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NYC Commission on Human Rights Finalizes Agency Rules and Regulations Regarding the Fair Chance Act

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As discussed in our [prior alert](#) in 2015, New York City enacted the Fair Chance Act (FCA), which, subject to limited exceptions, prohibits private employers from seeking information from job applicants regarding their past criminal convictions prior to making a conditional offer of employment. Two years after the enactment of the FCA, the New York City Commission on Human Rights has finally issued detailed rules and regulations that employers must follow in order to comply with the FCA. These rules and regulations, which are outlined below, become effective on August 5, 2017.

Subject to limited exceptions, under the FCA, employers with at least four employees are prohibited from asking individuals about any prior criminal conviction until after a conditional offer of employment is made. However, the FCA's prohibitions do not apply:

- To any actions taken by an employer pursuant to any federal, state or local law that requires criminal background checks for employment purposes or bars employment based on criminal history;
- To individuals applying for employment as a police officer, peace officer or at a law enforcement agency; or
- To individuals applying for a position listed on the website of the New York City Department of Citywide Administrative Services as having been determined to involve law enforcement, be susceptible to bribery or corruption or that entails the provision of services to or safeguarding of individuals who, because of age,

disability, infirmity or other condition, are vulnerable to abuse.

The rules and regulations promulgated by the Commission dictate that under the FCA, employers are prohibited from engaging in any of the following actions before making an adverse employment decision concerning an applicant for hire, promotion or transfer:

- Seeking to discover, obtain or consider the criminal history of an applicant.
- Expressing any limitation or specifications based on criminal history in job advertisements, postings or applications. This includes, but is not limited to, any language that states or implies "no felonies," "background check required" or "clean records only."
- Using an application that contains a question about an applicant's criminal history or pending criminal case or requests authorization to perform a background check even if applicants are informed that if they are applying for a position in New York City they can skip the question.
- Making any inquiry or statement related to an applicant's criminal history, whether written or oral, during a job interview.
- Asserting, whether orally or in writing, that individuals with a criminal history or individuals with certain convictions will not be hired or considered.
- Conducting investigations into an applicant's criminal history, including the use of publicly available records or the Internet for the purpose of learning about the applicant's criminal

history, whether such investigations are conducted by an employer or for an employer by a third party.

- Disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about the applicant's criminal history.
- In connection with an applicant, searching for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail" or "prison" or searching websites that purport to provide information regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history.

The rules and regulations state that an employer is not liable under the FCA if it inadvertently learns of an applicant's criminal history without engaging in any of the above actions. However, if the employer uses the inadvertently discovered information to further explore an applicant's criminal history before a conditional offer of employment has been made or uses the information to determine whether to make a conditional offer of employment, the employer will be liable under the FCA.

Further, the rules and regulations state that once an employer has made a conditional offer of employment, the employer may (1) ask, either orally or in writing, whether an applicant has a criminal conviction history; (2) run a background check or, after receiving the applicant's permission and providing notice, use a consumer reporting agency to do so; and (3) ask about the circumstances that led to the conviction and gather information relevant to the Article 23-A factors (discussed below).

If the employer does not wish to withdraw the conditional offer of employment, their obligations under the FCA have been satisfied. If, however, after learning of the applicant's criminal history, the employer wishes to withdraw the offer of employment, the rules and regulations require the employer to (1) engage in an Article 23-A analysis and (2) follow the "Fair Chance Process."

Under Article 23-A of the New York State Corrections Law, employers may not discriminate against employees or applicants based on their prior criminal conviction without taking into account the following factors:

- The specific duties and responsibilities necessarily related to the prospective job;
- The bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
- The time that has elapsed since the occurrence of the criminal offense that led to the applicant or employee's criminal conviction, not the time since arrest or conviction;
- The age of the applicant or employee when the criminal offense that led to their conviction occurred;
- The seriousness of the applicant's or employee's conviction;
- Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct; and
- The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

The FCA's rules and regulations also assert that after evaluating the above factors, the employer must then determine whether there is a direct relationship between the applicant's conviction history and the prospective job ("direct relationship exception") or if employing the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public ("unreasonable risk exception"). If, after weighing the above listed Article 23-A factors, an employer cannot determine that either the direct relationship or unreasonable risk exceptions apply, then the FCA prohibits the employer from revoking the conditional employment offer.

If, however, the employer determines that either the direct relationship or unreasonable risk exceptions apply and the employer wishes to withdraw the conditional offer, then the FCA's rules and regulations require the employer to follow the Fair Chance Process by:

- Providing a written copy of any inquiry made to collect information about criminal history to the applicant. This includes, but is not limited to, copies of consumer reporting agency reports, print outs from the Internet, records available publicly and written summaries of any oral

conversations, specifying if the oral information relied upon came from the applicant;

- Providing a written copy of the Article 23-A analysis to the applicant by use of the Fair Chance Notice, which is available on the Commission’s [website](#), or a comparable notice;
- Allowing the applicant a reasonable time to respond to the employer’s concerns (no less than three business days); and
- Considering any additional information provided by the applicant during this period.

If the employer ultimately decides to revoke the conditional offer of employment after following the above steps, the employer must notify the applicant in writing. Notably, the above restrictions and requirements apply not only to individuals with prior criminal convictions but also to those with pending arrests that have not yet been adjudicated.

The FCA’s rules and regulations note that there is a *per se* violation of the FCA if an employer takes any of the following actions:

- Declaring, printing or circulating, or causing the declaration, printing or circulation of any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history. This includes, but is not limited to, advertisements and employment applications containing phrases such as, “no felonies,” “background check required” and “must have clean record.”
- Using applications for employment that require applicants to either grant employers permission to run a background check or otherwise provide information regarding an applicant’s criminal history.
- Making any statement or inquiry relating to the applicant’s pending arrest or criminal conviction before a conditional offer of employment is extended.
- Using within New York City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, which requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position in New York City does not shield an employer from liability.

- Failing to comply with the requirements of the Fair Chance Process, as outlined above.
- Requiring applicants or employees to disclose an arrest that, at the time disclosure is required, has resulted in a non-conviction.

Employers who violate the FCA may be liable for, among other things, compensatory damages (*e.g.*, the wages the individual would have earned had they been hired), punitive damages, attorneys’ fees and civil penalties according the following schedule:

Employer Size (at the time of the violation)	1 st Violation	2 nd Violation (within three years of the resolution date of the first violation)
4-9 employees	\$500.00	\$1,000.00
10-20 employees	\$1,000.00	\$5,000.00
21-50 employees	\$3,500.00	\$10,000.00

If the Commission finds that an employer’s actions were willful, wanton or malicious, the Commission may impose a civil penalty of up to \$250,000.

New York City employers should review their job applications to ensure that they do not seek information regarding individuals’ criminal conviction history. Indeed, New York City employers who ask about prior criminal convictions on employment applications must revise those applications to remove such questions. Employers should also review job postings and other pre-hire paperwork to ensure that they do not inquire about or reference information concerning an applicant’s prior criminal conviction prior to making a conditional job offer.

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