



NYC Votes To Further Prohibit Consideration Of Criminal History In Employment Settings

Insights

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Further restrictions on New York City employers' ability to take adverse action against applicants or employees based on their criminal history are on the horizon. The New York City Council just passed a bill which will significantly expand the scope of the New York City Fair Chance Act (FCA). If enacted, the bill would impose restrictions on an employer's ability to take any adverse action against an applicant or current employee based on pending criminal charges or arrests — currently not covered by the FCA — and will also extend the FCA to cover current employees convicted of a crime while employed. After passing the council on December 10, the legislation now goes to Mayor DeBlasio, who signed the FCA into law in 2015. Mayor DeBlasio has 30 days to sign, veto, or take no action on the legislation. Given his prior support for legislation in this area and other workers' rights laws, the mayor is not expected to veto the bill. Accordingly, NYC employers should be prepared for changes to the Fair Chance Act.

What Do the Amendments Entail?

Before reviewing the amendments to the law, it is necessary to understand what is currently required under the FCA.

The Existing FCA Requirements

The FCA codifies the process employers must use in New York City when considering a job applicant's criminal history and added to the preexisting requirements under the New York State Human Rights Law and New York Correction Law Article 23-A. Under state law, an employer may not refuse to hire an individual by reason of their prior criminal convictions unless it is shown that there is a direct relationship between the criminal offenses and the employment sought, or there would be an unreasonable risk to property or the safety and welfare of specific individuals or the general public.

A prospective employer must take into account several factors when considering an applicant's criminal history: (a) the public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses; (b) the specific duties and responsibilities necessarily related to the employment sought or held by the person; (c) the bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities; (d) the time which has elapsed since the occurrence of the criminal offense or offenses; (f) the seriousness of the offense or

offenses; (g) any information produced by the person, produced on his behalf, in regard to his rehabilitation and good conduct; (h) the legitimate interest of the public agency or private employer in protected property, and the safety and welfare of specific individuals or the general public; and (i) any certificate of relief from disabilities or a certificate of good conduct issued to the applicant (the "Article 23-A Factors").

The FCA incorporated existing state requirements into City law, and also prohibited employers from inquiring about an applicant's criminal conviction history until after the employer has extended a conditional offer of employment to the applicant. Additionally, the FCA codified the process employers must follow should they wish to rescind a conditional offer of employment based on an applicant's conviction history.

Before rescinding the conditional offer of employment, the employer must: (1) provide the applicant with a written copy of the criminal background check; (2) analyze the applicant's criminal history using the Article 23-A Factors; (3) provide the applicant with a written copy of the analysis of the Article 23-A Factors; and (4) allow the applicant at least three business days to respond, during which time the employer holds the position open for the applicant (collectively steps one through four are referred to herein as the "Fair Chance Process"). As of January 11, 2020, the FCA applies to independent contractors as well as employees, due to an expansion of the New York City Human Rights Law to cover independent contractors.

The Amendments To The FCA

The amendments expand the scope of the FCA in several ways.

- **FCA extended to current employees.** The FCA currently applies only to job applicants. The amendments would extend the FCA to criminal convictions of a current employee during their employment. Specifically, an employer would not be permitted to take any adverse employment action against an employee convicted of a crime during employment unless the employer determines, after reviewing the relevant fair chance factors, that there is a direct relationship between the conviction and the employment or that continuing employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The employer must engage in the Fair Chance Process before taking any adverse employment action against a current employee because of a criminal conviction during employment.
- **FCA extended to pending arrests and criminal accusations.** The Fair Chance Process currently applies only to criminal convictions, not pending arrests or criminal accusations. That is, employers cannot inquire about any criminal history, including pending charges, until after extending a conditional job offer to an applicant. However, employers are not prohibited from withdrawing a conditional offer or terminating employment based on a pending arrest or criminal charge, nor are employers required to conduct any individualized analysis or engage in the Fair Chance Process before taking adverse action based on a pending arrest or charge. The amendments would extend the FCA to prohibit employers from rescinding a conditional job offer

or taking adverse action against a current employee based on a pending arrest or criminal accusation without analyzing the relevant fair chance factors. Additionally, employers would need to engage in the Fair Chance Process before taking an adverse action.

- **New factors for considering certain arrests and convictions.** The amendments to the FCA create a new set of factors that an employer must consider when analyzing a pending arrest or charge (for either an applicant or a current employee) or a conviction that occurs during employment. These factors are similar to, but not the same, as the Article 23-A Factors required to be used when analyzing prior conviction history. Specifically, employers would not need to assess how much time has elapsed since the criminal activity, since it is current. Instead, employers would need to consider whether the person was 25 years of age or younger at the time of the criminal offense. Additionally, employers would be required to consider any additional information concerning rehabilitation or good conduct, including history of positive performance and conduct on the job or in the community.
- **Affirmative obligation to ask applicants to provide any information relating to the relevant fair chance factors.** Currently, the Fair Chance Process requires employers to solicit evidence of rehabilitation and good conduct when considering an adverse employment action. The amendments would further require employers to solicit *any* information relating to the relevant fair chance factors. Failure to do so would constitute a violation of the Fair Chance Process
- **No inquiry about or consideration of violations, non-criminal offenses, non-pending arrests, adjournments in contemplation of dismissal, or youthful offender or sealed offenses.** The amendments to the FCA would prohibit employers from asking about, or denying employment based on, violations or other non-criminal offenses. This does not include traffic infractions, which are excluded from the definition of criminal violation. Additionally, employers could not ask about prior, non-pending arrests or criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications or sealed offenses.
- **Codification of “conditional offer of employment” regulations.** Current FCA regulations provide that for purposes of the FCA, a conditional offer of employment can only be revoked based on (1) the results of a criminal background check, (2) the results of a medical exam, to the extent permissible under applicable law, or (3) other information the employer could not have reasonably known before making the conditional offer, if based on the information, the employer would not have made the offer. The amendments would codify these regulations, and with respect to category 3, place the burden on the employer to prove they would not have made the offer regardless of the results of the criminal background check. Accordingly, New York City employers who conduct background checks, perform reference checks or have any other pre-employment screening will likely want to implement a two-tiered screening process, whereby they consider all information *except* criminal background history before making a conditional offer, and review criminal history only after the applicant passes all other pre-employment screening and a conditional offer of employment is made.
- **Misrepresentations excluded from law.** The amendments would clear up a gray area of the FCA — specifically, whether employers can take adverse action against an applicant or employee who

made an intentional misrepresentation regarding their arrest or conviction history. Specifically, the amendments state that nothing in the law will prevent an employer from taking adverse action against an applicant or employee who misrepresented their arrest or conviction history, so long as the adverse action is not based on a failure to disclose information not required to be divulged. Additionally, the employer will need to provide the applicant or employee with a copy of the documents that formed the basis of the determination that an intentional misrepresentation was made and give the person a reasonable time to respond.

What Should NYC Employers Do Now?

Mayor DeBlasio has until January 9, 2021 to act on the legislation. If the law is enacted, the amendments take effect 200 hundred days after enactment. You should continue to monitor developments as to the enactment and effective date.

Given the likelihood of the FCA amendments becoming law, you should start preparing to comply with the likely new reality when it comes to criminal background checks. You should review your background check policies and processes to understand what changes you will need to implement if and when the law is enacted.

We will continue to monitor developments impacting New York employers, so make sure you are subscribed to [Fisher Phillips' alert system](#) to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney, or any attorney in our [New York City](#) office.

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