

Fair Chance Ordinance Enforcement

Report to the San Francisco Board of Supervisors

Office of Labor Standards Enforcement

April 1, 2019

EXECUTIVE SUMMARY

The Office of Labor Standards Enforcement (OLSE) respectfully submits this report on enforcement of the Fair Chance Ordinance (FCO) to the San Francisco Board of Supervisors pursuant to Police Code Section 4909(f).

OLSE has initiated 80 investigations regarding alleged violations of the Fair Chance Ordinance since 2014, including 12 in the current fiscal year. The agency has completed 68 total investigations, with six of those concluded in this fiscal year. Twelve cases are currently pending.

OLSE has identified a violation of the FCO in 43 investigations, or 62% of cases. The employer under investigation has taken some type of corrective action in all of those cases. The most common types of corrective action were removing a prohibited question from a job application (17 cases) or correcting their hiring procedures (22 cases). In some instances, employers have also reinstated or hired the complainant (10 cases) or paid back wages or penalties (7 cases).

The FCO amendment, passed by the Board of Supervisors in April 2018, became operative on October 1, 2018. Among other changes, the amendment included enhanced penalties provision. Since the implementation of the FCO amendment on October 1, 2018, OLSE has collected \$1,500 in penalties. Prior to that date, OLSE had collected a total of \$50 in FCO penalties.

SAN FRANCISCO FAIR CHANCE ORDINANCE

The San Francisco Board of Supervisors unanimously passed the Fair Chance Ordinance (FCO) in February 2014, and the FCO became operative on August 13, 2014. The Ordinance is codified as Article 49 of the San Francisco Police Code and Chapter 12T of the San Francisco Administrative Code.

The FCO regulates when and how employers and affordable housing providers conduct background checks or inquire into conviction or arrest records. The San Francisco OLSE enforces employment provisions, including those that apply to employers throughout San Francisco (Police Code Art. 49) and those that apply to City contractors and lessees (Admin Code Ch. 12T). The San Francisco Human Rights Commission enforces the affordable housing provisions of the FCO. This report focuses on the employment provisions that OLSE enforces.

FCO AMENDMENT AND REPORTING REQUIREMENT

The Board of Supervisors amended the Fair Chance Ordinance in April 2019, and the amendment became operative on October 1, 2018. The amended ordinance:

- Lowers the threshold for employers to be covered by the law from 20 employees to 5 employees;
- Prohibits employers from inquiring about or considering any convictions that have been decriminalized, such as the noncommercial use or cultivation of cannabis;
- Incorporates enhanced penalty provisions;
- Authorizes the payment of penalties to the victims of those violations; and
- Creates a private right of action for victims.

The amended FCO also requires OLSE to report on “the number and types of complaints it receives alleging violations of [the FCO], and the resolution of those complaints” by April 1, 2019. The agency is required to report annually thereafter. (S.F. Police Code §4909(f))

FCO COMPLAINTS AND INVESTIGATIONS

OLSE initiates investigations based on complaints from job applicants and current employees. Compliance staff answer a public FCO hotline (415-554-5192) and respond to email inquiries sent to fco@sfgov.org. Through March 20, 2019, OLSE has responded to a total of 271 calls and 276 emails about the FCO. A small subset of these calls and emails, around 7%, are from applicants or employees who wish to report a violation of the law. If OLSE determines during a brief screening that the employee is likely to be covered by the law, OLSE logs the complaint and initiates an investigation. Many of the calls that are not included in the tally of complaints below are from people applying for jobs outside of San Francisco (in locations as far away as Atlanta and North Dakota).

OLSE has received a total of 80 complaints from applicants or employees who appeared to be covered by the FCO after an initial screening. OLSE has initiated an investigation in each of those 80 instances.

Fiscal Year	Complaints
FY 14-15	22
FY 15-16	17
FY 16-17	17
FY 17-18	12
<i>FY 18-19 thru March 20, 2019</i>	<i>12</i>
Total	80

Three of the 12 cases that OLSE opened in Fiscal Year 18-19 precede the implementation of the FCO amendment on October 1, 2018; nine complaints allege violations after that date.

Employer Industries

OLSE receives complaints from across a range of industries. The table below shows all investigations since August 2014 by employer industry.

Employer Industry	Investigations	% of Total
Information Technology	14	18%
Hospitality	10	13%
Retail	9	11%
Transportation*	8	10%
Employment / Staffing	8	10%
Nonprofit	8	10%
Business Services	5	6%
Services to Children/Seniors/Disabled*	5	6%
Financial*	4	5%
Background Check	1	1%
Utilities	1	1%
Security	1	1%
Personal Services	1	1%
Other	5	6%
Total	80	100%

* Sectors in which some or all FCO provisions may be preempted by federal or state law.

Types of Alleged Violations

FCO complaints that OLSE has received to date allege violations that fall into the categories below.

Prohibited Question on Job Application:

- The employer included question(s) about convictions on a job application.

Off-limits Inquiry:

- The employer inquired about arrests or convictions prior to a live interview (prior to 10/1/2018).
- The employer inquired about arrests or convictions prior to a conditional offer of employment (on or after 10/1/18).
- The employer inquired into a type of arrest or conviction that is off limits (often convictions more than 7 years old).

Improper Procedures when Considering Adverse Action:

- The employer failed to provide the complainant with a copy of the background check and/or failed to identify the reason for the adverse action.
- The employer failed to give the complainant 7 days to respond to a notice of potential adverse action with corrections, evidence of rehabilitation, or mitigating information.

No FCO Notice:

- The employer failed to provide and/or post the required FCO notice.

Retaliation:

- The employer retaliated against the complainant for asserting rights under the FCO.

Many cases involve more than one type of alleged violation. For example, an employer may have inquired about an item that is off-limits, such as convictions that are more than 7 years old, and also failed to provide the required FCO Notice. The number of complaints that fall into each category as are below. Complaints with multiple types of alleged violations are listed in more than one row.

Complaint Category	Complaints	% of Total Complaints
Prohibited Question on Job Application	29	36%
Off-limits Inquiry	25	31%
Improper Procedures when Considering Adverse Action	44	55%
No FCO Notice	5	6%
Retaliation	1	1%

FCO CASE RESOLUTIONS

OLSE has completed between 11 and 18 FCO cases in each fiscal year.

Fiscal Year	Cases Opened	Cases Closed	Cases Active at Fiscal Year-end
FY 14-15	22	16	6
FY 15-16	17	17	6
FY 16-17	17	18	5
FY 17-18	12	11	6
<i>FY 18-19 thru 3/20/19</i>	<i>12</i>	<i>6</i>	<i>n/a</i>
Total	80	68	

Of the 68 cases closed to date, OLSE identified evidence of a violation in 42 cases, or 62%.

Fiscal Year	Closed – Violation	Closed – No Violation Found	Total Cases Closed
FY 14-15	12	4	16
FY 15-16	11	6	17
FY 16-17	12	6	18
FY 17-18	4	7	11
<i>FY 18-19 thru 3/20/19</i>	<i>3</i>	<i>3</i>	<i>6</i>
Total	42	26	68

The most common reasons that OLSE compliance staff closed a case without finding a violation were:

- The employer was not covered by the FCO (often because of employer size or due to state or federal preemption).
- The applicant was not covered (typically because the job was located outside of San Francisco).
- The employer fully complied with the FCO.
- The complainant withdrew the complaint or stopped communicating with OLSE staff.

When OLSE did identify a violation, the agency required the employer to take one or more steps to correct the violation. The required corrective actions, and the number of employers who completed each, are as follows:

Corrective Action Completed	Number of Employers
Removed a prohibited question from a job application	17
Corrected background check and/or hiring procedures	22
Reinstated an employee or offered employment to an individual who was improperly denied employment	10
Paid back wages	5
Paid penalties	2

OLSE has collected more in FCO penalties from employers since the implementation of amended penalty provisions in October 2018. Despite the increase, the total dollar amount is still extremely modest compared to penalties collected in the other laws that OLSE enforces. The total that OSLE collected in back wages and FCO penalties is as shown below.

Fiscal Year	Back Wages	Penalties*
FY 14-15		
FY 15-16	\$18,750.00	\$50.00
FY 16-17	\$ 11,455.76	
FY 17-18	\$ 1,728.00	
<i>FY 18-19 thru 3/20/19</i>		\$1,500.00
Total	\$31,933.76	\$1,550.00

*Penalties prior to 10/1/2018 were payable to the City. Penalties for violations that date and later are payable to the claimant.