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Alert

New York City Commission on Human Rights Issues Enforcement Guidance on Fair Chance Act and Clarifies Credit Check Law Exemption

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The New York City Commission on Human Rights (the "Commission") recently released enforcement guidance on the Fair Chance Act (the "FCA"), which took effect on Oct. 27, 2015.[1] The FCA prohibits New York City employers from inquiring about a job applicant's criminal record prior to extending a conditional offer of employment. The Commission's guidance provides clarity as to how the Commission will enforce the new law. Separately, the Commission clarified how it will interpret the exemption to the Stop Credit Discrimination in Employment Act ("SCDEA") for positions involving responsibility for funds or assets worth $10,000 or more.[2]

Job Advertisements and Pre-Offer Inquiries

It is a violation of the FCA for an employer to "[d]eclare, print or circulate … any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction." The Commission explains that including in job advertisements or job applications phrases such as "no felonies," "background check required" or "must have clean record" violates the FCA "even if no adverse action follows."

The Commission provides clarity about what types of background checks an employer can conduct before extending a conditional offer of employment. An employer can still review an applicant's background so long as the employer does not attempt to discover an applicant's criminal history during this process.[3] An employer who inadvertently discovers an applicant's criminal history during this process will not be subject to liability, so long as the employer does not consider the information until after a conditional offer of employment has been given.

Inquiries Following a Conditional Offer of Employment

The FCA permits criminal background checks following a "conditional offer of employment," which the Commission defines as "[a]n offer of employment that can only be revoked based on: (1) the results of a criminal background check; (2) the results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act; or (3) other information the employer could not have

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[1] The enforcement guidance, "Legal Enforcement Guidance on the Fair Chance Act," is available on the New York City Commission on Human Rights' website.

[2] For a complete overview of the Commission's guidance on the Stop Credit Discrimination in Employment Act, see our *Alert*, "New York City Commission on Human Rights Issues Enforcement Guidance on Credit History Law."

[3] The Commission defines "criminal history" as a "previous record of criminal convictions or non-convictions or a currently pending criminal case."

reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance." The Commission's definition of "conditional offer of employment" could be interpreted to mean that an employer must complete all other pre-employment screening procedures (e.g., reference checks, drug screening) before making an offer conditioned on a criminal background check.

If an employer's inquiry reveals a criminal conviction,[4] the employer must perform the required analysis under Article 23-A of the New York State Correction Law ("Article 23-A") prior to revoking a conditional offer of employment. Article 23-A prohibits an employer from denying employment based on a criminal conviction unless the employer can show a "direct relationship between one or more of the criminal offenses" and the "employment sought or held by the individual" 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" and sets forth eight factors that an employer must consider in making this determination.[5]

If, after evaluating the applicant under Article 23-A, the employer wishes to revoke the offer, an employer must follow what the Commission has termed the "Fair Chance Process":

- The employer must disclose to the applicant "a written copy of any inquiry it conducted into the applicant's criminal history."
- The employer must provide the applicant a written copy of the employer's Article 23-A analysis. The Commission has issued a form that employers can use to document this analysis.[6]
- After providing the applicant with the above, the employer must give the applicant at least three business days from receipt to respond before revoking the conditional offer of employment.

Exemptions

The FCA contains limited exemptions that permit employers to conduct pre-offer criminal background checks on certain employees. The Commission explains that employers "have the burden of showing that an exemption applies." According to the Commission, the exemptions "are to be construed narrowly."

The FCA does not apply to actions employers take pursuant to "state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." The Commission has interpreted this provision to mean that employers are exempt from the FCA's requirements in instances in which the law places "mandatory barriers" to employment for applicants

[4] The Commission reminds employers that they "must never inquire about or act on non-conviction information."

[5] The eight factors are: "(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the license or employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (e) the age of the person at the time of occurrence of the criminal offense or offenses; (f) the seriousness of the offense or offenses; (g) any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; (h) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public."

[6] The form is available on the Commission's website. Employers may adapt the Commission's form to their "preferred format" but may not change the "material substance" of the form.

with certain convictions. Employers will not be exempt from the FCA if the law permits the employer discretion as to whether to deny an applicant employment due to certain criminal convictions.

According to the Commission, the FCA *does not* apply when employers are complying with "industry-specific rules and regulations promulgated by a self-regulatory organization." For asset managers,[7] this exemption may not be as useful as it appears at first blush. It is unlikely that asset managers will be deemed to be exempt from the FCA because the Investment Advisers Act and the Commodity Exchange Act registration regimes generally do not impose per se registration disqualifications for individuals with criminal convictions.[8]

The Commission has set out certain procedures that an employer must follow when the employer believes an exemption applies. The Commission instructs employers to inform applicants of the exemption and to create an exemption log, which should be maintained for a period of five years from the date an exemption is used.

Employers may be required to share their exemption logs with the Commission, and promptly doing so may "help avoid a Commission-initiated investigation into employment practices."

New York City employers should carefully review the Commission's enforcement guidance and make adjustments to hiring processes as necessary to ensure that they are in compliance with all of the FCA's requirements.

Update on the SCDEA

Separately, the Commission updated the FAQs[9] on its website to clarify the exemption from the SCDEA for positions involving responsibility for funds or assets worth $10,000 or more. The SCDEA prohibits New York City employers from requesting or using the credit history of applicants and employees when making employment decisions.

- Positions with signatory authority over third-party funds of $10,000 or more are exempt from the SCDEA.
- Positions that are required to "verify that a transaction of more than $10,000 is settled" are exempt from the SCDEA, even if such positions do not have "signatory" authority over the funds.
- Employees who receive corporate credit cards that are paid directly by the employer and can be used for amounts above $10,000 without any preliminary or subsequent approval are exempt from the SCDEA. Given that most employers require employees with corporate credit cards to submit receipts to verify transactions, it is likely that few positions will be considered exempt on the basis of the employee in such position having a corporate credit card.

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[7] Note that the analysis for broker-dealers may differ from that for investment advisers.

[8] Of course, the regulators can and do impose civil and administrative industry bars and there are regulations, such as the so-called "Bad Actor Rule" — i.e., SEC Rule 506(d), which can have significant adverse effects on asset managers employing officers with criminal convictions — but these kinds of situations generally are not within the FCA's "industry-specific rules" exemption (although they may be within Article 23-A).

[9] The FAQs are available on the Commission's website.

If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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