

## Now That New York City's Credit Check and "Ban the Box" Laws Are in Effect, How Do Employers Comply?

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Two important New York City laws impacting the hiring process have recently taken effect, requiring immediate action by most City employers.

The [Fair Chance Act](#), New York City's "ban the box" law ("Ban-the-Box Law"), took effect on October 27, 2015, restricting City employers' ability to inquire about job applicants' criminal history. In addition, New York City's [Stop Credit Discrimination in Employment Act](#) ("Credit Check Law") took effect on September 3, 2015, restricting City employers' ability to conduct credit checks on applicants and current employees. This *Act Now Advisory* will assist you in ensuring that your hiring processes are in compliance with these new laws.

### New York City's Ban-the-Box Law

The Ban-the-Box Law restricts the timing of *when* an employer may inquire about an applicant's criminal history. Under this law, New York City employers with four or more employees may not inquire about an applicant's criminal history (including pending arrests) until a contingent offer of employment has been made. This restriction applies to any direct (i.e., asking the applicant or placing the inquiry on the employment application) or indirect (i.e., by running a criminal background check) inquiry.

Further, the Ban-the-Box Law requires that certain steps be taken when an employer wishes to rescind a contingent offer on the basis of the applicant's criminal history.

Employers not claiming one of the [limited exceptions](#) to the law must do the following:

- Remove questions concerning criminal convictions and pending arrests from job applications.
- Indicate in an offer letter that the offer is contingent on the successful completion of a criminal background check or questionnaire, if such an inquiry will be made.

- Create (if desired) a criminal background questionnaire, which is generally in the form of the criminal history inquiry traditionally found in the employment application. This questionnaire can be provided to the employee along with the conditional offer letter. This way, if a disqualifying response is provided, the employer can avoid performing a background check. The questionnaire should make it clear that if inconsistencies exist between such reports and the report procured by the consumer reporting agency, adverse action may be taken based on those inconsistencies.
- Ensure full compliance with existing federal Fair Credit Reporting Act (“FCRA”) requirements, including all notice and authorization/disclosure requirements, as well as all applicable state laws.
- Once a report is obtained, analyze the applicant’s criminal history using the eight-factor balancing test set forth in [New York Correction Law Article 23-A](#).
- If you wish to take an adverse action based upon the applicant’s criminal history, send the applicant a “Notice of Intent to Take Adverse Action.” With this notice, also include:
  - a completed “[Fair Chance Notice](#),” summarizing the factors analyzed and the reasons for the decision;<sup>1</sup>
  - a copy of the criminal background report;
  - any other supporting documents that formed the basis for the intended adverse action;
  - a copy of “Summary of Your Rights Under the Fair Credit Reporting Act”; and
  - a copy of Article 23-A of the New York Correction Law.
- Hold the position open for five business days<sup>2</sup> to allow the applicant to respond.

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<sup>1</sup> The Fair Chance Notice is a template prepared by the New York City Commission on Human Rights (“NYCCHR”). Employers may download and use this notice, as is, or they may use their own preferred format of written notice, as long as the material substance does not change. The text of the Ban-the-Box Law does not require that employers use the actual form prepared by the NYCCHR. For ease, however, and because the NYCCHR will expect to see an analysis similar to that incorporated in the Fair Chance Notice, we recommend using the template notice.

<sup>2</sup> The Ban-the-Box Law requires that the applicant be provided with no less than three business days to respond. Under the FCRA, however, the Federal Trade Commission has recommended in an [opinion letter](#) that the employer provide the applicant with five business days to respond. Thus, to best comply with both laws, we recommend providing the applicant with five business days to respond.

- If a satisfactory response is not timely received from the applicant, send the applicant a “Notice of Adverse Action,” along with additional copies of:
  - the criminal background report,<sup>3</sup>
  - the supporting documents that formed the basis for the adverse action,
  - the “Summary of Your Rights Under the Fair Credit Reporting Act,” and
  - Article 23-A of the New York Correction Law.

In addition to the model Fair Chance Notice, the New York City Commission on Human Rights (“NYCCHR”) has also just released a [“Fact Sheet”](#) regarding this new law.

### **New York City’s Credit Check Law**

New York City’s Credit Check Law prohibits an employer from requesting or considering “consumer credit history” in employment decisions regarding applicants or employees. The Credit Check Law recognizes [certain limited exemptions](#) to this general prohibition.

The NYCCHR, the agency charged with enforcing the Credit Check Law, recently released [Enforcement Guidance](#), which provides greater detail about the Credit Check Law and clarifies its interpretation of the exemptions. Importantly, the NYCCHR has also recently indicated that it will undertake formal rulemaking later this year, including a notice and comment period, during which employers may submit inquiries and comments regarding the Credit Check Law.

The Enforcement Guidance appears to significantly narrow the Credit Check Law’s exemptions. However, during a recent training session held by the NYCCHR to educate employers on compliance with the Credit Check Law, NYCCHR representatives indicated that the narrow interpretation of the exemptions in the Enforcement Guidance may not necessarily apply in all situations, especially for employers in the financial services industry. Instead, certain exemptions may likely be applied in a manner that is more closely aligned with the actual text of the Credit Check Law.

For example, one statutory exemption applies to employees who have signatory authority over assets valued at \$10,000 or more. The Enforcement Guidance states that this exemption will only apply to employees at the executive level. During the training session, though, the NYCCHR indicated that the exemption would likely be applied more broadly, e.g., where the employee would have signatory authority over \$10,000, would oversee the transfer of \$10,000, or had a corporate credit card and could spend at least \$10,000 without receiving supervisor approval—even if such employee was not at the executive level.

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<sup>3</sup> If the applicant provides additional information, you may wish to revise the Fair Chance Notice to incorporate the new information into your analysis under Article 23-A and send it along with the Notice of Adverse Action. However, this step does appear to be explicitly required by the Ban-the-Box Law.

Although the interpretation of the exemptions may be in flux at the present time, employers must nevertheless follow a clearly stated process when claiming an exemption under the Credit Check Law:

- Employers must inform the applicant or employee of any exemption being claimed under the Credit Check Law prior to running a credit check. To inform an applicant of the exemption being claimed, employers should either:
  - revise offer letters for exempt positions in New York City to state that the offer is contingent upon completion of a successful background check, which will include a credit check, and then the employer must indicate which exemption(s) would justify the credit check being performed (for example, “[t]his offer is contingent upon successful completion of a background check, which will include a credit check because the position into which you are being hired will allow you to modify digital security systems established to prevent the unauthorized use of the company’s or its clients’ networks or databases),” or
  - revise the state/local notices page<sup>4</sup> of the authorization/disclosure form required under the FCRA when requesting consumer credit checks for applicants or employees in New York City, such that it contains a list of the exemptions with check-boxes, so that the employer can indicate the exemption being claimed.
- Maintain an “exemption log” to assist in responding to information requests by the NYCCHR, which should include:
  - which exemption is claimed,
  - how the applicant/employee fits into the exemption,
  - the qualifications of the applicant/employee for the position/promotion,
  - the name and contact information of the applicant/employee,
  - the nature of the credit history information considered and a copy of such information,
  - how the credit history information was obtained, and

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<sup>4</sup> In light of several lawsuits alleging that extraneous information included within the FCRA authorization/disclosure document violates the requirement under the FCRA that the authorization/disclosure form must be a clear and conspicuous disclosure and must be “in a document that consists solely of the disclosure,” this page should be entirely separate from the authorization/disclosure form and may include additional information that is needed to run a background check in New York (e.g., a criminal background questionnaire or confirmation of receipt of Article 23-A) or any other state. It should be noted here that, according to the FCRA, the authorization and disclosure may, indeed, be in the same document.

- how the credit history impacted any employment action.
- Maintain a copy of the applicant's or employee's job description with the exemption log to facilitate the determination of why a particular exemption was claimed.
- Retain the exemption log for a period of five years from the date that an exemption is claimed.

## What Employers Should Do Now

New York City employers must *act now* to review their practices and procedures and ensure that they are in compliance with both the Ban-the-Box Law and the Credit Check Law.

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