

New York City's Fair Chance Act Amendments Impose New Duties on Employers

As we reported [back in 2015](#), New York City employers with four or more employees are subject to New York City's Fair Chance Act (FCA), colloquially known as the "ban the box" law. In early 2021, New York City enacted significant amendments to the FCA, which took effect July 28. The following day, the New York City Commission on Human Rights (NYCCHR) issued revised [Enforcement Guidance](#) to reflect those amendments.

The 2015 Version of the FCA

As originally enacted, the FCA had *four main elements*:

- 1. Criminal History Inquiries.** It is unlawful for employers (along with employment agencies and unions) to inquire about or consider the criminal history of job applicants before extending a conditional offer of employment.
- 2. Fair Chance Analysis and Process.** Employers are required to assess any post-conditional offerees' criminal history using a multifactor balancing test laid out in New York Correction Law Article 23-A (the Article 23-A Factors):
 - The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses
 - The specific duties and responsibilities necessarily related to the employment sought or held by the person
 - The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on the person's fitness or ability to perform one or more such duties or responsibilities
 - The time that has elapsed since the occurrence of the criminal offense or offenses



- The age of the person at the time of occurrence of the criminal offense or offenses
- The seriousness of the offense or offenses
- Any information produced by the person, or produced on the person's behalf, in regard to their rehabilitation and good conduct
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public
- Whether the person has a certificate of relief from disabilities or good conduct, which creates a presumption of rehabilitation

The NYCCHR has released an updated [form](#) that employers may continue to use for this purpose.

- 3. Meaningful Opportunity to Respond.** The FCA requires employers seeking to withdraw a conditional job offer based on an applicant's conviction record to provide the applicant a meaningful opportunity to respond to the employer's assessment prior to the employer finalizing its decision. During that time, the position must be held open for the applicant.

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4. **FCA Exemptions.** Finally, the FCA does not apply to two buckets of employees: (1) positions subject to any federal, state or local laws requiring employment-related background checks or disqualifying employment based on criminal history; and (2) employment positions in the financial services industry, but only to the extent the FCA conflicts with industry-specific regulations issued by self-regulatory organizations, such as FINRA (Financial Industry Regulatory Authority).

The FCA's 2021 Amendments

The revamped FCA includes all the previous employer obligations in addition to *six major changes*:

1. **Enlargement to Existing Employees, Independent Contractors and Freelancers.** Before the amendments, the FCA did not apply to existing employees. Now, employers are required to conduct the Fair Chance Process before taking an adverse action against current employees based on pending arrests, pending criminal accusations and past criminal convictions. Importantly, “employees” include not just an employer’s W-2 population but also independent contractors and freelancers.
2. **Expanded Scope of “Criminal History” to Pending Arrests and Criminal Accusations.** Previously, the FCA applied only to applicants’ prior convictions. Now, employers must engage in the FCA process not only with regard to a prior conviction but also when seeking to take an adverse action based on a pending arrest or pending criminal accusation. This applies to hiring applicants as well as to determining terms and conditions of employment for current employees.
3. **Off-Limits “Non-Conviction” Criminal History Inquiries.** Employers may not ask applicants or employees about, or take adverse employment actions against them for, certain currently pending and no longer pending actions, which the NYCCHR’s Enforcement Guidance collectively refers to as “non-convictions” (which is somewhat of a misnomer as some of the off-limits criminal actions are indeed types of convictions):
 - **Pending “Non-Convictions.”** A criminal action that has been adjourned in contemplation of dismissal, so long as the order to adjourn is not revoked

- **Non-Pending “Non-Convictions.”** A criminal action that was concluded in any of the following five ways:
 - Termination in favor of the individual, even if not sealed
 - Adjudication as a youthful offender, even if not sealed or marked confidential
 - Conviction of a “violation” as defined in Penal Law Section 10 (i.e., a sentence to an offense, other than a traffic conviction, with a term of imprisonment of no more than 15 days)
 - Conviction of a noncriminal offense, as defined by a law of another state, even if not sealed
 - Certain convictions that have been sealed

The Enforcement Guidance provides a non-exhaustive list of non-convictions. Additionally, the Enforcement Guidance provides language that employers could use to make inquiries about criminal actions post-conditional offers that avoid soliciting or considering non-convictions.

4. **Two-Step Background Check Process:** Under the amendments, employers must implement a bifurcated screening process that, according to the NYCCHR, is meant to avoid discouraging applicants with criminal histories from applying.

Step 1 (Prior to Conditional Offer): *Before* extending a conditional offer of employment, an employer must first receive and evaluate an applicant’s *noncriminal* information (e.g., educational background and employment references). Key points:

- Employers need to coordinate with their consumer reporting agency vendors for separate noncriminal (Step 1) and criminal history (Step 2) background check reports. If a vendor is unable to produce separate reports, or if the vendor would face substantial impediment in order to do so, the vendor must be sure to segregate the Step 1 noncriminal information from any Step 2 criminal history information. Ultimately, the burden lies with employers—not their vendors—to prove that criminal history was inaccessible to hiring decision-makers until after the conditional job offer had been extended.
- Employers may not state in a job application or advertisement, or at any time before making a conditional offer, including when obtaining

authorization to collect background information pursuant to the federal Fair Credit Reporting Act (FCRA), that a “background check” is required or will happen. Employers are instead encouraged to use terms such as “consumer report” or “investigative consumer report” and omit mention of any criminal background check when seeking an applicant’s authorization for an employment-related background check prior to a conditional offer (presumably to help differentiate between the two steps).

Step 2 (After Conditional Offer): Only *after* the employer’s determination that the noncriminal information poses no issues in hiring the candidate may the employer extend a conditional job offer and conduct a criminal history inquiry. Key points:

- Any criminal history results may only be considered in compliance with the Fair Chance Process.
- An employer *cannot* consider noncriminal information at Step 2 unless it can satisfy the elements of an affirmative defense by showing (1) the employer could not have reasonably known the information gleaned at Step 2 before extending a conditional offer (i.e., the information did not exist prior to the conditional offer or could not have been obtained through reasonable due diligence), and (2) regardless of the results of the criminal background check, the employer would not have made the offer if it had known the information before the offer was extended.
- Because driving records could contain both noncriminal and criminal information, employers should not review driving records until Step 2. Noncriminal information in a driving record may be treated as information the employer could not have reasonably known before the conditional offer.

5. **Different (But Similar) Fair Chance Factors for Some Contexts.** In contrast to the Article 23-A Factors, which still must be used when assessing an *applicant’s* criminal history, employers must now consider seven “Fair Chance Factors” *for current employees based on pending cases or convictions that occur during employment and for job applicants based on pending cases at the time of an employment application.* These seven Fair Chance Factors are:

- The policy of New York City to overcome stigma toward, and unnecessary exclusion from employment of, persons with criminal justice involvement
- The specific duties and responsibilities necessarily related to the employment held by the person
- The bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in the case of pending arrests or criminal accusations, on the applicant’s or employee’s fitness or ability to perform one or more such duties or responsibilities
- Whether the person was 25 years of age or younger at the time of occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations, which shall serve as a mitigating factor
- The seriousness of such offense or offenses
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public
- Any additional information produced by the applicant or employee, or produced on his or her behalf, in regard to his or her rehabilitation or good conduct, including but not limited to a history of positive performance and conduct on the job or in the community

6. Changes to the Fair Chance Process:

- **Employer Active Solicitation of Information on FCA Factors.** Under the prior FCA, employers were only required to solicit evidence of rehabilitation and good conduct. Now, employers must affirmatively solicit information regarding the above-described factors, which must be taken into account when making employment-related decisions.
- **More Time for Applicant to Respond to Fair Chance Notice.** The time for applicants to respond to a pre-adverse action notice (which includes the employer’s written Fair Chance Analysis) is increased from three to five business days.
- **Leave Option for Employees.** An employer may elect, at its discretion, to place an employee on unpaid leave during the Fair Chance Process.

- **Intentional Misrepresentation.** An employer may disqualify an applicant without undertaking the Fair Chance Process if the applicant intentionally misrepresents his or her conviction history or pending criminal cases. Before taking any adverse action, the employer must provide to the applicant a copy of the information underlying the employer’s belief of such intentional misrepresentation and the applicant must be given at least five business days to respond.

What Employers Should Do

- Ensure that hiring managers, HR and anyone else involved in the recruitment process is familiar with the FCA’s new employer requirements and the protections extended to applicants, employees, independent contractors and freelancers. A review of the NYCCHR’s [Updated FCA Guidance](#) and the [NYC FCA information](#) page is a good place to start.

- Ensure recruitment policies and procedures are compliant with the FCA’s amendments, including the screening and background check process, background check disclosures/authorizations, and job posting language.
- Confirm that background check vendors understand and comply with the two-step screening process.

Related Professionals

Ian Carleton Schaefer. ischaefer@loeb.com
Mark Goldberg. mgoldberg@loeb.com
Brian M. Hayes. bhayes@loeb.com

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6730 REV1 08-31-2021