

Management Alert



New York City Issues Enforcement Guidance and a Revised Fair Chance Act Form

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On November 5, 2015, the New York City Commission on Human Rights released its long awaited Enforcement Guidance governing the New York City Fair Chance Act, which makes it unlawful to request or consider an applicant's criminal background prior to a conditional offer of employment. (See our prior blog posts [here](#), [here](#), and [here](#)).

The NYCCHR's Interpretive Enforcement Guidance is available [here](#). The NYCCHR also made available a revised Fair Chance Act Notice Form, which should be distributed to applicants in the event an employer is considering revoking a conditional offer of employment as a result of the applicant's criminal background check. The revised form -- which we believe may have been modified to address some of the questions and concerns that arose after the NYCCHR released its original version of the form -- may be found [here](#).

Compliance with the Fair Chance Act for Private Employers

A. *Per Se* Violations of the Fair Chance Act

Employers should take note that the NYCCHR's Interpretive Enforcement Guidance expands on the statutory language of the Fair Chance Act, and determines that certain acts will be deemed "per se" violations of the Fair Chance Act, including:

- Declaring, printing, or circulating any solicitation, advertisement, or publication for employment (including employment applications, fliers, handouts, online job postings, and materials distributed at employment fairs) that state any limitation or specification regarding criminal history, even if no adverse action follows. This includes advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."
- Making any statement or inquiry into criminal history, even if no adverse action follows. Consequently, employers cannot ask about or discuss criminal history during the interview process. Based on the definition of a "statement" under the Act, this prohibition may be applied to bar employers from distributing a Fair Credit Reporting Act Disclosure and Acknowledgment Form authorizing a background check prior to a conditional offer of employment.
- Taking an adverse employment action because of an applicant's non-conviction.
- Withdrawing a conditional offer of employment based on an applicant's criminal history before completing the "Fair Chance Process" (see our post on best practices for compliance, [here](#), for more detail). The "Fair Chance Process" requires:

- 1) Providing the applicant a copy of the employer's inquiry into his or her criminal history (i.e. a copy of the consumer report or any other information relied upon by the employer);
- 2) Providing the applicant a written copy of the employer's Article 23-A analysis (i.e. the Fair Chance Act Notice Form, available [here](#));
- 3) Holding the prospective position open for at least three (3) business days from the applicant's receipt of the above documents.

Notably, "[e]mployers may therefore wish to confirm receipt, either by disclosing the information in person, electronically, or by registered mail." The Commission, however, states that "[s]uch method of communication must be mutually agreed on in advance by the applicant and employer." Employers, consequently, may need to revisit and revise their disclosure and authorization forms to ensure that the applicant authorized the chosen method of communication.

B. Post-Conditional Offer Inquiries

Once an employer extends a conditional offer of employment, all permissible inquiries into an applicant's criminal history may be explored. For employers that choose to pose a written question to the applicant (in addition to conducting a background check), the NYCCHR's guidance warns that it is never permissible to inquire about a non-conviction. To avoid this risk, the NYCCHR condones the following language for a post-conditional offer inquiry:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

C. The Fair Chance Act Form and Consideration of Article 23-A Factors

The NYCCHR's guidance also expands upon what the Commission considers appropriate consideration of the Article 23-A factors in determining whether to revoke a conditional offer of employment.

Article 23-A permits an employer to withdraw a conditional offer of employment if (1) there is a direct relationship between the applicant's criminal record and the prospective job; or (2) the applicant's employment "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

The enforcement guidance, however, places the burden on the employer to demonstrate the applicant meets at least one of these two exceptions to Article 23-A in order to withdraw the conditional offer because of the applicant's criminal record. The Commission warns that "[a]n employer cannot simply presume a direct relationship or unreasonable risk exists because the applicant has a conviction record. The employer must evaluate the Article 23-A factors using the applicant's specific information before reaching either conclusion." Specifically, the Commission states that:

-- In order for an employer to claim the direct relationship exception, "an employer must first draw some connection between the nature of conduct that led to the conviction(s) and the potential position. If a direct relationship exists, an employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated."

-- Likewise, in order for an employer to claim the unreasonable risk exception, "an employer must begin by assuming that no risk exists and then show how the Article 23-A factors combine to create an unreasonable risk. Otherwise, this exception would cover all convictions not directly related."

The Commission intends to "review private employers' adverse employment decisions to ensure that they correctly consider the Article 23-A factors and properly apply the exceptions." In so doing, the Commission states that: "Employers must evaluate each Article 23-A factor; they cannot ignore evidence favorable to the applicant; and they cannot disproportionately weigh any one factor over another. Employers should consider applicants' successful performance of their job duties in past

employment, along with evidence that they have addressed the causes of their criminal activity.” It remains to be seen how the Commission’s intent to act as a super-personnel department in reviewing private employer’s decisions with respect to these positions will be reconciled with long standing case law affirming that such personnel decisions are not to be second-guessed by judicial review. In the meantime, employers should consider whether their process for completing the Fair Chance Act Notice form takes the Commission’s guidance into account.

Indeed, the NYCCHR has issued a few additional tips for completing (or modifying) the Fair Chance Act Notice form, namely:

-- That “[t]he Notice requires employers to evaluate each Article 23-A factor and choose which exception – direct relationship or unreasonable risk – the employer relies on.”

-- That “[t]he Notice also contains space for the employer to articulate its conclusion.”

-- That “Boilerplate denials that simply list the Article 23-A factors violate the FCA. For example, an employer cannot simply say it considered the time since conviction; it must identify the years and/or months since the conviction. An employer also cannot list specific facts for each factor but then fail to describe how it concluded that the applicant’s record met either the direct relationship or unreasonable risk exceptions to Article 23-A.”

-- And, that “the Notice informs the applicant of her or his time to respond and requests evidence of rehabilitation and good conduct. The Notice provides examples of such information. Employers may identify specific examples of rehabilitation and good conduct that would be most relevant to the prospective position, but examples must be included.”

D. Exemptions and Exemption Log

The NYCCHR acknowledges that employers are exempt from the Fair Chance Act when hiring for certain positions where federal, state, or local laws require criminal background checks or bar employment based on certain criminal convictions. These exemptions only apply where the criminal history is a *mandatory* -- not discretionary -- bar to a license or employment. For example, mandatory exemptions extend to:

-- Employers regulated by the state Department of Health (“DOH”), Office of Mental Health (“OMH”), and Office of People with Developmental Disabilities (“OPWDD”);

-- Employers in the financial services industry, but only when complying with industry-specific rules and regulations promulgated by a self-regulatory organization (“SRO”) for the hiring of certain positions (not all positions within the financial services firm);

-- Employers hiring police and peace officers; and

-- the New York City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Youth and Community Development, the Business Integrity Commission, and the District Attorneys’ offices in each borough.

Notably, the Commission states that where a position requires a license or approval by a government agency, the Fair Chance Act still applies, even if the license has mandatory barriers. The Commission advises such employers to “only ask whether an applicant has the required license or can obtain one within an acceptable period of time,” and not to ask about a criminal record prior to a conditional offer of employment. If the applicant is then unable to obtain a license as a result of his or her criminal history, the conditional offer may be rescinded.

Employers who do not follow the Fair Chance Act because they believe an exemption applies must be able to show that the position falls within one of the exemptions. If an exemption applies, employers should:

-- inform applicants of the exemption they believe applies;

-- keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used;

-- keep an exemption log that may be provided to the commission, including: (a) the exemption(s) claimed; (b) how the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption; (c) a copy of any inquiry, along with the name of the employee who made it; (d) a copy of the employer's Article 23-A analysis and the name of any employees who participated in it; and (e) the final employment action that was taken based on the applicant's criminal history; and

-- maintain, separately and confidentially, the results of any inquiry into an applicant's criminal history.

Compliance with the Fair Chance Act for Consumer Reporting Agencies

The Fair Chance Act certainly imposes burdens on private employers who make hiring decisions. For the first time, however, the NYCCHR's Enforcement Guidance imposes additional credentialing obligations on consumer reporting agencies (CRAs) who process consumer reports for New York City applicants.

Specifically, the guidance states: "Because CRAs can be held liable for aiding and abetting discrimination under the NYCHRL, they should ensure that their customers only request criminal background reports after a conditional offer of employment."

CRAs would be well advised to revisit their credentialing criteria and end-user certification process to ensure their customers are complying with the Fair Chance Act to avoid aiding and abetting liability.

Compliance with the Fair Chance Act with Respect to Contractors

The Commission has taken the position that employers who uses contractors, even though they are not employees, must still go through the Fair Chance Process if inquiring into the contractors' criminal history or withdrawing an assignment based on that history.

With respect to temporary help firms or staffing agencies, the Commission has stated that "the FCA applies the same way to temporary help firms as it does to any other employer. The only difference is that, for these firms, a conditional offer of employment is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients." Before withdrawing a conditional offer of employment after discovering an applicant's conviction history, such staffing agencies must follow the Fair Chance Process. The Commission has cautioned that temporary help firms may be liable if they aid and abet an employer's discriminatory hiring preferences.

Enforcement

The NYCCHR intends to "vigorously enforce" the Fair Chance Act, including the use of civil penalties. The Commission did not specify the amount of civil penalties that may be applied for a violation of this law, but states that the amount will be determined by the following factors:

- The severity of the particular violation;
- The existence of additional previous or contemporaneous violations;
- The employer's size, considering both the total number of employees and its revenue; and
- Whether or not the employer knew or should have known about the Fair Chance Act.

Civil penalties supplement the penalties available under the NYCHRL, including front and back pay, compensatory damages, punitive damages and attorneys' fees and costs.

In enforcing this law, the Commission explains that there will be a rebuttable presumption that an employer was motivated by an applicant's criminal record if it revokes a conditional offer of employment. Additionally, the Commission will presume that any reason known to the employer *before* its conditional offer is not a legitimate reason to later withdraw the offer.

Finally, the Commission cautions that the NYCHRL will continue to be broadly enforced in accordance with the 2005 Civil Rights Restoration Act.

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