

Federal Contractor Obligations Under Fair Chance Act

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Beginning December 20, 2021, federal contractors must comply with the federal [Fair Chance Act](#) (FCA), which prohibits contractors from inquiring about a job applicant's criminal background in certain cases in the initial stages of the application process, even as regulatory revisions on the "ban-the-box" law have yet to be released.

Background

The FCA's purpose is to ensure employers' hiring decisions are focused first on applicants' qualifications and abilities, rather than screening out otherwise-qualified applicants due to their prior criminal history.

The federal contractor law, passed on December 20, 2019, is not as simple as it appears. The FCA provides that the Administrator of General Services and the Secretary of Defense should issue regulations providing additional exemptions from the FCA by April 20, 2021. Additionally, the 2020 National Defense Authorization Act (NDAA), under which the FCA was passed, directs the Federal Acquisition Regulatory (FAR) Council to revise the Federal Acquisition Regulation to implement the FCA by June 20, 2021. The FAR Council's draft revisions were initially scheduled to be completed by May 27, 2020, but that deadline was extended to January 5, 2022. As of this writing, however, these regulatory revisions have not been released.

Contracts, Contractors Covered

The FCA covers civilian agency contracts ([41 U.S.C. §4714](#)) and defense contracts ([10 U.S.C. §2338](#)). Both statutes generally use the same language, in Section (a)(1)(B), for the prohibition. They provide that the government "shall require, as a condition of receiving a [f]ederal contract and receiving payments under such contract that the contractor may not verbally, or through written form, request the disclosure of criminal history record information" from their applicants for positions performing work related to such contracts before extending a conditional offer to the applicant.

In other words, covered contractors are generally precluded from requesting criminal history information from employment applicants for positions related to work related to federal contracts until *after* the contractor has extended the candidate a conditional employment offer.

To determine whether a federal contract is covered by the FCA, the FCA provides that a contractor's consent to its provisions is a condition of "*receiving* a [f]ederal contract and receiving payments under *such* contract" (emphasis added). Additionally, the 2020 NDAA provides that the FCA's prohibitions will apply only to "contracts awarded pursuant to solicitations issued *after* [December 20, 2021]" (emphasis added). Accordingly, the FCA appears to be inapplicable to existing contracts entered into prior to December 20, 2021.

Positions Covered

How to determine whether the position is to perform work “related to” work under the federal contract is unclear. The FCA does not define this. Consequently, this requirement has resulted in a broad interpretation of the positions encompassed.

Once a contractor has established an open position is “related to” a federal contract, it must determine whether the position falls into any of the three categories of positions exempted from the FCA (see section below).

If a contractor has established an open position is related to a federal contract and does not qualify for any of the statutory exemptions, the employer must additionally ensure compliance with any state or local pre- or post-offer ban-the-box or “fair chance” initiatives, including criminal arrest or conviction consideration and individual assessment laws. The FCA does not alter the requirement that contractors comply with these obligations.

Positions Exempted

Certain positions are exempted from the FCA, including:

1. Positions for which employers are required by law to consider applicants’ criminal history prior to extending a conditional offer,
2. Positions relating to national security or involving access to sensitive law enforcement or classified information, or
3. Positions falling into an enumerated exception (*i.e.*, as may be covered by any regulations issued by the Secretary of Defense or Administrator of General Services).

Compliance

Compliance with the FCA should be a priority for current and prospective federal contractors. The first violation of the FCA may result in a written warning and a requirement to remedy the violation, but subsequent violations may have more significant ramifications. For instance, under the FCA, the contractor can be deemed ineligible to receive future federal contracts and the government can suspend payment for work completed on an existing contract until the contractor demonstrates compliance.

If you have any questions regarding complying with the FCA or your state or local jurisdiction’s requirements concerning preemployment criminal background investigations, please contact the Jackson Lewis attorney(s) with whom you regularly work.

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