

New York City Amends Fair Chance Act, Further Limits Employers' Consideration of Criminal History

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The New York City Council has expanded NYC's Fair Chance Act to further restrict NYC employers from taking adverse actions against applicants or employees based on their criminal history. The [law](#) will go into effect on or about July 28, 2021. We highlight the changes in the law and action items below.

First, a Quick Refresher on the Current NYC Fair Chance Act

The Fair Chance Act prohibits employers from *inquiring* about an applicant's pending and past arrests and convictions until *after* the employer extends to the applicant a conditional offer of employment. After extending that offer, the Act permits inquiry (except with respect to certain types of arrests and convictions), but requires an employer to undertake the Fair Chance Process should it wish to rescind the offer based on the applicant's past arrest or conviction history.

Under the Fair Chance Process, to rescind the conditional offer, the employer first must determine whether: (i) there is a direct relationship between the criminal offense and the employment sought; or (ii) there would exist an unreasonable risk to property or the safety and welfare of specific individuals or the general public if they employ the applicant. In making this determination, the employer must run an individualized assessment of each of the eight factors set forth under [Article 23-A of the New York State Corrections Law](#). In addition, the employer must also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant. A certificate does not automatically entitle the applicant to employment, but it does create a presumption the employer would need to overcome to revoke the offer. In running this assessment, no one factor is determinative and employers may not ignore evidence favorable to the applicant or disproportionately weigh one factor over another factor.

If, after running that assessment, the employer determines that it wants to rescind the conditional offer because the criminal offense was directly related to the job or there is a threat to safety or welfare, the employer must then: (i) provide the applicant with a copy of the inquiry made (i.e. the search(es) the employer ran); (ii) provide the applicant with a copy of Article 23-A; (iii) provide the applicant with a copy of the Article 23-A assessment the employer performed, including the

documents on which the employer relied; (iv) provide the applicant with a reasonable time to respond to the written assessment (no less than 3 days) and hold the position open during that period; and (v) determine whether additional information provided by the applicant affects the Article 23-A assessment sufficient to reverse the employer's decision.

You'll note that under current law an employer is not required to undertake the Fair Chance Process when seeking to rescind an offer based on a *pending* arrest of an applicant. Nor does the Fair Chance Act come into play when considering the criminal history of an existing employee.

The Amended Fair Chance Act Expands the Application of the Fair Chance Process

The amended Fair Chance Act expands employee protections in several significant ways, including:

- ***Extension to Pending Arrests and Other Criminal Accusations*** – Employers will now be required to undergo the Fair Chance Process when seeking to act on a pending arrest or other criminal accusation.
- ***Extension to Employee Criminal History*** – Employers will also be required to undergo the Fair Chance Process when seeking to rescind a promotion or transfer or to end the employment of a current employee.
- ***Extension to Independent Contractors & Freelancers*** – Because the Fair Chance Act now applies to employees and not just applicants, and because the New York City Human Rights Law, of which the Fair Chance Act is part, was recently expanded to treat independent contractors and freelancers as employees, employers must also apply the Fair Chance Process to these individuals as well – a significant expansion.
- ***Prohibition on Any Inquiry at Any Time About Certain Criminal History*** – The amended law prohibits inquires about or acting adversely based upon an applicant or employee's: (1) violations; (2) non-criminal offenses; (3) non-pending arrests or criminal accusations; (4) adjournments in contemplation of dismissal; (5) youthful offender adjudications; or (6) sealed offenses; when those matters would violate the New York State Human Rights Law.
- ***Creation of New Fair Chance Factors for Application*** – The new law maintains the Article 23-A factors when employers assess an *applicant's* criminal history. But the law creates a *new* set of relevant factors to consider as part of the individualized assessment, which are similar to, but different than, the Article 23-A factors, when employers assess: (1) employee convictions that occur *during* employment; or (2) *pending* arrests or criminal charges for both applicants and employees that occur at any time. The new factors to be considered as part of the Fair Chance Process in these circumstances are:
 1. New York City's policy to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in employment;
 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;
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 history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

- ***Creation of Affirmative Requirement to Ask Applicants to Provide Fair Chance Factor Information*** – The law goes beyond the current Fair Chance Act (which requires employers to solicit from applicants evidence of rehabilitation and good conduct) to now require applicants and employees to provide *any* information relevant to the applicable fair chance factors. If the employer does not solicit this information, the employer may be found in violation of the Fair Chance Process.
- ***Expansion of Period for Applicants to Respond to Written Assessment*** – Under current law, employers wishing to rescind a conditional offer to an applicant must hold the position open for a “reasonable time”, which the law defines as no less than 3 business days after providing the applicant with the written assessment of relevant factors. During that period the applicant may offer rebuttal evidence. The law expands that “reasonable time” period from 3 to 5 business days for applicants. The law also creates a similar “reasonable time” window for existing employees before the employer can withdraw the promotion or transfer or end the employee’s employment, but it does not specifically denote a minimum of 5 business days. We would expect future agency guidance to address the interpretation of “reasonable time” for a current employee.
- ***Codification of NYC Commission Guidance on Conditional Employment Offers*** – The law codifies existing guidance from the NYC Commission on Human Rights to confirm the employers may only revoke a conditional offer of employment based on: (1) the results of a criminal background check after undergoing the Fair Chance Process; (2) the results of a medical exam, to the extent permissible under applicable law; or (3) other information the employer could not have reasonably known before making the conditional offer, if based on the information, the employer would not have made the offer.
- ***Exclusion of Misrepresentations from Fair Chance Act Coverage*** – The amended law confirms that it does not protect applicants or employees who make intentional misrepresentations to their employer. However, the law does however install certain safeguards where an employer wants to act on an alleged misrepresentation. Now, employers will have to provide the applicant or employee with a copy of the documents that formed the basis of the determination that an intentional misrepresentation was made, and provide the applicant or employee a “reasonable” time to respond.

- **Confirmation Regarding Unpaid Employee Leave During Fair Chance Process** – The law clarifies that employers may place employees on unpaid leave for a “reasonable” amount of time when conducting a Fair Chance Process assessment regarding the employee’s criminal conviction during employment or pending arrest/criminal accusation during employment.

Key Takeaways:

As noted above, the amendments to the Fair Chance Act will go into effect in late July 2021, which gives NYC employers a window of time to prepare in the following ways:

- **Review Applications, Policies, and Hiring Processes Now** – Employers must review their applications, background checks, and other hiring policies, procedures and practices to come into compliance with these expanded requirements and prohibitions. Significantly, this also includes updating background check-related policies, procedures and practice as applied to existing employees, independent contractors and freelancers.
- **Partner with Third Party Background Check Providers to Ensure Compliance** – Employers should also work with their third-party background check providers to ensure they are not soliciting improper information from applicants or including the same on background check reports.
- **Train Human Resources Professionals & Managers** – Employers should update training materials and ensure Human Resources professionals and individuals involved in the hiring process are trained to properly the law’s restrictions related to criminal history inquiries and the proper application of the Fair Chance Process.
- **Stay Tuned for Further Guidance** – We expect the NYC Commission on Human Rights to put forward rules and/or other interpretative guidance regarding the new amendments, hopefully before their effective date, and to update their forms (and potentially create new ones) which employers can use to run individualized assessments and distribute to impacted applicants and employees. The current version of the assessment form can be found [here](#). We will watch closely for further guidance and instruction here.

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