

Management Alert



New York City's Fair Chance Act: Final Rules and Regulations

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Seyfarth Synopsis: On August 5, 2017, the [Final Rules and Regulations](#) for the New York City Fair Chance Act (the "FCA") go into effect. The FCA, which is enforced by the New York City Commission on Human Rights (the "Commission"), makes it unlawful to request or consider an applicant's criminal background prior to a conditional offer of employment and imposes compliance requirements for New York City employers performing background checks on applicants and employees. (See our prior posts [here](#), [here](#), [here](#) and [here](#)).

The FCA

Under the FCA, employers with at least four employees are prohibited from inquiring about a job applicant's criminal history until after a conditional offer of employment has been made to the applicant. In addition, employers are prohibited from referring to criminal history in job postings, employment applications, or any type of inquiry during the interview process itself. Prohibited inquiries extend to conducting investigations into an applicant's criminal history, such as using publicly available records or conducting searches on the Internet, regardless of whether the investigations are conducted by the employer or a third party. There are narrow exceptions, such as for employers who are required to conduct background screens pursuant to federal, state, or local law, or subject to the rules of a financial self-regulatory organization, such as the SEC or FINRA.

In the event that an employer decides to rescind the conditional offer of employment due to an applicant's criminal history, the FCA requires that the covered employer follow certain procedures. The factors outlined in Article 23-A of the New York Correction Law must be taken into consideration in order to reach a determination as to whether there is a "direct relationship" between the applicant's criminal conviction history and the job duties in question, or an unreasonable risk to people or property that would preclude the applicant from employment. The FCA also sets forth a fair chance process, including providing applicants with a copy of their background check report, an analysis of the factors outlined in Article 23-A (in a form prescribed by the Commission, or one that is reasonably similar) and an opportunity for the applicant to address the criminal history at issue and present mitigating information or material before the offer of employment is rescinded.

New Guidance

1. **Per Se Violations**

The Commission has identified *per se* violations, regardless of whether adverse action is actually taken by the employer:

- Declaring, printing, or circulating of any solicitation, advertisement, policy, or publication that directly or indirectly expresses (orally or in writing) any limitation or specification in employment regarding criminal history (for example, “no felonies,” “background check required”). Importantly, this also applies to out-of-state employers with job postings for positions in New York City.
- Employing applications that require applicants to consent to employers running background checks or providing information regarding criminal history prior to a conditional offer of employment being issued. This includes the use of a multi-jurisdiction boilerplate application form that inquires as to criminal history, regardless of the use of disclaimers indicating that the applicant should disregard the specific questions if applying for a position subject to the FCA.
- Making any inquiry or statement relating to an applicant’s criminal history before a conditional offer of employment is tendered.
- Disqualifying an applicant because they refused to respond to a prohibited inquiry regarding criminal history.
- Using publicly available records or conducting searches on the Internet to learn about an applicant’s criminal history. Such searches are prohibited regardless of whether the investigations are conducted by the employer or a third party.
- Failing to comply with the fair chance process pursuant to the FCA, including providing the candidate with a criminal history report and a copy of the Article 23-A form analysis, or holding the position open for at least three business days from the candidate’s receipt of the pre-adverse action notification letter.
- Changing the requirements of the position after learning of the applicant’s criminal history and therefore disqualifying the applicant based upon the revised requirements.

Per se violations may result in employers incurring fines based upon the employer’s size and history of previous violations; they range from \$500 to \$3,500 for initial violations to \$1,000 to \$10,000 for repeat violations. Willful, wanton, or malicious actions found on the part of an employer may result in the Commission’s imposition of a civil penalty of up to \$250,000. Additionally, violations of the FCA may result in compensatory damages, punitive damages, and attorney’s fees.

2. **Non-Convictions and Pending Criminal Charges**

The Rules emphasize that an employer can never require an applicant to disclose, nor may it consider, non-convictions (*i.e.*, criminal accusations that are not currently pending, were terminated in favor of the applicant, were adjudicated as a juvenile or resulted in a sealed conviction). Inquiries or consideration of non-convictions would be deemed a *per se* violation.

The fair chance process is NOT applicable to pending criminal charges, however, employers still cannot make inquiry or explore information about such charges before a conditional offer of employment is made.

3. **Inadvertent or Unsolicited Disclosure**

If an employer inadvertently learns of an applicant’s criminal history without solicitation or inquiry, the employer will not be liable under the FCA. This does not allow the employer to inquire further about the criminal history or rely on the information for hiring purposes without a conditional offer of employment being made.

4. Temporary Help Agencies

While temporary help agencies must comply with the FCA, the Rules recognize that conditional offers generally only make the applicant available for assignment to agency clients. The Rules clarify that temporary help agencies may consider only the minimum skill requirements and qualifications necessary in order to evaluate convictions to determine whether they are job-related. Temporary help agencies cannot make determinations about an applicant's suitability based upon an employer's preference to disqualify individuals with specific types of convictions.

5. Falsification

The Rules expressly provide that, "[i]f a background check reveals that an applicant has intentionally failed to answer a legitimate question about their conviction history, the employer, employment agency, or agent thereof may revoke the conditional offer or take an adverse employment action." Rescission of the employment offer would still need to comply with the fair chance process under the FCA.

6. Rebuttable Presumption

The Rules impose a rebuttable presumption that a rescission of a conditional offer of employment was motivated by a candidate's criminal history. In order to rebut the presumption, employers can show that the rescission was based upon a permissible physical examination or material information it could not have reasonably known before extending a conditional offer or evidence that the employer had no knowledge of the candidate's criminal history prior to revocation.

7. Enforcement Initiatives

The Commission has implemented an early resolution program to allow employers to admit liability for *per se* violations of the FCA. The employer would have to accept a penalty and enter into an agreement with respect to compliance, however, the Commission reserves the discretion to conduct a full investigation and take a complaint to hearing if an early resolution would not serve the public interest.

Employer Outlook

Employers operating in New York City have been legally obligated to comply with the FCA since October 27, 2015, however, they should take this opportunity to review their applications, job postings, policies, practices, and onboarding documents to ensure that they are prepared to comply with the more robust guidance. Additionally, employers should ensure that all recruiting and onboarding personnel and human resource business representatives understand the FCA compliance requirements.

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