



New York City “Bans the Box”

New York City enacted Int. 0318-2014, i.e. the Fair Chance Act (the “Act”), into law, barring employers from inquiring into a job applicant’s criminal history until a conditional offer of employment has been made.¹ The Act also provides additional protections to current and prospective employees with criminal histories. The Act took effect on October 27, 2015.

This Compliance Alert has been republished to include updates from the recent Fair Chance Act amendments² passed in January 2021. These amendments become effective July 28, 2021

Current City & State Laws

The New York State Human Rights Law makes it an unlawful discriminatory practice for an employer to inquire about or take an adverse action based upon an applicant or employee’s prior arrest records or a criminal accusation that is not currently pending against that individual, or which has been resolved in favor of that individual, resolved by a youthful offender adjudication or resulted in a sealed conviction.³

Thus, even prior to the Act, under New York law, employers were only permitted to inquire into pending arrests and convictions. This law continues to remain in place, but the Act further limits this permissible inquiry by delaying its timing until after a conditional offer of employment is extended.

Another important existing requirement is set forth in the New York Fair Credit Reporting Act, which requires employers to

provide applicants with a copy of Article 23-A before obtaining a background check on the individual.⁴

The Fair Chance Act

As previously mentioned, the Act further restricts employers from making any otherwise lawful criminal history inquiries—about pending arrest records and convictions—until after a conditional offer of employment is made. The term “inquiry” would include questioning the applicant directly as well as any pre-offer searches of publicly available records or consumer reports that are conducted for the purpose of obtaining criminal background information. For purposes of this subsection of the Act, the term “employer” only includes employers with four or more employees.

An applicant also cannot be required to respond to any inquiry or statement that violates the aforementioned restrictions on criminal record inquiries and any refusal to respond to any such inquiry cannot disqualify an applicant from the prospective employment.

¹ The outline and content of this writing is based in large part on the following article: Mark Goldstein & Cindy Minniti, *BREAKING: NYC “Bans the Box,” Barring Most Pre-Employment Criminal Inquiries*, REED SMITH LLP (June 10, 2015, <http://www.employmentlawwatch.com/2015/06/articles/employment-us/breaking-nyc-bans-the-box-barring-most-preemployment-criminal-inquiries/>).

² Int. 1314-A

³ New York State Human Rights Law §296(16).

⁴ NY Gen. Bus. L. § 380-g(d) & §380-c(b)(2)

In addition, the Act requires employers to delay asking applicants for authorization to obtain a background check until after a conditional offer of employment is made. The Act makes it an unlawful discriminatory practice for an employer to “[d]eclare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person’s arrest or criminal conviction.” Enforcement Guidance issued by the NYC Commission on Human Rights elaborates on this, stating that “[s]olicitations, advertisements, and publications encompass a broad variety of items, including, without limitation, employment applications, fliers, handouts, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness organizations. Employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check.”⁵ Thus, employers must ensure that applicants are only being asked to authorize the procurement of a background check after a conditional offer of employment has been made.

Additional Adverse Action Procedures

After extending a conditional offer of employment, the employer is permitted to inquire into an applicant’s criminal convictions or pending arrests and criminal accusations. However, before the employer can take any adverse employment action based on conviction information, the employer must:

1. Provide the applicant with a written copy of any inquiry it conducted into the applicant’s criminal history;
2. Request from the applicant information relating to the relevant fair chance factors;⁶
3. Perform the Article 23-A analysis mentioned below and provide the applicant with a copy of the analysis (which must include any supporting documentation that formed the basis for the adverse action and the employer’s reason for taking the adverse action). This analysis should be applied to all criminal

convictions preceding employment, all criminal convictions during employment, and all pending arrests and criminal accusations preceding and during employment; and

4. Allow the applicant a reasonable period of time to respond (no less than five business days) after giving him or her the inquiry and analysis information mentioned above, and hold the position open for the applicant during this period of time.

⁵ NYC Commission on Human Rights, Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 4-5 (2015), <https://www1.nyc.gov/site/chr/law/fair-chance-act.page>

⁶ The relevant fair chance factors include, with respect to arrests or criminal accusations pending at the time of an application for employment and arrests or convictions that have occurred during employment:

(a) the policy of the city, as expressed in this chapter, to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in the areas of licensure and employment;

(b) the specific duties and responsibilities necessarily related to the employment held by the person;

(c) 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 or employee’s fitness or ability to perform one or more such duties or responsibilities;

(d) 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;

(e) the seriousness of such offense or offenses; and

(f) the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public; and

(g) any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

The relevant fair chance factors also include those set forth in section 753 of the correctional law, with respect to arrests or convictions preceding employment, other than those pending

The New York State Correction Law Article 23-A⁷ requires employers to undertake a multifactor, case-specific analysis to evaluate whether there is a direct relationship between the applicant’s criminal history and the position sought. Both city and state laws prohibit employers from discriminating against applicants based on their prior criminal conviction(s), unless:

1. There is a direct relationship between the previous criminal offense and the specific position sought; or
2. Hiring the individual would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Additionally, after the Fair Chance Act was amended in January 2021, employers are now required to apply the relevant fair chance factors before taking adverse action based on an applicant or employee’s pending, open criminal charges, arrests or accusations. This approach also applies when considering an employee’s criminal convictions that occurred during employment. These factors are similar to the New York State Correction Law factors. Please refer to the amended Fair Chance Act for additional guidance on implementation. The law mentions that employers are expressly prohibited from withdrawing a conditional offer, or terminating employment, because of a pending criminal charge or accusation unless:

1. There is a direct relationship between the alleged wrongdoing that is the subject of the pending arrest or criminal accusation and the employment sought or held; or
2. The granting or continuation of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

If the employer contemplates taking an adverse action based on criminal record information learned after extending a conditional offer of employment, the employer must conduct this Article 23-A or fair chance factor analysis and provide a copy of the analysis to the applicant. These requirements are in addition to the pre-adverse and adverse action notices

required by the federal Fair Credit Reporting Act (“FCRA”). The 2021 Fair Chance Act amendments make it clear that a conditional offer of employment can only be revoked based on:

- The results of a criminal background check after completion of the respective analysis detailed above;
- The results of a medical exam permitted by the American with Disabilities Act; or
- 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 and the employer can show the information is material.⁸

Exemptions

The Act provides an exemption for and does not apply to any actions taken by an employer pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. Under the Act, a “federal” law includes any rules or regulations promulgated by a self-regulatory organization as defined by Sec. 3(a)(26) of the Securities Exchange Act of 1934.

The Act also provides an exemption for police or peace officers, and for certain positions within the department of citywide administrative services.

The full text of the Act can be found [here](#).

The 2021 Amendments to the Act can be found [here](#).

⁷ <https://www.nelp.org/wp-content/uploads/N-Y-Correct-Law-Art-23-A-Employer-Guide.pdf>

⁸ 47 N.Y.C.R.R §2-01.