

## NYC Issues Guidance and Required Notice as Ban-the-Box Law Takes Effect

New York City's Fair Chance Act, which took effect on October 27, prohibits most employers from conducting criminal background checks or inquiring about a job applicant's criminal history prior to a conditional offer of employment. It also imposes a number of requirements on an employer that seeks to base a hiring decision on criminal history information it later receives. NYC has now released enforcement guidance as well as a form that employers may use to comply with these requirements.

### Background

New York City's Fair Chance Act took effect on October 27, restricting the use of criminal history and background checks for employment purposes. The so-called ban-the-box law amended the city's Human Rights Law to prohibit most private employers from conducting criminal background checks or inquiries concerning an applicant before making a conditional job offer. (See our *For Your Information* from [June 18, 2015](#).)

The new law allows criminal background checks and inquiries later in the hiring process, but restricts an employer's ability to take adverse employment action based on the results. Before revoking a conditional job offer based on criminal history, an employer must perform the multi-factor analysis required by New York Correction Law Article 23-A, provide a written copy of the analysis to the applicant, and hold the position open for at least three business days to allow the applicant to respond.

### Fair Chance Guidance

The New York City Commission on Human Rights (NYCCHR), the agency charged with enforcing the Fair Chance Act, recently issued an [interpretive enforcement guide](#), a [fact sheet](#) and a model [notice](#). Although the Act applies to both employment and licensure, the guidance focuses on employment issues and employers' obligations throughout the hiring process and beyond under the new law.



## Definitions Clarified

The guidance provides important compliance information for employers and applicants, clarifying key enforcement terms including:

**Applicant.** Refers to both prospective and current employees.

**Hiring process.** Includes the processes for making all decisions affecting the terms and conditions of employment, including hiring, termination, transfers and promotions. The broad interpretation underscores the NYCCHR's view that the new law applies both to pre-employment convictions and convictions during employment.

**Conditional offer of employment.** A job offer that is revocable only because of: (1) the results of a criminal background check; (2) the results of a medical exam permitted under the Americans with Disabilities Act; or (3) other material information that the employer could not reasonably have known before the conditional offer but, if known, would have prevented the offer.

**Conviction history.** A prior criminal conviction of a felony or misdemeanor under New York law and crimes as defined by other states' laws.

**Criminal background check.** When an employer orally or in writing: (1) asks an applicant whether he or she has a criminal record; or (2) searches public records for an applicant's criminal history (directly or through a third party like a consumer reporting agency).

**Criminal history.** Prior records of criminal convictions and non-convictions as well as pending criminal cases.

**Non-conviction.** A criminal action that concluded in one of the following ways: (1) action terminated in favor of the individual; (2) sealed or unsealed adjudication as a youthful offender; (3) sealed non-criminal conviction; or (4) sealed conviction.

## Per Se Violations

The guidance clarifies that there are four separate, chargeable violations of the new law:

- Declaring, printing or circulating solicitations, advertisements or publications that include a limitation or specification based on criminal history
- Making a prohibited inquiry prior to a conditional offer of employment, even if no adverse action is taken
- Withdrawing a conditional offer of employment without completing the Fair Chance process discussed below
- Taking an adverse employment action based on an applicant's non-conviction

### Ban the Box: A Growing Trend

Currently, 19 states and over 100 cities and counties nationwide have adopted so-called "ban-the-box" or "fair chance" laws that remove the criminal history question on job applications and delay background checks in the hiring process. While most of these laws apply to public employers, momentum has been building to extend the same restrictions to the private sector.

Seven states — Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Oregon and Rhode Island — and the District of Columbia have banned the box for both public and private employers. Major cities such as Baltimore, Buffalo, Chicago, Newark, Philadelphia, San Francisco and Seattle have extended their fair chance laws to private employers as well. Los Angeles is currently considering a proposal to expand the state's public sector ban to city contractors and other private employers.

## Criminal Background Checks and the Fair Chance Process

The guidance and fact sheet clarify employer obligations and employee rights both before and after a job offer is made. While largely focused on the application process, they also confirm that the law provides employees with the same rights with respect to other employment decisions like promotions, and provides certain other clarifications.

**Comment.** Last month, President Obama [ordered](#) federal agencies to ban the box. While a number of agencies already delay inquiries into criminal history until later in the hiring process, the president [directed](#) the Office of Personnel Management to issue rules standardizing the practice across the federal government. Whether the president will seek to impose similar requirements on federal contractors remains to be seen.

## Pre-Offer Background Checks and Inquiries

While the Fair Chance Act does not alter what information employers may consider, it does alter when employers may do so. Employers cannot seek, obtain or base an adverse employment action on a non-conviction. Employers cannot inquire about criminal history during the interview process. They cannot seek, obtain or base an adverse employment action on a criminal conviction before a conditional job offer is made.

## Post-Offer Background Checks and Inquiries

Once a job offer is made, the employer may ask about and consider the applicant's criminal record. The NYCCHR clarifies that employers can require applicants to authorize a background check, and can refuse to hire an applicant who refuses to authorize one.

If asked about criminal convictions, applicants must disclose felony and misdemeanor convictions, regardless of how old they are. Unless applying for a law enforcement position, employers cannot ask about — and, if asked, applicants are advised not to disclose — arrests without conviction and sealed convictions, such as non-criminal violations (like disorderly conduct), court-ordered drug treatment programs, or violations as a youthful offender or juvenile delinquent. According to the NYCCHR, this information — even if discovered by an employer — cannot be used against the applicant.

## Withdrawing a Conditional Offer

The guidance puts the burden on the employer to show that at least one of two exceptions to Article 23-A supports withdrawal of a conditional job offer because of the applicant's criminal record — either (1) a direct relationship between the applicant's criminal record and the job, or (2) the applicant's employment would pose an unreasonable risk to property, the safety or welfare of specific individuals, or the public. If an employer wants to revoke an offer on that basis, the employer must explain why, furnish a copy of any background check conducted by the employer or third-party vendor, and give the applicant three days to respond.

Employers may use the NYCCHR form notice, which summarizes the factors an employer must consider in the Article 23-A analysis required under the new law, to comply with these requirements. Employers may adapt the form to the employer's preferred format provided "the material substance does not change." Employers that rely on a consumer reporting agency to conduct the background check must provide the applicant with a copy of the

### Other NYC Restrictions on Applicant Screening

The NYC Fair Chance Act took effect on the heels of the city's *Stop Credit Discrimination in Employment Act*. That law restricts most employers' ability to run credit checks or use an individual's personal credit history for employment purposes. See our [September 28, 2015 For Your Information](#).

agency's report. Employers that rely on public records or an Internet search must provide the applicant with a copy of those records.

### Special Rules for Temporary Help Firms

The Fair Chance Act applies to temporary help firms like other employers. For these firms, a conditional offer of employment is an offer to place an applicant in the firm's labor pool for assignment to firm's clients. Before a firm withdraws a conditional offer of employment based on an applicant's conviction history, it must undertake the Fair Chance process described above.

Employers that accept placements from such firms must also follow the Fair Chance Act to vet temporary workers assigned to them and to decline their employment based on criminal histories.

**Additional notice obligations.** NYC employers that are considering revoking a job offer also have notice obligations under the Federal Credit Reporting Act (FCRA). In addition to providing applicants with the Fair Chance Notice, employers must also provide notices or other documents required by the FCRA, including the Pre-Adverse Action Notice, the Summary of Rights Under the FCRA, and a copy of the background check. If the employer ultimately decides to revoke the offer, the FCRA would also require the employer to send a Notice of Adverse Action Form to the applicant.

**Comment.** While NYC's ban-the-box law requires the job to be held open for at least three business days to allow the applicant to respond, the Federal Trade Commission has recommended that an applicant be provided five business days to respond under the FCRA.

### Exemptions

The guidance explains that exemptions from coverage by the new law's anti-discrimination provisions are to be narrowly construed, with the burden on employers to prove that an exemption applies. The guidance clarifies the four categories of positions that are exempt under the new law:

- Positions where federal, state or local law would require criminal background checks or impose mandatory barriers to employment because of certain criminal convictions
- Positions in the financial services industry that are subject to industry-specific rules and regulations promulgated by a self-regulatory organization (but not other positions in the industry)
- Police and peace officers, positions in law enforcement agencies and certain other city agencies
- City positions designated by the department of Citywide Administrative Services as exempt

### Best Practices

The guidance suggests best practices for employers, including:

- Keeping a detailed log for five years of any exemptions claimed
- Limiting the use, distribution and dissemination of an applicant's criminal history to the employment decision makers
- Collecting and maintaining the results of criminal inquiries separately and confidentially

## In Closing

The new law alters the way in which employers may screen potential or current employees, and factor criminal records into employment decisions. Although it does not prohibit background checks, it does delay the timing. Employers with employees who work in NYC will want to review their hiring and background screening practices in light of the enforcement guidance and make any needed changes to ensure compliance.

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