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Best Practices for Complying with the New York City Fair Chance Act

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Given the imminent effective date of New York City's Fair Chance Act, employers may be wondering what they need to do to comply with the law. As many employers are aware, effective October 27, 2015, the Fair Chance Act amends the New York City Human Rights Law to prohibit most employers from inquiring about criminal history until after a conditional offer of employment is extended (see our prior blog post *here*). (Some employers may fall into the exceptions of this law.) The law also imposes upon employers the obligation to provide applicants with a copy of the relevant inquiry (e.g. the consumer report) and the company's analysis under Article 23-A of the New York Corrections Law (in a form to be determined by the New York City Commission on Human Rights ("NYCCHR")). However, because the NYCCHR has not yet published the required form, many employers are in limbo, awaiting guidance for a law they are obligated to comply with in mere days. Considering this fact, employers may want to consider taking the following actions:

1. Review all pre-employment forms. Employers should ensure that job advertisements, applications for employment, interview questionnaires, and all other pre-conditional offer documents make no reference to the fact that a background check will be conducted, that criminal history will be considered, or otherwise inquire about criminal history.

2. Train hiring managers. Hiring managers should be trained not to ask questions about criminal history prior to a conditional offer of employment. If a job candidate independently informs the manager of his or her criminal background prior to a conditional offer, managers should be trained to respond that such information is not considered by the Company at this stage in the process.

3. Revise the adverse action protocol. The Fair Chance Act requires that prior to taking adverse action based on criminal history an employer:

   (a) provide the applicant with a copy of the "inquiry" (which by definition includes "any question communicated to an applicant in writing," "any searches of publicly available records," or consumer reports);

   (b) conduct an analysis in accordance with Article 23-A and provide a written copy of that analysis to the applicant, and any supporting documentation that impacted the analysis; and

   (c) keep the job opportunity open for at least three business days after the applicant receives the above documentation before taking adverse action.

The law anticipates that employers provide a copy of the Article 23-A analysis in a "form" to be provided by the NYCCHR, but this form has not yet been issued. Until the form is available, employers may want to consider utilizing an individualized assessment form, which lists each of the eight factors of consideration under Article 23-A, and details the employer's consideration of each factor and the basis for its adverse determination. A copy of this document should be provided to applicants in the event of an adverse action decision until the NYCCHR's form is released.

4. Consider best practices for direct inquiries to the applicant. Many employers may still wish to ask the applicant personally whether he or she has a criminal history. Such inquiry is still permissible under the Fair Chance Act, provided (1) it occurs after a conditional offer of employment is given; (2) the applicant is provided a copy of the inquiry, at the same time as the applicant is given the consumer report and any Article 23-A analysis (as described above); and (3) the question otherwise complies with the state law limitations as to the type of criminal history an employer is permitted by law to consider. Employers are still able to terminate or refuse to hire an individual who makes misrepresentations in responding to a criminal history inquiry, but employers should follow the notice protocol above and as set forth in the Fair Credit Reporting Act (FCRA) before taking action.

5. Review FCRA disclosure forms. Employers should ensure that their FCRA disclosure forms accurately describe the information to be obtained by the Company in a consumer report. And, particularly in light of the Fair Chance Act's companion law, the Stop Credit Discrimination in Employment Act (SCDEA), applicants should not receive disclosure forms mentioning that a consumer report may include credit history information, unless the applicant meets an exception under the law. (See our prior Client Alerts *here* and *here*.)

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