

Amendment to New York City's Fair Chance Act Further Prohibits Employers from Basing Personnel Decisions on Criminal History

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On January 10, 2021, New York Mayor Bill DeBlasio signed an amendment passed by the New York City Council to expand the City's Fair Chance Act. This amendment provides further prohibitions on NYC employers from taking adverse actions against applicants or employees based on their criminal history. Primarily, the amendment ensures that such adverse actions cannot be taken against employees and applicants on the basis of arrest records, pending criminal accusations or criminal convictions. The amendment goes into effect on July 29, 2021.

The Fair Chance Act

The Fair Chance Act currently prohibits employers from asking about an applicant's pending and past arrests and convictions until after a conditional offer of employment is made. Once a conditional offer is made, employers are permitted to ask questions or to run a criminal background check, but employers are required to conduct an analysis known as the Fair Chance Process before the offer is rescinded based on the applicant's past conviction history.

Under the Fair Chance Process, the employer must determine whether (1) there is a direct relationship between the criminal offense and the employment sought or (2) if there would be an unreasonable risk to property or the safety and welfare of specific individuals or the general public if the applicant were employed. In making this determination, the employer must run an assessment of each of the eight factors set forth under Article 23-A of the New York State Correction Law:

- New York's public policy stressing the importance of encouraging the licensure and employment of persons who were previously convicted of criminal offenses
- The specific duties and responsibilities necessarily related to the licensure or employment sought or held by the individual at issue
- The bearing, if any, of the crime for which the individual was convicted on the individual's

fitness or ability to perform the duties of the job

- The time elapsed since the crime was committed
- The age of the individual at the time the crime was committed
- The seriousness of the offense
- Any information produced by the individual regarding their rehabilitation and good conduct
- The employer's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public.

An employer also must give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the employee.

Importantly, no one factor is dispositive and employers cannot ignore evidence favorable to the employee or applicant or disproportionately weigh one factor over another factor.

If, after running that assessment, the employer determines that it will 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 provide the applicant with:

- A copy of the inquiry made (i.e., the search(es) the employer ran)
- A copy of Article 23-A
- A copy of the Article 23-A assessment the employer performed, including any documents the employer relied on in making its decision
- At least three (3) days to respond, and hold the position open during that period. Once the employer receives the individual's response, the employer must then determine whether the information provided by the applicant sufficiently affects the original Article 23-A such as to reverse the original decision.

Under the current law, an employer is not required to undertake the Fair Chance Process when rescinding an offer based on a pending arrest of an applicant. Nor does the Fair Chance Act come into play when considering the criminal history or the arrest of an existing employee.

Employee Protections under the Amended Fair Chance Act

The amended Fair Chance Act expands employee protections in the following ways:

- New York City employers will now be:
 - Required to conduct the Fair Chance Process when seeking to act on a *pending* arrest or other criminal accusation.

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- Required to undergo the Fair Chance Process when seeking to rescind a promotion or transfer, or when ending the employment of a current employee.
 - Required to apply the Fair Chance Act to independent contractors and freelancers.
 - Prohibited from inquiring about specific types of criminal history at any point, including the employee/applicant'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.
- The law also creates new factors to review as part of the Fair Chance Process when employers are making any assessment specifically based on (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:
 - New York City's policy to overcome a stigma toward and unnecessary exclusion of persons with criminal justice involvement in employment
 - The specific duties and responsibilities necessarily related to the employment held by the person
 - 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's or employee's fitness or ability to perform one or more such duties or responsibilities
 - Whether the person was 25 years of age or younger at the time of the 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
 - The seriousness of the offense or offenses
 - The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public
 - Any additional information produced by the applicant or employee, or produced on their behalf, with regard 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.
- An employer now must solicit information from applicants and employees that may be relevant to the Fair Chance Process.
 - The applicant or employee must be allowed no fewer than five (5) business days to respond.
 - The new law clarifies that employers may place current employees on unpaid leave for a "reasonable" amount of time when conducting a Fair Chance Process assessment.

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