

Everything Else You Need to Know About New York City's FCA—New Rules Effective August 5, 2017

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New York City has issued new rules interpreting the city's Fair Chance Act (FCA). These rules, which went into effect on August 5, 2017, provide clarification and guidance on how employers can comply with the requirements of the FCA, the city's restrictive "ban the box" law which prohibits (with few exceptions) employers from inquiring about or considering an individual's criminal history until after a conditional offer of employment is extended.

The New York City Commission on Human Rights previously issued guidance on the FCA shortly after the law went into effect in October of 2015, but the legal effect of that guidance was unclear. The final rules, which had been pending since March of 2016, are consistent with prior guidance, with some clarifications and additional obligations. Specifically, the rules provide

1. an expanded list of per se violations;
2. an affirmative duty requiring employers to collect additional information from applicants in order to conduct the Article 23-A analysis;
3. the required components of a compliant Fair Chance Notice (FCA Notice) when employers opt to use a customized form versus the model form provided by the Commission;
4. a requirement that employers provide applicants or employees with written copies of all criminal history information obtained, regardless of the source, including documentation of public records and general Internet searches (e.g., Google searches);
5. guidance for determining a reasonable waiting time between sending an applicant the FCA Notice and making a final employment decision;
6. details concerning enforcement, including an early resolution process for certain employers that commit per se violations; and

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7. a rebuttable presumption that criminal history information motivated an employer's decision to rescind a conditional offer of employment.

Per Se Violations

Per se violations are those that result in automatic liability for an employer. The final rules provide an expanded list of per se violations, which include the following:

1. Declaring, printing, or circulating any solicitation, advertisement, policy, or publication for employment that states, directly or indirectly, orally or in writing, any limitation or specification regarding criminal history. This would include, for example, an employer that publishes a classified ad that states "background check required."
2. Using an employment application that requires applicants to grant an employer permission to run a background check or provide information regarding criminal history *prior* to extending a conditional offer.
3. Making any statement or inquiry relating to an applicant's pending arrest or criminal history information before a conditional offer of employment is extended.
4. Using a boilerplate employment application that requests or refers to criminal history information, even if it includes a disclaimer directing City applicants not to respond to those questions.
5. Failing to comply with the Fair Chance Process before withdrawing a conditional offer of employment.
6. Requiring applicants to disclose an arrest that, at the time disclosure is required, has resulted in a non-conviction. "Non-conviction" means any arrest or criminal accusation, *not currently pending*, that was terminated in favor of the individual, adjudicated as a youthful offender, or sealed.

Employers' Affirmative Duty

The final rules clarify that the city's Fair Chance Process (unlike the individualized assessment process described in the U.S. Equal Employment Opportunity Commission's 2012 Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964) requires employers to *actively* seek out additional information from applicants in order to conduct their Article 23-A analyses, including clarification and evidence of rehabilitation and good conduct.

Compliant FCA Notice

An employer that wants to move forward with an adverse employment decision after conducting an Article 23-A analysis must send an FCA Notice to the affected applicant or employee before taking adverse action. The Commission has provided a model notice on its website for this purpose; however, employers may choose to create their own customized notices, so long as they are

comparable. The final rules provide that a “comparable” FCA Notice must

1. include the specific facts that were considered in connection with the Article 23-A analysis;
2. set forth the outcome of that analysis;
3. articulate the concerns and the basis for determining that (a) there is a direct relationship between the criminal record and the job in question or (b) an unreasonable risk of harm to specific person, the general public, or property; and
4. inform the individual of his or her rights upon receipt of the notice, including how the individual can respond to the notice and the time frame within which he or she must do so.

Provide a Written Copy of Any Inquiry

With the FCA Notice, an employer must provide a written copy of any inquiry it made to collect information about an applicant’s criminal history. The final rules clarify that written copies must be complete and accurate, and should contain each and every piece of information relied upon to determine if the applicant has a criminal history, including copies of consumer reporting agency report(s), printouts from Internet searches (with the information source identified and a date stamp showing the date and time the employer made the inquiry), public record(s), and written summaries of any oral conversations, specifying whether the oral information was self-disclosed by the applicant.

Reasonable Amount of Time

After the affected individual receives the FCA Notice and a written copy of the employer’s inquiry, an employer is required to hold open a position for a reasonable amount of time in order to provide the individual with an opportunity to respond to the employer’s concerns. Under the final rules, a “reasonable” amount of time is at least three business days *and* the employer should further determine what is reasonable based on (1) what additional information the applicant is purporting to gather and whether the additional information would change the outcome of the employer’s initial Article 23-A analysis; (2) why the applicant needs more time to gather the information; (3) how quickly the position must be filled; and (4) any other relevant information.

Enforcement

The final rules provide for the early resolution of per se violations in certain circumstances where an employer is willing to admit liability and pay a penalty. The Commission will offer early resolution to employers that have (1) 50 or fewer employees; (2) no other pending Human Rights Law violations; and (3) no more than one Human Rights Law violation in the prior three years. Nevertheless, the Commission retains the right to proceed with a full investigation and hearing in cases where an early resolution would not serve the public interest.

Rebuttable Presumption

The final rules establish a rebuttable presumption that when an employer revokes a conditional offer of employment without following the Fair Chance Process, the employer’s decision was improperly motivated by the applicant’s criminal history. To rebut this presumption, an employer must show that

the offer was revoked based on (1) a medical exam permissible under the Americans with Disabilities Act; (2) material information that the employer could not have reasonably known prior to the conditional offer if, based on the information, the employer can show it would not have made the employment offer; or (3) the employer's production of evidence that it did not know of the applicant's criminal history prior to revoking the conditional offer.

Key Takeaways

Although the FCA has been in effect for nearly two years now, employers should take this time to reexamine their practices with respect to gathering New York City applicants' criminal history information—whether from background checks obtained from a consumer reporting agency or any other source—to ensure that they are in compliance with the law. Failing to comply with the FCA can be costly, as the FCA provides for penalties in addition to those typically available under the New York City Human Rights Law. The Commission has made clear its intent to vigorously enforce the FCA and take a narrow view of any available exemptions under the law.

Federal, state, and locally compliant background check forms and letters, including disclosure and authorization forms, are provided in the *O-D Comply: Background Checks* subscription materials, which are updated and provided to *O-D Comply* subscribers as the law changes.

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