

New York City Issues Guidance on Fair Chance Act Amendments Effective July 29, 2021

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July 22, 2021

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The New York City Council amended New York City's Fair Chance Act (FCA) to significantly expand the scope of protections for applicants and employees with criminal charges or arrests. The amendments are effective on July 29, 2021.

Below is a summary of the existing law highlighting the changes set forth by the amendments, which were refined by guidance recently issued by the New York City Commission on Human Rights.

Existing Requirements

The New York City FCA initially took effect on October 27, 2015. It generally prohibits employers from making inquiries about an applicant's criminal conviction record until after a conditional offer of employment. It further requires employers who wish to withdraw a conditional offer of employment to balance numerous factors (FCA Factors) as part of the Fair Chance Process, which analyzes the job-relatedness of the applicant's conviction. For details, see our articles, [New York City Enacts Ban-the-Box Legislation](#) and [New York City Human Rights Commission Fair Chance Act Fact Sheet Offers Compliance Guidance](#).

Amendments

Pursuant to the amendments, which are effective shortly:

- Employers can only request and review criminal history information after favorably evaluating the candidate's non-criminal information. Further, employers utilizing background checks should have the consumer reporting agency bifurcate reports so that reports containing criminal history information are only obtained and evaluated after all non-criminal information has been evaluated. If the consumer reporting agency cannot bifurcate the reports, the employer must establish an internal system to segregate criminal history information and to ensure that it is reviewed and considered only *after* all non-criminal information. Because driving abstracts often cannot be bifurcated to separate criminal and non-criminal information, employers must treat driving records as criminal history information and, therefore, only request and review criminal history information after favorably evaluating the candidate's non-criminal information.
- Consumer reporting agencies conducting background checks must also ensure they do not aid or abet employment discrimination based on criminal history by, for example, advising an employer to approve or deny an applicant based on a list of conviction histories that the employer wishes to exclude. Doing so would circumvent the Fair Chance Process.
- Temporary help firms, *i.e.*, agencies that place individuals in job assignments for clients, are required to follow the Fair Chance Process when considering whether

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to withdraw a conditional offer of employment.

- Independent contractors are covered under the FCA and have the same right to the Fair Chance Process as employees and applicants.
- Employers cannot discriminate against a current employee who is convicted during employment or against applicants and current employees with pending arrests. For convictions and pending arrests during employment, employers must consider a series of factors with the newly defined and slightly different Fair Chance Factors applicable to the extended covered criminal records. These include, among other things, the policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement, whether the person was under 25 years old at the time of the occurrence, the seriousness of the offense, and the legitimate interest of the employer in protecting property and the safety and welfare of specific individuals to the general public. This differs slightly from arrests or convictions preceding employment, which require employers to consider the Article 23-A factors. Article 23-A factors include, among other things, the age of the person at the time of the occurrence, the seriousness of the offense, the specific duties and responsibilities related to the license or employment sought or held by the person, and the time elapsed since the occurrence.
- Employers who wish to disqualify an applicant after an individualized analysis must continue to utilize a Fair Chance Act Notice (which has been slightly revised). Employers must allow applicants/employees at least five business days (originally three business days) to respond to the Fair Chance Act Notice. An employer may place an employee on unpaid leave while the employer undertakes the Fair Chance Process, but must allow the employee to use accrued paid leave if available.

For more information on these amendments to the FCA, see our article, [New York City Council Amends New York City Fair Chance Act](#).

Jackson Lewis attorneys are available to assist employers with this and other workplace issues.

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