

CITY OF LOS ANGELES



RULES AND REGULATIONS IMPLEMENTING THE FAIR CHANCE INITIATIVE FOR HIRING (BAN THE BOX) ORDINANCE

EFFECTIVE JANUARY 22, 2017

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**RULES AND REGULATIONS
IMPLEMENTING THE FAIR CHANCE INITIATIVE FOR HIRING ORDINANCE**

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RULES AND REGULATIONS IMPLEMENTING THE FAIR CHANCE INITIATIVE FOR HIRING ORDINANCE

The Department of Public Works, Bureau of Contract Administration (BCA), promulgates these Rules and Regulations as the Designated Administrative Agency (DAA) pursuant to Section 189.01, 189.09(B) and 189.11 of the Los Angeles Municipal Code (LAMC) and Section 10.48.1, 10.48.8(D) and 10.48.10 of the Los Angeles Administrative Code (LAAC). The BCA may also amend or revise these Fair Chance Initiative for Hiring Ordinance (FCIHO) Rules and Regulations from time to time, consistent with applicable law.

SCOPE OF BCA AUTHORITY

Under the LAMC Sections 189.09 and 189.10 and the LAAC Sections 10.48.8 and 10.48.9, the BCA enforces the FCIHO and imposes penalties and administrative fines for the violation of the FCIHO. When necessary to carry out its function as the DAA, the BCA may conduct inquiries and investigations to determine compliance with the FCIHO.

The effective date of the FCIHO for Private Employers and City Contracts and Subcontracts is January 22, 2017.

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REGULATION #1: DEFINITIONS

For purposes of these Rules and Regulations, the definitions set forth in LAMC Section 189.01 and LAAC Section 10.48.1 are incorporated herein by reference. In addition, the following definitions shall apply in these Rules and Regulations.

“Applicant” means an individual who submits an application or other documentation for employment to an Employer regardless of location.

“Criminal History” means information regarding one or more Convictions, transmitted orally or in writing or by any other means, and obtained from any source, including, but not limited to, the individual to whom the information pertains and a Criminal History Report.

A conviction shall include a plea, verdict, or finding of guilt regardless of whether sentence is imposed by the court. In the State of California, an employer is prohibited from asking about any arrest information, unless it results in a conviction, and otherwise specified.

“Employee” means any individual who performs at least two (2) hours of work on average each week within the geographic boundaries of the City for an Employer. An Employee also qualifies as an employee entitled to payment of a minimum wage from any Employer under the California minimum wage law, as provided under Section 1197 of the California Labor Code and wage orders published by the California Industrial Welfare Commission. This Employee is covered by the FCIHO regardless of whether the Employee is full-time, part-time, seasonal, or temporary.

Under the Administrative Code at LAAC § 10.48.1(L), “Employee” means any individual who has Employment with a City Contractor or Subcontractor or with any Employer that enters into a contract with a Contractor or Subcontractor. Employment is defined at LAAC § 10.48.1(N) as any occupation, vocation, job or work performed in the City.

1. Time spent in the geographic boundaries of the City solely for the purpose of traveling through Los Angeles with no employment-related stops except for refueling or the Employee’s personal meals in not considered time worked within the geographic boundaries.
2. The FCIHO applies to all Employees that meet the above definition, including the owner or owners and management and supervisory employees.
3. The FCIHO applies to Employees regardless of an Employer’s designation of an Employee as an “independent contractor”; and Employer’s labeling a worker as an “independent contractor” is not conclusive for the purpose of the FCIHO.

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4. Telecommuting: An individual who lives in the City and performs work for an Employer from home, including telecommuting, is an Employee under the FCIHO. An individual who works from a home that is outside of the City is not an Employee under the FCIHO, even if the Employee works for a Los Angeles based company, unless the individual also works at least two hours on average per week for the Employer within the geographic boundaries of the City.

“Employer” in these Rules and Regulations refers to a private employer, as defined in LAMC Section 189.01 as any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that is located or doing business in the City, and that employs ten (10) or more Employees. “Employer” includes job placement and referral agencies and other employment agencies.

“Employer” also refers to a Contractor or Subcontractor, as defined in LAAC Section 10.48.1 as any individual, firm, corporation, partnership, labor organization, group of persons, association, or other organization however organized, that enters into a Contract with the City, or a contract with a Contractor or Subcontractor that employs ten (10) or more Employees. The owner or owners and management and supervisory employees must be counted as an Employee if they meet the definition of Employee.

“Equal Employment Opportunity Commission (EEOC) Enforcement Guidance” – The EEOC is the federal government agency that enforces anti-discrimination laws in employment. In 2012, the EEOC issued a legal guidance on the consideration of applicants’ arrest and conviction history as it relates to Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000(e) *et seq.* The EEOC’s recommendations were issued to help employers comply with Title VII. The EEOC developed its guidance to assist and be a resource for Employers to ensure that screening policies are (1) consistent with business necessity and (2) applicants are individually assessed. For additional information, please see the U.S. Equal Employment Opportunity Commission website at www.eeoc.gov.

“Individualized Assessment” means a written determination made by the Employer that there is or is not an effective link between specific aspects of the Applicant’s Criminal History and the risks inherent in the job duties and responsibilities of the employment position. At the minimum, the Employer must consider factors identified in the EEOC Enforcement Guidance.

“Temporary Help Firm” means a business which recruits, hires, and assigns its own employees to perform work at or services for other organizations, for a temporary time period, to support the other organization’s workforce.

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REGULATION #2: EMPLOYER REQUIREMENTS

A. Application and Interview Procedure

1. An Employer shall not include on any application for Employment any questions that seek the disclosure of an Applicant's Criminal History.

a. Some Employers may use the same online or hard copy application for multiple jurisdictions, including those areas that do not have a Fair Chance law in effect. Employers may remove any questions inquiring about an Applicant's Criminal History or Employers could also create a specific application for those positions that would be covered by the City of LA's FCIHO or include a disclaimer that Applicants should not respond to those questions about their Criminal History on the application. Example: For jobs located in the City of Los Angeles, you should not answer this question. The disclaimer should be next to the question asking for a Criminal History.

b. Statements such as "Criminal background checks must be passed to be considered for a position", or similar, cannot be included. This would be a violation of the FCIHO.

2. An Employer shall not, at any time or by any means, inquire about or require disclosure of an Applicant's Criminal History, using any mode of communication, including, but not limited to, application forms, interview, and Criminal History Reports, until a Conditional Offer of Employment has been made to the Applicant.

a. The FCIHO does not prevent an Employer from looking into an applicant's background and experience to verify qualifications for an employment position, including asking for resumes and references and performing general internet searches. A violation of the FCIHO would include trying to discover an Applicant's Criminal History prior to a Conditional Offer of Employment.

b. The FCIHO allows an Applicant to refuse to respond to any prohibited inquiry or statement without it disqualifying the Applicant from prospective employment.

B. Employer Assessment of Criminal History

1. If an Applicant has been made a Conditional Offer of Employment, at this point, then an Employer is allowed to perform a Criminal History check on the Applicant. The Employer is required to follow any local, state, and federal requirements for requesting a review of an individual's Criminal History.

For Temporary Help Firms, the Conditional Offer would be considered when an

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individual is to be placed in a pool of applicants from which the applicant may be sent to temporary positions.

Note: The FCIHO does not require that an Employer perform a Criminal History check on an Applicant. If an Employer's hiring process did not require a Criminal History check before, the FCIHO does not require that they initiate this process. However, if an Employer chooses to start this process in the future, they will need to follow the requirements of the FCIHO.

2. If the Employer plans to take an Adverse Action, the FCIHO requires that an Employer prepare written documentation including an Individualized Assessment of the Applicant. This Assessment must effectively link specific aspects of the Applicant's Criminal History with risks inherent in the duties of the Employment position sought.

a. The Employer shall, at the least, consider the "Green factors" identified by the EEOC Enforcement Guidance, such as:

i. What is the nature and gravity of the offense? (The harm caused by the criminal conduct should be considered.)

ii. How much time has passed since the offense? (Convictions remote in time are less significant than similar more recent ones.)

iii. What is the nature of the job duties and responsibilities? (Consider the job's essential functions and the circumstances under and the environment in which the job is performed.)

iv. Are you looking at ONLY convictions? Arrests cannot be considered in employment decisions.

3. If an Employer determines that an Applicant poses an unreasonable risk, then the Employer, prior to withdrawing their Conditional Offer of Employment, must provide, at a minimum, the following documents to the Applicant:

a. A written notification of proposed Adverse Action;

b. Copy of written Assessment performed pursuant to Section 189.03(A);

c. Any other documentation or information supporting the Employer's proposed Adverse Action; and

d. The date the Applicant is notified should be documented.

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C. Fair Chance Process

When an Employer proposes to withdraw their Conditional Offer of Employment based on the Individualized Assessment, they must give the Applicant an opportunity to present additional information through the Fair Chance Process.

The Fair Chance Process involves the following:

1. The Employer must hold the Employment position(s) open for at least five (5) business days after the Applicant receives the notification to provide the Employer with any additional information or documentation.
2. The EEOC Enforcement Guidelines provides Applicants with examples of relevant individualized evidence they may submit, such as:
 - a. The facts or circumstances surrounding the offense or conduct;
 - b. The number of offenses for which the individual was convicted;
 - c. Older age at the time of conviction, or release from prison;
 - d. 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;
 - e. The length and consistency of employment history before and after the offense or conduct;
 - f. Rehabilitation efforts. Samples of rehabilitation are: certificates or proof of education/training; letters of recommendation from community leaders; certificate of rehabilitation granted by a court;
 - g. Employment or character references and any other information regarding fitness for the particular position; and
 - h. Whether the individual is bonded under a federal, state or local bonding program.
3. If the Applicant does not submit any documentation within the five (5) business day time period, the Employer can take the proposed Adverse Action decision without any additional requirements under the Ordinance.
4. If the Applicant submits any documentation, then the Employer must perform a Reassessment of the proposed Adverse Action using the same process as the original Assessment, but taking into consideration the information and/or

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documentation submitted by the Applicant. Following the Reassessment the Employer should notify the Applicant of the final decision and provide him/her with a copy of the written reassessment.

D. Notice and Posting Requirements for Employers

1. Employers shall state in all solicitations or advertisements seeking Applicants for Employment that the Employer will consider for employment qualified Applicants with Criminal Histories in a manner consistent with the requirements of the FCIHO.
2. Employers shall post a notice informing Applicants of the provisions of the FCIHO in a conspicuous place at every workplace, job site, or other location in the City under the Employer's control and visited by Employment Applicants, and shall send a copy to each labor union or representative or workers with which they have a collective bargaining agreement or other agreement or understanding that is applicable to Employees in the City.

E. Prohibition Against Retaliation

An Employer must comply with LAMC Section 189.05 and LAAC Section 10.48.5 prohibiting retaliation for activities related to the FCIHO.

F. Maintenance of Records

1. Employers are required to maintain Individualized Assessments and any other documentation to demonstrate compliance with the FCIHO. The types of documents required by the BCA are all records related to Applicants' Employment applications and the written Individualized Assessment and Fair Chance reassessment performed pursuant to the FCIHO for a period of three (3) years following the receipt of an Applicant's Employment application. If an investigation is initiated by the BCA, these documents will be required to be provided to the BCA.
2. If an Employer relied on oral information to form a determination of Adverse Action, the Employer should summarize this information by putting it in writing and maintain it with their Employment records. For example, a verbal reference check with former Employer should be documented.

G. Employer Size

As defined in these Rules and Regulations, Employers with ten (10) or more Employees, are subject to the FCIHO. This would include owners, management, and supervisory staff if they also meet the definition of Employee..

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The size of an Employer's business shall be determined by the highest average number of Employees during any given quarter of the previous calendar year from the original date of application submission, rounded up to the next whole number of Employee.

At the end of each calendar year, an Employer should determine the highest average number of Employees employed during any quarter in that calendar year.

For example: If an Applicant applies for a job in June 2018, the Employer would determine the highest average number of Employees of any quarter in the 2017 calendar year (January 1st through December 31st of 2017). If the Employer finds that the business had an average number of Employees exceeding the threshold of ten (10) or more in any given quarter of 2017, the Employer is subject to the FCIHO.

Employees will include but are not limited to:

- Full-time Employees
- Part-time Employees
- Temporary or seasonal Employees

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REGULATION #3: EXCEPTIONS

A. Exception from LAMC Sections 189.02, 189.03, 189.04(A) and LAAC Sections 10.48.2, 10.48.3, 10.48.4(A):

1. The Employer is required by law to obtain information regarding a Conviction of an Applicant.
2. The Applicant would be required to possess or use a firearm in the course of his or her Employment.
3. An individual who has been convicted of a crime is prohibited by law from holding the position sought by the Applicant, regardless of whether that conviction has been expunged, judicially ordered sealed, statutorily eradicated, or judicially dismissed following probation.
4. An Employer is prohibited by law from hiring an Applicant who has been convicted of a crime.

B. Consistency with Federal or State Law - Nothing in the FCIHO shall be interpreted or applied so as to create any requirement, power, or duty in conflict with federal or state law.

C. Employers may assert the application of an exception to defend against liability, and they have the burden of proving the exception by a preponderance of the evidence. The BCA does not assume that an entire employer or industry will receive an exception and will investigate how an exception applies to a particular position or role.

An Employer claiming an exception must be able to show that the position falls under LAMC 189.07 or LAAC 10.48.7. BCA requires the Employer to keep a record of their use of such exception for a period of three (3) years following the receipt of an Applicant Employment application. Keeping an exception log will help the Employer respond to the BCA's requests for information. The exception log should include the following:

1. Which exception(s) is claimed; and
2. How the position fits into the exception and the federal, state, or local law allowing the exception.

The BCA recommends Employers availing themselves of exception to the FCIHO inform Applicants of the exception they believe applies.

D. The FCIHO does not apply to the actions of Employers or their agents that are taken pursuant to any state, federal, or local law that requires criminal background checks for

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Employment purposes or bars Employment based on Criminal History. Retaliation and other provisions may still apply.

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REGULATION #4: ENFORCEMENT

A. Civil Enforcement - An Applicant or Employee may bring a civil action in a court of competent jurisdiction against an Employer for violation of the FCIHO within one (1) year of the completion of the administrative enforcement process or a hearing officer's decision on the matter, and if successful shall be awarded the penalty set forth in the Ordinance and any other legal and/or equitable relief as may be appropriate to remedy the violation.

B. Administrative Enforcement

1. Complaint Submittal Process

a. An Applicant or Employee alleging that an Employer has violated the requirements of the FCIHO, within one (1) year of the alleged violation, may report the alleged violation, in writing, to the DAA, which will investigate the complaint.

b. Whether based upon a complaint or its own investigation of a violation of any of the provisions of the FCIHO, where the DAA determines that an Employer has violated the FCIHO, the DAA shall issue a written notice to the Employer of the violation, require the Employer to immediately cure the violation, and impose an administrative fine as set forth in the FCIHO.

2. Complaint Investigation Process

a. When a complaint is received, the DAA will provide notice of the alleged violation to the Employer.

b. The DAA will provide Employer with the opportunity to respond to the notice with proof, documentation, or evidence of compliance.

c. The DAA, as a part of its investigation, may request the Board of Public Works to issue a subpoena for Employer records and documents and for books, papers, records and other items relevant to the enforcement of the FCIHO.

d. Once a determination is made, the DAA will notify the complainant and Employer. At that time the DAA will provide the opportunity to appeal the DAA's determination to a hearing officer. The hearing officer's decision shall constitute the City's final decision, and any review of that decision shall be made by the filing of a petition for writ of mandate in the Superior Court of the County of Los Angeles under Section 1094.5 of the Code of Civil Procedure.

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3. Record Keeping - The DAA shall maintain a record of the complaints it receives alleging violations of the FCIHO and the resolution of complaints. The DAA shall compile a summary of the record of complaints on an annual basis and report the summary to the City Council.

C. City Contractors/Subcontractors

1. In addition to the Civil and Administrative Enforcement listed in Regulation #4 A and B, the DAA has the following enforcement tools for City Contractors and Subcontractors available for violations of the FCIHO:

- a. Request the Awarding Authority to declare a material breach of the Contract and exercise its contractual remedies, which are to include, but not be limited to, termination of the Contract and the return of any monies paid by the City for services not yet rendered;
- b. Request that the Awarding Authority document the determination in the Contractor Evaluation required under the LAAC Section 10.39;
- c. Require that the Contractor document the determination in each of the Contractor's subsequent Contractor Responsibility Questionnaires submitted under the LAAC Section 10.40; and
- d. Request the City Attorney to bring a civil action against the Contractor or Subcontractor seeking an order declaring that the Contractor or Subcontractor violated the FCIHO and /or preventing the Contractor or Subcontractor from future violations of the FCIHO.

D. Penalty/Administrative Fine Schedule

1. Private Employers – The Penalty/Administrative Fine Schedule is contained in LAMC Section 189.10.
2. City Contractor/Subcontractors – The Penalty/Administrative Fine Schedule is contained in LAAC Section 10.48.9.

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APPENDIX A

The forms listed below have been approved by the BCA for use in conjunction with these FCIHO Rules and Regulations. When the FCIHO Rules and Regulations refer to the use of a form, only the forms listed in this Appendix may be used. Forms may be revised and updated as necessary in which case the updated forms must be used.

FORM NAME

Notice to Applicants and Employees for City Contractors
Notice to Applicants and Employees for Private Employers
Notice to Rescind Employment Offer Sample Letter
Fair Chance Initiative for Hiring Complaint Form (English)
Fair Chance Initiative for Hiring Complaint Form (Spanish)