

**CRIMINAL BACKGROUND CHECKS:
COMPLYING WITH NEW YORK CITY'S FAIR CHANCE ACT**

New York City's Fair Chance Act (the Act) prohibits most private employers from inquiring about applicants' (and employees' and unpaid interns') criminal histories until after a conditional job offer has been made, and imposes significant obligations on employers who intend to take action based on such information. This Legal Alert will help nonprofit managers review their pre-employment and hiring practices to ensure that their organizations are in compliance with the Act. In July 2021, the New York City Council amended the Act, principally broadening the Act's protections to current employees with criminal charges, arrests, or convictions.¹ In addition, employers must now provide applicants/employees at least five business days (the Act originally allowed three business days) to respond to a negative determination under the Act's required analysis. The New York City Human Rights Commission (Commission), which enforces the law, then published guidance reflecting the Amendment.

The Commission's website is: <http://www.nyc.gov/html/cchr/html/home/home.shtml>

Prohibited Conduct Under the Act

The Act makes it an unlawful discriminatory practice under New York City's Human Rights Law for an employer or its agent to "[m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for a position . . . until after such employer or agent . . . has extended a conditional offer of employment to the applicant."² The Act defines "any inquiry or statement" making it clear that an employer or an outside agent may not, at the initial application stage:

- ask any oral or written questions concerning an applicant's criminal background,
- run any type of criminal background search, including a Google search and obtaining driving records, on an applicant, and
- make any statement designed to elicit a disclosure from the applicant for purposes of obtaining information concerning the applicant's arrest record, conviction record, or a criminal background check.

Per the July 2021 amendment, the Act's protections now also extend to current employees. An employer cannot discipline or terminate an employee based on a pending case or conviction until the employer determines that there is a "direct relationship" between the alleged or convicted conduct and the job, or that continuing to employ the person "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."³

¹ Local Law No. 004 (2021) of City of New York.

² N.Y.C. Admin. Code § 8-107(11)(b)(5)(i)(a)(3).

³ N.Y.C. Admin. Code § 8-107(10)(c).

Employers are required to evaluate an applicant's employment qualification factors prior to extending a conditional offer. Any non-criminal information must be considered prior to the extension of a conditional offer. Unless an employer can show that it could not have reasonably known the non-criminal information before the conditional offer and the employer would not have made the conditional offer if it had known the non-criminal information regardless of the results of the criminal background check, it may not consider non-criminal information after extending a conditional offer. Because of the intrinsic nature of criminal and non-criminal information in a driving abstract, an employer may not review driving abstracts prior to extending a conditional offer but may consider non-criminal information contained on the driving aspects provided the employer could not have reasonably known such information before the conditional offer.

Exemptions

The restrictions above do not apply to certain employers, including:

- employers with less than four employees [NOTE: independent contractors who do not have their own employees are included in this count] and
- employers who are required under federal, state, or local law or regulation to conduct background checks for employment purposes or to bar employment in a particular position based on criminal history. **Accordingly, the new law does not prohibit nonprofits, such as childcare or home health care providers, who are legally prohibited from hiring applicants with certain types of criminal convictions from asking applicants for such positions about their criminal history at the start of the hiring process. However, providers subject to E.O. 151 under city human services contracts must still wait until after the first interview to inquire about criminal history.**

Notification Process

An employer who makes inquiries into an applicant's criminal history, including running a background check, after a conditional offer of employment is extended, and determines that the information may warrant an adverse employment action (e.g., not hiring the applicant) must follow the following process:

- Perform a multi-factor analysis required by Article 23-A of the New York State Corrections Law, which forbids employers from denying employment to an applicant based on a criminal conviction unless certain criteria are met regarding:
 - the relationship between the position and the criminal offense or
 - the safety risk to property or individuals.
- Provide the applicant with a written copy of the report on which the decision not to hire is based, if the employer has decided to withdraw the offer of employment after evaluating the applicant according to the multi-factor Article 23-A analysis.
- Provide a copy of the multi-factor Article 23-A analysis to the applicant. Employers may use the Commission's "Fair Chance Act Notice" form, which can be found here: https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf. Employers may use their own form as long as it captures the "material substance" of the Article 23-A analysis providing the reasons for the decision to withdraw the conditional offer.
- Allow the applicant five business days to respond with additional or mitigating information. During this period of time, the position must stay open. The intent of this provision is to provide

an opportunity for the applicant and the employer to discuss whether the employer's risk assessment is unfounded or whether any reasonable measures are available to mitigate the perceived risk.

- Maintain an exception log of all adverse employment decisions based on criminal background, including the Article 23-A analysis. The Commission may request the log.

An employer is not prohibited from disqualifying an applicant if the employer is able to credibly demonstrate that the applicant intentionally misrepresented their conviction history or pending cases; misrepresentations about non-convictions may not be used to disqualify an applicant. Although an employer is not required to perform the multi-factor analysis if it is denying employment based on intentional misrepresentation, it must first provide the applicant with a copy of the information that led the employer to believing the applicant has intentionally misrepresented their conviction history or pending cases and afford the applicant a reasonable period of at least five business days to respond with additional information. If an applicant is able to credibly show that the information provide was not a misrepresentation or that the misrepresentation was unintentional, the employer must then perform the multi-factor analysis.

An employer who makes inquiries into a current employee's conviction history or pending case and determines that the information may warrant an adverse employment action (e.g., discipline or termination) must follow the following process, as stated in the July 2021 amendment:

- Perform a multi-factor analysis under Article 23-A for any convictions that predate the person's employment, or perform a multi-factor analysis according to the NYC Fair Chance Factors (which are similar but not identical to the Article 23-A Factors) for any pending cases and convictions that occur during the person's employment. The NYC Fair Chance Factors can be found on the Commission's website: <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page>.
- Provide the employee with a written copy of the report on which the decision for adverse employment action is based, if the employer has decided to take such action after evaluating the employee according to the Article 23-A analysis or the NYC Fair Chance Factors.
- Provide a copy of the analysis to the employee. Employers may use the Commission's "Fair Chance Act Notice" form, which can be found here: https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf. Employers may use their own form as long as it captures the "material substance" of the analysis providing the reasons for the decision to take the adverse employment action.
- Allow the employee five business days to respond with additional or mitigating information. The intent of this provision is to provide an opportunity for the employee and the employer to discuss whether the employer's risk assessment is unfounded or whether any reasonable measures are available to mitigate the perceived risk.
- Maintain an exception log of all adverse employment decisions based on criminal background, including the analysis under Article 23-A or the NYC Fair Chance Factors. The Commission may request the log.

Enforcement

The Act is enforceable against private employers through an administrative action or through a private right of action. Therefore, aggrieved individuals are able to file a complaint with the Commission or file an action directly in court. Successful plaintiffs can receive damages (both compensatory and punitive), back pay, reinstatement or other equitable relief, and attorneys' fees and costs.

This alert is meant to provide general information only, not legal advice. If you have any questions about this alert please contact Judith Moldover at (212) 219-1800 ext. 250 or visit our website at www.lawyersalliance.org for further information.

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