineering.

REWARD: PERFORMANCE ON THE JOB

The following case studies demonstrate that qualified employees with prior records represent an untapped talent pool that should have a fair chance at being considered for work—to the benefit of employers and employees alike.

EMPLOYERS—BOTH LARGE AND SMALL—HAVE EXPERIENCED DOCUMENTED SUCCESS IN HIRING FAIR CHANCE WORKERS:

- **JOHNS HOPKINS HEALTH SYSTEM & HOSPITAL has employed hundreds of people with criminal records since 2000, making up 5% of its yearly hires.**

A study conducted among their workforce found that, over a four-year period, evaluations of employees with criminal records were not significantly different from employees without records. Furthermore, the Fair Chance workers had a retention rate of 43%, significantly better than the rate for those without a record. Their Vice President of Human Resources also reported that they had never fired one of their employees with records due to problematic behavior.³³

- **DAVE'S KILLER BREAD, one of the fastest-growing baking companies in North America, has been a private sector leader in hiring Fair Chance workers and has put the practice at the heart of the company's identity.**

Dave's Killer Bread reports that its Fair Chance hiring practices have led to a lower turnover rate than the baking industry as a whole, helping them secure a significant advantage over their competitors. The company is currently undergoing a study with partnering businesses to assess the economic impacts of hiring Fair Chance workers.

- **BUTTERBALL FARMS, INC., the largest supplier of specialty butters in North America, has been a private sector leader in hiring Fair Chance workers.**

In 2015, 57% of Butterball's hires had criminal records. Butterball found that turnover rates for hires with felony backgrounds were nearly identical to turnover rates for employees without felony backgrounds.³⁴ These practices inspired nearby Michigan-based employers Cascade Engineering and Grand Rapids Community College, to come together to start a new initiative: 30-2-2, which is enlisting 30 companies to employ two formerly incarcerated workers for two years each. Today the program has placed over 100 employees at 19 companies, and recently inspired local leaders in New Orleans to launch their own version of the program.³⁵

- **THE UNITED STATES ARMY – the nation's largest employer – presents an interesting test case.**

Between 2002 and 2009, the Army granted an unusually high number of waivers allowing people with prior felony convictions to enlist who were previously barred. Researchers found that enlistees with felony waivers were no more likely to be subject to early termination and showed no higher rates of overall negative performance than enlistees without felony waivers. *In fact, enlistees with felony waivers were also more likely to receive promotions – including high-level promotions above the rank of sergeant – than their counterparts without waivers.*³⁶

- **VIRGIN GROUP, the multinational group headed by billionaire Richard Branson, has been an international leader in fair chance employment.**

In 2015, 3% of the company's new hires had criminal records. The Virgin Group has published materials designed to introduce other multinational employers to Fair Chance employment.³⁷

SUCCESS IN SAN FRANCISCO – FAIR CHANCE HIRING LAW BENEFITS BOTH FAIR CHANCE EMPLOYERS AND WORKERS:

- In 2015, the city and county of San Francisco invited a team of Stanford University public policy students to research the effects of its "Fair Chance Ordinance"—a law that expanded California's "Ban-the-Box" law to cover **private employers** in San Francisco starting August 13, 2014.
- To conduct the study, the team analyzed data for roughly **5,000 of San Francisco's employees** hired in the prior year and a half.
- They found **NO** differences in performance between the approximately **800 persons with a conviction** to new hires without convictions.
- Specifically, in reviewing the proportion who were terminated for unsuccessful job performance (e.g., failure to appear for work, or a disciplinary action), the **proportions were equal for employees with and without records.**
- In addition, when looking at the city's policy for evaluating a group of candidates whose specific convictions triggered additional inquiry — a group of about 170 individuals — the team found that the policy **opened pathways to employment regardless of the type of crime the candidate had committed.**³⁸

ON COMPANY LOYALTY:

FAIR CHANCE EMPLOYERS:

We have been hiring returning citizens for several years. We have found that these employees genuinely appreciate the opportunity to participate in the workforce and often end up being the most productive members of our team.

– Mark Peters, CEO, Butterball Farms³⁹

Many of these employees are our best employees, people who truly and sincerely made a mistake and have turned their lives around and have done great things with themselves and their careers.

– Keith Maki, Director of Marketing, Cascade Engineering⁴⁰

FAIR CHANCE WORKERS:

We come in with a different expectation. You get so many no's, and now this one company has said yes. ...Very rarely do you find that person who wants to blow that opportunity.

– Jahaun McKinley, Lead Systems Manager, Cascade Engineering⁴¹

I came here and I saw other people that were on the prison yard with me and I saw them getting promoted. At the end of every shift my supervisor would come to me and say, "Hey, you're doing great. See you tomorrow!" I knew if I kept working and kept learning and going that extra step that I would make a wage that I could actually live on that I wouldn't have to supplement in other ways. When an employer goes that extra step a person can't help but go that extra step too.

– Steven, Make-Up Department, Dave's Killer Bread⁴²

REWARD: LOYALTY OF FAIR CHANCE WORKERS

The success of any business depends on hiring employees who are committed to the success of their employer, and who support the culture and goals of the workplace. Many employers report that their Fair Chance workers feel a special connection and loyalty to the company.

In the box to the left, hear from Fair Chance business leaders and prized workers who share their experiences of company loyalty.

REWARD: BOOST THE ECONOMY AND INDIVIDUAL PRODUCTIVITY

Fair Chance employment has the potential to improve the economic health not just of individual businesses, but of the greater economy, in California and beyond.

Currently, Fair Chance workers face considerable barriers to employment for many reasons, including:

- *the stigma of incarceration;*
- *myths and stereotypes of workers with records as untrustworthy and dangerous;*
- *the erosion of basic job skills and disruption of formal education;*
- *loss of social and professional networks that can improve job-finding prospects;*
- *discrimination based on illegal or unreliable screening practices; and*
- *the deterioration of "people skills" after years of separation and isolation.⁴³*

These barriers to employment may be compounded by other forms of discrimination based on race, ethnicity, language, gender, and/or disability status.

A study of 2014 employment rates found that barriers to employment faced by formerly incarcerated people and people with felony convictions led to a **loss of up to 1.9 million workers**, costing the U.S. economy as much as **\$87 billion** in gross domestic product.⁴⁴ When it comes to race, the breakdown is even more grim. Black men who are formerly incarcerated suffered a 4.7 to 5.4 percentage point reduction in their employment rate in 2014. Latino men saw a reduction of as much as 1.6 percentage points, while the drop was up to 1.3 percentage points for white men.⁴⁵

Through Fair Chance hiring, employers decrease unemployment, and increase economic productivity and health.

REWARD: FINANCIAL INCENTIVES FOR INCREASING THE CANDIDATE POOL

The State of California and the federal government offer financial incentives to employers to encourage Fair Chance hiring.

FEDERAL INCENTIVES:

Work Opportunity Tax Credit (WOTC)

WOTC is a federal tax credit available to employers who hire and retain workers who face significant barriers to employment, including people with previous felony convictions under any state or federal law. Employers can receive up to \$9,600 per eligible employee hired in federal income tax credits.

The WOTC requires the employee and employer to fill out a few forms and submit them to a state certification agency. Visit <https://www.doleta.gov/business/incentives/opptax/> to learn more and download forms.

Federal Fidelity Bonding

The U.S. Department of Labor (DOL), in partnership with the California Employment Development Department (EDD), provides free "bonding insurance" for employers who hire workers with previous felony convictions for acts that include employee dishonesty. While only 1% of Federal Fidelity Bonds are ever claimed, the program can give employers peace of mind in the unlikely event of covered employee misconduct. These bonds can range from \$5,000 to \$15,000, and last for six months after they are issued. Both part-time and full-time employees are eligible, including workers hired by temp agencies.⁴⁶

Fidelity Bonding requires no paperwork from employees or employers! To apply, an employee can visit their local EDD Workforce Services or America's Job Center site in California. Find your local America's Job Center of California location online at: http://www.edd.ca.gov/office_locator/.

CALIFORNIA STATE INCENTIVES:

California New Employment Tax Credit

The California New Employment Tax Credit is a state business income tax credit, run by the Governor's Office of Business and Economic Development (GO-BIZ). It's designed to reward employers who pay livable wages in select regions of California with the highest poverty and unemployment rates.

Employers who hire employees with a previous felony conviction can receive the credit for employees who are paid between 150% and 350% of the state's minimum wage, who are also salaried employees OR work at least 35 hours per week.⁴⁷ The portion of the employee's wages between 150% and 350% of the state's minimum wage are eligible for this tax credit.⁴⁸

Under California's \$11 per hour minimum wage law, employers qualify for the Tax Credit for employees earning between \$15 and \$35 per hour. For example, an employee earning \$20 per hour would qualify for \$5 per hour in tax credits for their employer (\$20-\$15 = 5). If the employee works 2000 hours that year, they would qualify for \$10,000 in tax credits for their employer (\$5 per hour x 2000 hours = \$10,000.)

(Please note: some places in California have higher minimum wage requirements than the state amount.)

IV. BEST PRACTICES FOR ONBOARDING & TRAINING

In Section 4, learn about industry best practices for recruiting, onboarding, and retaining Fair Chance workers.

In most ways, Fair Chance workers are no different than any other employee. So many of the best practices for onboarding and retaining employees, generally, will apply equally well to Fair Chance practices. Fair Chance workers want to know that they are a part of the team, and that they will be subject to the same expectations and fair treatment as anyone else at the company.

This section shares some best practices and tips from the field that will make Fair Chance workers more successful in transitioning into employment with your company.

“ ANYONE IN A NEW JOB IS GOING TO FEEL A LITTLE TIMID GOING INTO IT... [A MENTOR] CAN HELP RELAX PEOPLE’S NERVES AND HELP THEM FEEL LIKE PART OF THE TEAM RIGHT AWAY.”

– Sara Baier, HR Generalist, Dave’s Killer Bread

SEE THE WHOLE PERSON, NOT JUST THE RECORD

In the hiring and on-boarding process, it's important to make sure any job candidate is ready, that they've taken responsibility for what has happened, and that they have the resources and support they need to succeed in full-time work. For a list of workforce development organizations that can assist your company in recruiting talented Fair Chance workers who are a good fit for the job, see the list on [Toolkit page 24](#).

OFFER A WELL-STRUCTURED ORIENTATION & ON-BOARDING PROGRAM

For all employees, not just Fair Chance workers, a well-structured onboarding and orientation program leads to good retention rates. In one study, new employees who attended a structured orientation program were 69 percent more likely to remain at the company up to three years.⁴⁹ Other studies have shown that good on-boarding leads to: higher job satisfaction; organizational commitment; lower turnover; higher performance levels; career effectiveness; and lowered stress.⁵⁰ Incorporating information about the company's fair hiring and H.R. practices can improve the overall health of a company and retention of its employees.

OFFER MENTORSHIP

Many employers have found that creating a strong mentorship program that pairs experienced employees with new employees can be helpful. Mentorship programs can help provide new employees, including those with records, an open space to ask questions or voice concerns that they may feel uncomfortable sharing with others.

PROVIDE ONGOING TRAINING FOR ALL STAFF, ESPECIALLY HUMAN RESOURCES PERSONNEL

It is critical for employers to provide ongoing training for all staff on fair hiring and Fair Chance employment, especially anyone involved in upper management, Human Resources, or hiring decisions.

In addition, training for all staff, not just upper management and H.R. personnel, can help to reduce the stigma and stereotypes that often attach to Fair Chance workers. We hope this Toolkit provides employers with factual information and guidance to help quell workplace concerns.

KEEP RECORDS CONFIDENTIAL

Fair Chance workers should be given a safe space for discussing the impact of their histories, without being targeted, stereotyped, isolated, or harmed. A best practice is to keep any criminal history information confidential, and to only share it with others at the company when

there is a business need for doing so. In interviews with employers for the development of this Toolkit, many Fair Chance employers reported conflict within the company when a manager disclosed a worker's record without his or her permission.

ENGAGE LEGAL COUNSEL

It is challenging to create a corporate policy for how to collect and consider criminal record background checks that complies with ALL applicable federal, state, and local laws. This Toolkit is intended to simplify California employers' legal obligations and risks, but is not a substitute for legal counsel and is not intended to be legal advice. Involving legal counsel will help an employer consider all of its legal obligations and risks more carefully, and in a way that is tailored to the particular needs of a given company and job position. Legal counsel will be able to make sure a business is compliant in how it collects and considers criminal records

HAVE A DIVERSITY POLICY

A strong diversity policy improves company performance AND provides a solid foundation for collecting and considering criminal background information in a fair and lawful manner. Diversity is not simply about race, age, or gender; it extends to differences in personal backgrounds and experiences.

An employer looking to increase its hiring of Fair Chance workers in particular may even consider adding a line to the "equal opportunity" statement on its job postings with a note that it will not discriminate on the basis of irrelevant conviction history information. This can create a signal of workplace diversity for those with prior criminal justice involvement.

CONNECT WITH WORKFORCE READINESS AGENCIES WHO DO THE HARD WORK FOR YOUR COMPANY!

For employers interested in reaching out to the Fair Chance workforce as potential new hires, below are a number of resources to connect and find the right fit!

STATEWIDE

- *America's Job Centers: Allow community stakeholders to connect with employers and employees. For more information, go to: <http://www.americasjobcenter.ca.gov/>.*
- *Staffing Agencies: Experienced staffing agencies can help vet potential employees and know what sorts of needs they have as they reenter the workforce.*
- *Reentry Focused Nonprofits & State Agencies: Many non-profit organizations in California focus on helping individuals with criminal histories reintegrate into mainstream society.*



ACTION STEP

Connect with nonprofit workforce development agencies to help your company identify talented Fair Chance workers who have been vetted and prepared to be a good fit for your workplace. Call Root & Rebound's Hotline at (510) 279-4662 for referrals.

WATCH ONLINE EDUCATIONAL VIDEOS

We recommend visiting the Dave's Killer Bread Foundation "Second Chance Playbook" website for educational videos and interviews on Second Chance employment here: <http://www.dkbfoundation.org/second-chance-playbook.html> (create a user name and password, and the content is free!).

One in three employee-partners at Dave's Killer Bread, the fastest growing bread company in the country, has a criminal background. In 2015, Dave's Killer Bread introduced its non-profit, the Dave's Killer Bread Foundation, with the mission to inspire other businesses to become Second Chance Employers to reduce the impacts of mass incarceration and recidivism, and to affect positive societal change.

TAKE A FAIR CHANCE BUSINESS PLEDGE

Sign on to a fair chance business pledge to show your support for Fair Chance Employment practices, and join a network of businesses committed to fair hiring practices.

THE FAIR CHANCE BUSINESS PLEDGE OF THE FORMER WHITE HOUSE:

During the Obama Administration, the White House highlighted the importance of giving Fair Chance workers a fair opportunity to find gainful employment and invited the business community to join them through its Fair Chance Business Pledge. Employers who participated in the Fair Chance Business Pledge made a commitment to "remove unnecessary barriers that may prevent these individuals from gaining access to employment, training, education and other basic tools required for success in life." This includes promoting fair chance hiring policies and taking action locally.

A number of internationally recognized employers signed the White House Fair Chance Business Pledge of the Obama Administration, including the Coca-Cola Company, Facebook, Georgia Pacific, Google, Greyston Bakery, The Hershey Company, The Johns Hopkins Hospital and Health System, Koch Industries, Libra Group,

PepsiCo, Prudential, Starbucks, Uber, Under Armour/ Plank Industries, Unilever, and Xerox.

LOS ANGELES MAYOR'S OFFICE BLUE RIBBON COMMISSION ON EMPLOYMENT EQUITY:

In Los Angeles, Mayor Eric Garcetti launched the city-wide Blue Ribbon Commission on Employment Equity in April of 2016, to draw citywide attention to the need for providing new opportunities to historically underemployed Angelenos. As a part of this effort, business and nonprofit members of the Blue Ribbon Commission have agreed to refrain from asking job applicants about their criminal histories until they have given them a conditional offer of employment, and to develop recruiting and on-boarding policies designed for populations which have historically been unemployed or underemployed.

Members of the Commission include the Chamber of Commerce of Los Angeles County, the National Association of Women Business Owners, Uber, Lyft, the Black Business Association, Luxe, Root & Rebound, Isidore Recycling, Coalition for Responsible Community Development Enterprises, and more.⁵¹



ACTION STEP

Employers who wish to participate in the Los Angeles Mayor's "Blue Ribbon Commission on Employment Equity" can do so by e-mailing the Los Angeles Mayor's Office at mayor.garcetti@lacity.org or by calling its main office at phone number (213) 978-0600.

BAY AREA BLUE RIBBON COMMISSION:

The Bay Area Blue Ribbon Commission launched in June 2017. It is comprised of private for-profit and non-profit and government employers of various sizes, and from various industries, doing business in the Bay Area, that have answered the call to action to increase employment opportunities for Bay Area residents with criminal records.



ACTION STEP

Employers who wish to participate in the Bay Area Blue Ribbon Commission can do so by e-mailing Root & Rebound at info@rootandrebound.org. Employers in other areas of the state who are interested in joining a similar commission in their area can also contact for information on ongoing regional efforts to organize these commissions.

“AROUND 70 MILLION AMERICANS HAVE SOME SORT OF CRIMINAL RECORD ... NOW, A LOT OF TIME, THAT RECORD DISQUALIFIES YOU FROM BEING A FULL PARTICIPANT IN OUR SOCIETY — EVEN IF YOU’VE ALREADY PAID YOUR DEBT TO SOCIETY. IT MEANS MILLIONS OF AMERICANS HAVE DIFFICULTY EVEN GETTING THEIR FOOT IN THE DOOR TO TRY TO GET A JOB MUCH LESS ACTUALLY HANG ON TO THAT JOB. THAT’S BAD FOR NOT ONLY THOSE INDIVIDUALS, IT’S BAD FOR OUR ECONOMY. IT’S BAD FOR THE COMMUNITIES THAT DESPERATELY NEED MORE ROLE MODELS WHO ARE GAINFULLY EMPLOYED. SO WE’VE GOT TO MAKE SURE AMERICANS WHO’VE PAID THEIR DEBT TO SOCIETY CAN EARN THEIR SECOND CHANCE.”

- President Obama, November 2, 2015

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APPENDICES

APPENDIX A. SAMPLE LIST OF EVIDENCE OF REHABILITATION

APPENDIX B. SAMPLE NOTICES:

- "A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT" &
- SAMPLE ADVERSE ACTION NOTICE

APPENDIX C. RELEVANCY SCREEN & MATRIX

APPENDIX D. SUMMARY OF CALIFORNIA BAN-THE-BOX LAWS: STATE AND LOCAL

APPENDIX A. SAMPLE LIST OF EVIDENCE OF REHABILITATION

Hiring the right person is no easy job—it requires an investment of time, money and training with limited information. Criminal history information may or may not be relevant to the job at hand, but for employers who are conducting individualized assessments, and looking into the context of a person’s history, below are activities and documentation of various types of “rehabilitation,” meaning positive steps a person has taken since his or her criminal justice system involvement.

Below is a sample list of evidence and activities that can demonstrate a person’s rehabilitation, which employers can ask for and consider to get a fuller context of a Fair Chance job applicant’s rehabilitation and readiness for work.⁵²

EDUCATIONAL ATTAINMENT:

- *Degrees Earned*
- *Transcript letter from a teacher or school administrator who can attest to the applicant’s school enrollment; course completion; and other aspects of their engagement like attendance, punctuality, leadership, strong grades, motivation to succeed, etc.*

JOB TRAINING OR INTERNSHIPS:

- *Proof of job training participation*
- *A letter from a program supervisor or administrator, who can attest to the applicant’s participation; program completion; and other aspects of their performance like attendance, punctuality, skills acquired relevant to the job sought, leadership, motivation to succeed, ability to work well with others, etc.*

EMPLOYMENT:

- *Letter, email, and/or phone references from previous supervisors and colleagues who can describe the job the applicant previously held, for how long, the responsibilities and qualifications required, compensation, promotions, and other aspects of the person’s performance including punctuality, reliability, skill, ability to work well with others, etc.*

COUNSELING:

- *A letter or other proof of participation/completion of a program for people with problems related to addiction, mental health challenges, etc.*
- *Proof of negative drug tests (ideally for 6-12 months prior to working).*

SOCIAL SERVICE PROGRAMS:

- *A letter or other proof of participation or completion of a program dedicated to social or charitable service.*

VOLUNTEER WORK OR COMMUNITY ENGAGEMENT:

- *A letter or other proof of volunteer work for a school, nonprofit organization, faith-based community, or other group or program aimed at community improvement, civic engagement, or social support.*

DISMISSAL, CERTIFICATE OF REHABILITATION, OR OTHER “RECORD-CLEANING” REMEDY:

- *A record cleaning remedy indicates that an individual with a criminal record has satisfied the terms of the rehabilitation, including any parole or probation requirements, to the satisfaction of the court and presiding judge.*

LETTER FROM PAROLE OR PROBATION OFFICER:

- *A letter or other proof of good conduct during a period of parole or probation from a parole officer or other relevant authority.*

LETTER FROM CLERGY OR FAITH LEADER:

- *A letter or other form of endorsement from a clergy or faith leader who has worked closely with an individual, either during or after incarceration.*

PROGRAM ENGAGEMENT WHILE INCARCERATED:

- *Information concerning an individual’s engagement in a treatment or other rehabilitative or developmental program while incarcerated.*

APPENDIX B. SAMPLE NOTICES: - "A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT" & - SAMPLE ADVERSE ACTION NOTICE

"A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT"

Available online at the following website: <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>

SAMPLE ADVERSE ACTION NOTICE:

[Name of Applicant]
[Address of Applicant]
[Date of Notice]

This letter is to inform you that we intend to take back the offer of employment further based on information we have obtained from a consumer report. This letter explains how you can present additional information that will assist us in assessing whether your record should not prevent you from filling the position.

While the consumer reporting agency provided us with the information used to make this decision, they were not responsible for the decision itself.

A copy of the report used to make this decision as well as a summary of your legal rights under the Fair Credit Reporting Act (FCRA) and Fair Chance Act have been enclosed. You have the legal right to contact the consumer agency directly and challenge the accuracy of the information found in the report. You also have the right to provide mitigating evidence about the circumstances of the offense or evidence of your rehabilitation. You are required to respond to this notice within at least five business days. If you would like to correct errors or submit additional evidence for our consideration, you are then entitled to five additional days to submit more documents. our initial decision will become final.

Sincerely,

[Name of HR Representative]
[HR Contact Information]

Enclosed:

- Copy of consumer report used to make decision
- A Summary of Your Legal Rights under FCRA
- A Summary of Your Legal Rights under California's Fair Chance Act

APPENDIX C. RELEVANCY SCREEN & MATRIX

Employers can help ensure that they are considering only relevant information about a job applicant's criminal history by developing what is known as a "relevance screen." A relevance screen is a document which helps an employer understand what information about an applicant's criminal history is relevant and what should not be considered, and can also help background check companies understand what information they should provide to employers.

The National Workrights Institute recommends that employers ask themselves the following questions when developing a relevance matrix:

- *What are the Actual Responsibilities of the Job?* It's important to understand what employees actually do on a regular basis in order to determine what risks are relevant. Often times a written job description will fail to capture all of the real responsibilities of a job.
- *What Risks are Associated with the Position?* Any job presents the possibility that an employee will engage in some form of misconduct or another. The key question for employers should be "does this job present a greater risk than others?"
- *What Prior Convictions Create these Risks?* Some cases present obvious risks. Other risks are subtler. A conviction for involuntary manslaughter might, for example, be based on a fatal accident where a driver was at fault.
- *Is the Risk Permanent?* Recidivism rates vary greatly by offense, and the risk of reoffending for all offenses declines over time. Eventually, the risk that an ex-offender will commit a new offense become virtually indistinguishable from general population.
- *Determining Look-Back Periods:* Analyzing the above factors can help employers develop an appropriate "look-back period." A look-back period is how far back in time an employer would like a background check screen to extend. Common look-back periods for serious crimes of violence or dishonesty range from 5-7 years, while look-back periods for less serious crimes are typically 2-3 years.⁵³

Things to keep in mind as you develop a relevancy screen:

- *Blanket policies forbidding hiring anyone with a criminal record are usually illegal under state and federal law.*
- *Because you are not permitted to consider an applicant's criminal record until after you have extended a conditional offer of employment, determine whether their criminal history is directly related to the duties of the job of an otherwise qualified candidate.*

Blanket policies disqualifying anyone with a felony conviction from employment are not permissible.

The EEOC's guidance – quoting the United States Supreme Court – stresses that employment policies which screen out applicants must "measure the person for the job and not the person in the abstract."

It's best to only consider convictions and arrests pending prosecution – arrests which did not lead to convictions are generally irrelevant.

The EEOC's 2012 Guidance emphasizes that arrests are not proof that an individual committed a crime.⁵⁴ Many arrests do not result in criminal charges, much less criminal convictions.⁵⁵

By law, you must ban the box!

As of January 1, 2018, all employers with five or more employees cannot ask questions about criminal convictions on job application forms, and can only inquire about criminal convictions after extending a conditional offer of employment.

Any exclusions based on a criminal record must be directly and adversely related to the duties of the job.

Once employers have extended a conditional offer of employment, they may ask about an employee's conviction history. In doing so, employers must conduct an individualized assessment to determine whether the applicant's conviction history has a direct and adverse relationship with the duties of the job. In other words, employers must show that their policy effectively links specific criminal conduct with the risks inherent in the duties of a particular position. In order to establish a link between an individual's conduct and the risks of a position, employers should develop a relevance screen based on the Nature-Time-Nature Test which can help them screen individual applicants on a case-by-case basis.⁵⁶

APPENDIX D. SUMMARY OF CALIFORNIA BAN-THE-BOX LAWS: STATE AND LOCAL

This chart, adapted from the National Employment Law Project, summarizes state and local Ban-the-Box rules, as they apply to both public and private employers.⁵⁷

	WHICH EMPLOYEES ARE COVERED?			WHEN CAN AN EMPLOYER RUN A BACKGROUND CHECK?		DOES LAW REQUIRE INDIVIDUALIZED CONSIDERATION USING EEOC CRITERIA?	WHAT ARE MY RIGHTS IF MY EMPLOYER DENIES MY APPLICATION?
	PRIVATE	GOV'T CONTRACTORS AND VENDORS	PUBLIC (GOV'T)	ONLY FOR SOME POSITIONS	ONLY AFTER CONDITIONAL JOB OFFER FINALIST		
CALIFORNIA (STATEWIDE BAN-THE-BOX LAW)							
CALIFORNIA STATE LAW	X		X		X	X	N/C/A*
CITY SPECIFIC BAN-THE-BOX LAWS IN CALIFORNIA							
ALAMEDA COUNTY			X				
BERKELEY			X	X		X	
CARSON			X				
COMPTON		X	X			X	
EAST PALO ALTO			X				
LOS ANGELES	X	X	X		X	X	N/C/A*
OAKLAND			X	X	X	X	N/C/A*
PASADENA			X				
RICHMOND		X	X	X			
SACRAMENTO		X					
SAN FRANCISCO (CITY AND COUNTY)	X	X	X		X	X	N/C/A*
SANTA CLARA COUNTY			X				

* N/C/A—**Notice** of intended adverse action before adverse action; **Copy** of background check report and opportunity to dispute contents or relevance before adverse action; right to **Appeal** denial of employment.



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**Eric
Garcetti**
#iamayor



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