

ALERTS

New Requirements for Employers Using Criminal Background Checks in New York City

August 6, 2021

The New York City Commission on Human Rights (“Commission”) released its updated *Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History*, which interprets the amendments to the New York City Fair Chance Act (“FCA”) that went into effect on July 29, 2021. We have previously written on the FCA’s ban on performing criminal background checks on applicants prior to a conditional offer of employment. The amendments provide additional employment protections to applicants and employees with a criminal history, pending criminal arrest or charges, or certain “non-convictions.”

A Conditional Offer Should Only Be Made After All Other Checks Are Done

The FCA prohibits employers from asking about or considering information about an applicant’s conviction history or pending criminal cases until after the employer has assessed all other job qualifications and made a conditional offer of employment to the applicant. According to the new Guidance, employers who wish to withdraw a conditional offer based on the applicant’s criminal history can only withdraw the offer based on:

1. The results of a criminal background check conducted in accordance with the Fair Chance Process (discussed below);

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 reasonably known before the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.

Employers, therefore, are required to institute a two-tiered background check process. They should perform all non-criminal background checks (e.g., checking references, confirming prior employment, verification of educational degrees, etc.) on prospective employees before the conditional offer of employment. These background checks must still comply with other relevant laws, such as the Fair Credit Reporting Act (as discussed in this *Alert*). Accordingly, consumer reporting agencies must issue separate non-criminal and criminal background check reports, or employers must institute a system to internally segregate such records to ensure that decision makers cannot access the criminal history until after a conditional job offer has been extended.[1]

Non-Convictions Cannot Be Considered

The amendments to the FCA make it illegal for an employer to consider non-convictions, including convictions for violations (such as trespass or disorderly conduct) or non-criminal offenses, instances when the police decided not to charge or prosecute following arrest, and criminal charges resolved in the favor of the individual, including adjournments in contemplation of dismissal, convictions that were sealed, etc. Non-convictions are “completely protected.” Post offer of employment, employers should consider using the following suggested language set forth in the new Guidance to avoid unlawful inquiries about non-convictions:

Have you ever been convicted of a misdemeanor or felony? Answer “NO” if you received an adjournment in contemplation of dismissal (“ACD”) that has not been revoked and restored to the calendar for further prosecution or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as “disorderly conduct;” (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

The NYC Fair Chance Process

The amendments to the FCA also make it illegal to refuse to hire an applicant or take adverse action against a current employee on the basis of a pending criminal charge (i.e., a pending arrest) without performing the “Fair Chance Process.” The Fair Chance Process requires employers to perform a “Fair Chance Analysis” by considering “the relevant Fair Chance Factors” prior to making a decision to deny employment. With respect to arrests or convictions preceding the application for employment, “the relevant Fair Chance Factors” refers to the New York State mandated Article 23-A factors, discussed in our prior *Alert*. With respect to arrests or criminal accusations pending at the time of an application for employment, or during employment, “the relevant Fair Chance Factors” means the following “NYC Fair Chance Factors”[2]:

1. The policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement;
2. The specific duties and responsibilities necessarily related to the employment held by the person;
3. The bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in the case of pending arrests or criminal accusations, on the applicant or employee’s fitness or ability to perform one or more such duties or responsibilities;
4. Whether the person was 25 years of age or younger at the time of occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations, which shall serve as a mitigating factor;
5. The seriousness of such offense or offenses;
6. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public; and
7. Any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including, but not limited to, history of positive performance and conduct on the job or in the community.

At the conclusion of the employer's individual assessment of the applicant's or employee's criminal history after applying the Article 23-A or NYC Fair Chance Factors, the employer must follow the modified four-step Fair Chance Process:

1. Disclose to the applicant or employee a written copy of the inquiry the employer conducted;
2. Request from the applicant or employee any information that will be relevant to the employer's analysis;
3. Disclose to the applicant or employee a written copy of the employer's analysis under the relevant Fair Chance Factors; and
4. Provide at least five business days for the applicant or employee to respond to the employer's decision, during which time the employer must hold the applicant's or employee's job open.

Enhanced Protections for Applicants and Employees

The amendments to the FCA add additional protections for applicants and employees. An employer that wishes to deny employment to an applicant or to discipline or terminate an employee on the basis of criminal conviction history or a pending criminal case must follow the Fair Chance Process, including consideration of the relevant Fair Chance Factors. The employer may deny employment to the applicant or discipline or terminate an employee on the basis of criminal conviction history or a pending criminal case if, after conducting a Fair Chance Analysis, the employer properly:

1. Determines that there is a direct relationship between the alleged or convicted conduct and the job; or
2. Shows that employment "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

An employer is permitted to place an employee on leave for a reasonable period of time while it conducts the Fair Chance Analysis. If the employee has accrued leave time, the employee should be permitted to use that time consistent with the employer's policies on leave.

Changes to the Definition of Applicant

The definition of “applicant” now includes current employees who are seeking or being considered for promotion or transfer, in addition to persons seeking initial employment. Conditional offers of employment therefore include offers of promotion or transfer of current employees. Employers may only revoke such conditional offers of employment based on the limited exceptions enumerated above.

Exemptions to the Amendments to the Fair Chance Law

Certain employers are exempt from some or all portions of the changes to the Fair Chance Law described above. To the extent that the FCA conflicts with financial industry-specific rules and regulations promulgated by a self-regulatory organizations, financial industry employers do not need to comply with the FCA.

Likewise, federal, state or local laws may require an employer to perform a criminal background check on an applicant prior to extending even a conditional offer of employment. In such cases, employers may advise applicants once they apply for the position that a background check is required and will be conducted prior to a conditional offer of employment. The employer may conduct the criminal background check before extending the conditional offer in that case, but must still conduct a Fair Chance Analysis of the applicant’s criminal history and provide the applicant with a copy of the inquiry and Fair Chance Notice and provide a reasonable period of at least five days to respond to the employer’s concerns.

Conclusion

These amendments enhance job protections to applicants with criminal histories, and provide protection to current employees. Employers must review their hiring process, background check procedures and other policies to ensure compliance with the FCA.

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

[1] The Commission encourages employees to avoid using the term “background check,” and instead use terms like “consumer report” or “investigative consumer report” in any authorization notice used prior to a conditional offer. Note that driving records may contain both criminal and non-criminal information and should not be reviewed until after a conditional offer.

[2] If an applicant has both a conviction history and a pending criminal charge, the employer must separately analyze each according to the relevant Fair Chance Factors.

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