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New York City Finalizes Rules to Interpret the Fair Chance Act

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On August 5, 2017, the final rules ("Final Rules") interpreting New York City's Fair Chance Act ("FCA") took effect—nearly 18 months after the New York City Commission on Human Rights ("Commission") published proposed rules ("Proposed Rules") to the FCA. These Final Rules offer slight modifications to the Proposed Rules.

The FCA, which amended the New York City Human Rights Law ("NYCHRL"), controls when New York City employers can inquire into a job applicant's criminal background.[1] The FCA has been in effect since October 27, 2015. Over the past two years, the Commission has published Legal Enforcement Guidance, Frequently Asked Questions, and Fact Sheets for Employers and Employees interpreting and explaining the FCA.

The Final Rules largely confirm the contents of the Proposed Rules but do have a few important changes, including:

- clarification of several definitions;
- confirmation that the FCA applies only to positions within New York City;
- greater guidance as to what actions employers may take when exemptions to the FCA apply due to positions (i) where applicable law bars employment of individuals based on criminal history, and (ii) that are regulated by self-regulatory agencies;
- application of the "Early Resolution" process to additional violations of the FCA; and
- elimination of certain factors that the Commission will consider when determining penalties under the FCA.

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[1] The FCA covers all employers with four or more employees in New York City. For more information on the FCA, please see our *Act Now* Advisory titled "Now That New York City's Credit Check and 'Ban the Box' Laws Are in Effect, How Do Employers Comply?"

The following is a summary of the Final Rules.

Definitions

The Final Rules establish a set of definitions, as noted below, which generally mirror the definitions used in the Legal Enforcement Guidance and the FCA:

- The term "applicant" includes both individuals seeking initial employment and current employees who are seeking or being considered for promotions or transfers.

- The term "non-conviction" means any arrest or criminal accusation, not currently pending, that was concluded in one of the following ways:

    - termination in favor of the individual, as defined by New York Criminal Procedure Law ("CPL") section 160.50 (even if not sealed);

    - adjudication as a youthful offender, as defined by CPL section 720.35 (even if not sealed);

    - conviction of a non-criminal offense that has been sealed under CPL section 160.55; or

    - convictions that have been sealed under CPL section 160.58.

- The term "criminal background check" refers to when an employer (i) asks, orally or in writing, a person whether or not he or she has a criminal record, or (ii) searches for publicly available records (including using a consumer reporting agency, the Internet, or private databases) for a person's criminal history.

- Throughout the Final Rules, the Commission expands the term "employer" to read "employer, employment agency or agent thereof" when discussing limitations and actions required under the FCA.

- The Final Rules clarify that "conviction history" includes records of a "conviction of a felony, misdemeanor, or unsealed violation as defined by New York law or federal law, or the law of the state in which the individual was convicted."

***Per Se* Violations**

Under the Final Rules, the following actions and inactions will be considered *per se* violations of the FCA (meaning that they violate the FCA, regardless of whether any adverse employment action was taken or any actual injury to an applicant occurred):[2]

- circulating a solicitation, advertisement, policy, or publication that suggests, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history (indeed, the Final Rules confirm that job advertisements

[2] The *per se* violations will not apply when an employer is exempted from the requirements of the FCA because the position being applied for falls within one of the delineated exemptions.

and employment applications may not contain phrases such as "no felonies," "background check required," or "must have clean record");

- making any statement or inquiry relating to an applicant's pending arrest or criminal conviction before making a conditional offer of employment;

- using employment applications that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer of employment;

- using, within New York City,[3] a standard application form, intended for multi-jurisdictional use, containing a disclaimer that applicants in New York City should not answer specific questions[4] (in other words, an application used in New York City may not contain a criminal history inquiry, even if it includes a disclaimer clarifying that the applicant should not answer that question if he or she is applying for a job in New York City);

- failing to comply with any of the requirements listed in the "Fair Chance Process" (described below) before revoking a conditional offer of employment; and

- requiring applicants to disclose arrests that resulted in a non-conviction.

Inadvertent Discovery or Disclosure of Criminal Conviction History

The Final Rules address how an employer should proceed if, prior to making a conditional offer of employment, it inadvertently discovers, or the applicant provides unsolicited disclosure of, an applicant's criminal conviction history. In these instances, the Final Rules confirm that an employer is not liable for a violation unless the employer "further explores" the applicant's criminal conviction history upon the discovery or disclosure of such information or uses the information to determine whether to make a conditional offer of employment.

The "Direct Relationship" and "Unreasonable Risk" Exceptions

Under the FCA, employers that wish to take an adverse action based on an applicant's criminal history must first conduct an analysis of the applicant's criminal history using an eight-factor balancing test set forth under Article 23-A of the New York Correction Law ("Article 23-A Analysis"). An employer may not withdraw an offer of employment unless, after evaluation of the eight factors, the employer can demonstrate that the criminal conviction history fits within one of two permissible exceptions: (i) the "**Direct Relationship Exception**" or (ii) the "**Unreasonable Risk Exception**." Under the Final Rules, employers are prohibited from altering the duties and responsibilities of a position because they learned of an applicant's criminal history; however, employers may consider whether any

[3] The Final Rules amended this provision to clarify that applications used outside New York City may include such a reference.
[4] A similar restriction is included in Philadelphia's Ban-the-Box law.

alternate positions are vacant and available to the applicant that would alleviate the concerns identified by the Article 23-A Analysis.

The Direct Relationship Exception

The Final Rules establish that, in order to claim the Direct Relationship Exception, the employer must draw a connection between (i) the nature of the conduct that led to the conviction(s) or pending arrest and (ii) the position for which the applicant is applying. Even if such connection exists, the employer must examine the eight Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated. The Final Rules define a "direct relationship" as "a finding that the nature of the criminal conduct underlying a conviction or pending case has a direct bearing on the fitness or ability of an applicant to perform one or more of the duties or responsibilities necessarily related to the … terms and conditions of employment in question."

The Unreasonable Risk Exception

In order to use the Unreasonable Risk Exception, an employer must consider and apply the eight Article 23-A factors to determine if employment of the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

The Fair Chance Process

If an employer determines that one or both exceptions apply, the employer must follow the "Fair Chance Process." The Fair Chance Process requires the employer to (i) provide the applicant with written copies of any information relied upon in connection with the employer's decision not to move forward with the hire (e.g., copies of consumer reporting agency reports, Internet searches, or written summaries of oral conversations, including whether any such conversations were with the applicant or someone else) and a copy of the Article 23-A Analysis, and (ii) inform the applicant that he or she will have a reasonable time to respond to the employer's concern. Finally, the employer must consider any additional information provided by the applicant.

Importantly, if the employer used a third party to perform the background check, the employer should also send to the applicant a notice of intent to take adverse action, a copy of the Summary of Your Rights under the federal Fair Credit Reporting Act ("FCRA") document, and a copy of Article 23-A of the New York Correction Law.

When providing the Article 23-A Analysis, the employer may choose to use the Fair Chance Notice created by the Commission or a comparable notice in a format preferred by the employer. The Final Rules provide that a comparable notice must (i) include specific facts that were considered pursuant to the Article 23-A Analysis and the outcome; (ii) articulate the employer's concerns and basis for determining that there is a direct relationship or an unreasonable risk; and (iii) inform the applicant of his or her rights upon receipt of the notice, including how he or she can respond to the decision, and the time frame within which he or she must respond.

Additionally, applicants must be provided with a "reasonable time" to respond. Under the Final Rules, a "reasonable time" is determined by what additional information the applicant is purporting to gather and whether that additional information would change the outcome, the reason why more time is required, an employer's need to fill the position, and any other relevant information. The employer, however, must provide the applicant with a minimum of three business days to respond. If the employer has used a third-party background check company, the FCRA also requires a reasonable period of time to respond, and the U.S. Federal Trade Commission has opined that a minimum of five business days is reasonable in most cases.

If, after receiving and reviewing a copy of his or her background check, the applicant discovers an error, he or she must inform the employer of the error and request time to gather supporting documentation. The Final Rules state that, if the applicant can establish that he or she does not have a conviction history or that any criminal history resulted in a non-conviction, then the employer *cannot* withdraw its offer or take any adverse employment action. If the applicant can establish that the conviction history is different than what was presented in the background check, the employer must conduct a *second* Article 23-A Analysis based on the corrected information.

The Final Rules also state that an employer may revoke an offer or take adverse action if the background check exposes that an applicant has intentionally misrepresented his or her criminal history.

Clarification of Exemptions Under the FCA

Positions Where Applicable Law Requires Criminal Background Checks

The Final Rules clarify that the FCA exemption for positions where federal, state, or local law requires criminal background checks (or bars the employment of persons with criminal convictions) does *not* apply to employers that are authorized, but not required, to conduct such checks. The Final Rules state that the FCA exemption applies to the requirement to perform the Fair Chance Process, not the requirement to comply with the Article 23-A Analysis under New York State law. Indeed, even if this exemption applies, the employer must still perform the Article 23-A Analysis required by New York State law.

Positions Where Applicable Law Bars Employment of Individuals Based on Criminal History

The Final Rules add more detail regarding positions where applicable federal, state, or local law bars employment of individuals based on criminal history. In this case, employers may:

- notify applicants of the specific mandatory bar to employment prior to a conditional offer,
- inquire at any time during the application process whether an applicant has been convicted of the specific crime that is subject to the mandatory bar to employment, and
- disqualify any applicant with such criminal history *without* following the Fair Chance Process.

The Final Rules further clarify that, when an employer is hiring or promoting an applicant into a position that merely requires licensure or approval by a government agency (as opposed to registration with a regulatory body), the exemption does not apply. Instead, employers hiring for these types of positions may only ask whether the applicant has the necessary license or approval for the position, or whether he or she can obtain such license or approval within a reasonable period of time (and cannot generally inquire about criminal history prior to the conditional offer).

Positions Regulated by Self-Regulatory Organizations

Significantly, with respect to the exemption for positions regulated by self-regulatory organizations (e.g., FINRA), when such rules or regulations require criminal background checks or bar employment based on criminal history, the Final Rules expand this exemption to cover a position in which the applicant voluntarily or permissively registers with the regulatory body while in the position or elects to remain registered, even though registration with a self-regulatory organization is not mandatory in the new position.

Rebuttable Presumption

Under the Final Rules, an employer that revokes a conditional offer of employment without adhering to the Fair Chance Process is presumed to have done so because of the applicant's criminal history. This presumption, however, can be rebutted by demonstrating that the offer was revoked based on one of the following:

- the results of a medical exam in situations in which such exam is permitted by the American with Disabilities Act;

- information that the employer could not have reasonably known before the conditional offer was made but, if known, would have prevented the offer and the employer can show that the information is material; or

- evidence that the employer did not have knowledge of the applicant's criminal history before revoking the conditional offer.

Early Resolution for *Per Se* Violations (Available Only to Small Employers)

The Final Rules provide for an expedited settlement of Commission-initiated complaints pertaining to *per se* violations. This process, available only to employers with 50 or fewer employees, is called "Early Resolution." Under the Early Resolution process, employers are permitted to admit liability and pay a penalty instead of entering into litigation. An employer that employs 50 or fewer employees[5] at the time of the alleged violation may exercise the option to expedite *if* the employer has:

- committed a *per se* violation,

[5] The Final Rules do not specify whether these 50 employees must work in the employer's New York City office(s). However, in other circumstances, the Commission has held that employees outside of New York City should be counted in determining such jurisdictional thresholds.

- no other pending or current allegations concerning violations of the NYCHRL, *and*

- no more than one violation of the NYCHRL in the past three years.

Under Early Resolution, the Commission will mail a notice of Early Resolution to the employer, simultaneously with a copy of the complaint. The employer must, within 90 days, either (i) admit liability and agree to pay the fine or (ii) file an answer to the complaint.

The penalties provided under the Early Resolution process differ from penalties by the Commission after litigation. The Final Rules provide the following penalty schedule for Early Resolution:

Employer Size (at the time of the violation)	**First Violation**	**Second Violation (within three years of the resolution date of the first violation)**
4-9 Employees	$500	$1,000
10-20 Employees	$1,000	$5,000
21-50 Employees	$3,500	$10,000

Even if an employer wishes to participate in Early Resolution and all the requirements are met, the Commission retains discretion to proceed with a full investigation and a referral to the Office of Administrative Trials and Hearings when the offer of Early Resolution will not serve the public interest.

Penalties Outside of the Early Resolution Process

The Final Rules eliminated a set of factors published in the Proposed Rules that the Commission would consider when determining penalties under the FCA. Rather, the Final Rules are silent on factors to consider when determining penalties.

What New York City Employers Should Do Now

- Review the background check portion of your hiring process to ensure compliance with the timing and other requirements of the FCA, including the Final Rules.

- If you use multistate applications, either (i) create a separate application without the criminal history question for positions in New York City or (ii) remove the criminal history question from multistate applications completely.

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