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Amendments to NYC's ban-the-box law take effect

Amendments to New York City's "ban-the-box" law substantially alter the way many NYC employers can screen job applicants' and current employees' criminal history, effective July 29. Recent enforcement guidance from the New York City Commission on Human Rights clarifies its interpretations of the law and the impact of the amendments on employers' obligations during the hiring process and beyond.

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Background

New York City's "ban-the-box" law, the Fair Chance Act (FCA), restricts employers' use of an individual's criminal conviction history in making employment decisions. With certain narrow exceptions, the FCA prohibits employers from conducting pre-hire criminal background checks or asking about a job applicant's criminal history before a conditional offer of employment is made.

In some circumstances, the FCA allows employers to rescind job offers based on an individual's criminal history. However, it requires employers to make an individualized assessment of that history, share it with the individual, and give them an opportunity to respond before finalizing an employment decision.

FCA amendments

On January 10, 2021, [Int. 1314-A](#) became law, amending the FCA. The amendments went into effect on July 29, expanding employment protections for individuals with a criminal history and imposing new obligations on employers that conduct background checks. The amended law extends FCA protections to job applicants, existing employees and independent contractors and limits employers' ability to factor pending criminal charges, arrests or convictions into employment decisions.

Enforcement guidance

On July 15, the New York City Commission on Human Rights released its Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History. The guidance explains and clarifies the Commission’s interpretations of the FCA and the impact of the 2021 amendments on employers’ consideration of criminal history during the hiring process and during employment.

Two-step background checks required

The amended law requires employers to conduct most preemployment background checks in two steps — pre- and post-offer. Prior to extending a conditional offer of employment, an employer may receive and evaluate an applicant’s noncriminal information (such as employment history, education and references). Before extending a conditional job offer, NYC employers must complete this part of their preemployment background check process — and confirm that the results pose no hiring issues.

Once a conditional offer is made, it cannot be revoked based on noncriminal information that could have been obtained before the offer was made. However, employers may still consider the information if they could not reasonably have known the information before extending the offer and would not have made an offer if they had known. After a conditional offer has been made, criminal history and driving records can be checked.

Buck comment. Employers relying on a third-party background check company should request separate reports for noncriminal information and criminal history. Employers that secure a single report must establish a system to segregate criminal history information and ensure that it is available only to decision-makers after a conditional offer is made.

In addition to the restrictions on background checks, the guidance places new limitations on job advertisements. It prohibits employers from expressing any limitation or specification based on criminal history in their job advertisements, such as “no felonies,” “background check required,” or “clean records only.” In addition, it generally prohibits employers from making unsolicited neutral statements pre-offer about criminal background checks (such as “Applicants’ criminal history will be considered consistent with the requirements of the New York City Fair Chance Act”).

Buck comment. To ensure compliance with these restrictions, employers may have to change their disclosure and consent forms or to use separate pre-offer and post-offer forms. For example, the guidance emphasizes that employers should omit mention of a criminal background check when seeking an applicant’s authorization pre-offer and encourages employers to use terms such as “consumer report” or “investigative consumer report” instead.

Protections for non-convictions

With limited exceptions, the amendments prohibit employers from seeking or considering a person’s non-conviction information in their employment decision-making. Further, employers are prohibited

from disqualifying an applicant from prospective employment based on their refusal to respond to an unlawful question about non-convictions. Examples of non-convictions include cases where:

- No criminal charge was brought or the prosecutor declined to prosecute
- Criminal charges were dismissed or otherwise resolved in favor of the individual (including adjournment in contemplation of dismissal, unless later revoked)
- The individual was adjudicated as a youthful offender
- A conviction was for a violation rather than a misdemeanor or felony
- A conviction was for a noncriminal offense under the laws of another state
- The conviction was sealed

Revoking a conditional offer

The guidance explains that once a conditional offer of employment, promotion, or transfer is made, it can only be revoked based on an FCA-compliant criminal background check, medical information, or other information an employer could not have known before the offer was made. Employers that seek to withdraw a conditional offer based on the applicant's criminal history must comply with new pre-adverse action requirements and can only withdraw the offer in limited circumstances.

The amendments set forth a list of factors — the Fair Chance Factors — that NYC employers must consider before taking adverse action based on criminal convictions and pending charges. They codify and expand on existing requirements under New York State law. With respect to arrests or convictions preceding employment, employers must consider the factors listed in New York Correction Law Article 23 before taking adverse action. With respect to arrests or criminal accusations pending at the time of an application for employment and arrests or convictions occurring during employment, the relevant Fair Chance Factors include:

- The policy of the city to avoid the unnecessary exclusion of persons with criminal justice involvement in employment
- The specific duties and responsibilities of the job
- The bearing, if any, of the criminal offense(s) for which the applicant or employee was convicted, or that are alleged in the cases of pending arrests or criminal accusations, on the applicant's or employee's fitness to perform job duties or responsibilities
- Whether the person was 25 years of age or younger when the criminal offense(s) occurred
- The seriousness of the offense(s)
- The employer's legitimate interest in protecting property or people's safety
- Additional information produced by or on behalf of the applicant or employee regarding their rehabilitation or good conduct

Prior conviction history must still be analyzed using the Article 23-A factors. If an individual has both a prior conviction history and pending charges, the employer must separately analyze each under the applicable set of factors.

In closing

NYC employers should update their applicant screening forms and background check protocols with regard to the consideration of criminal history, arrests, pending or open criminal charges, and non-convictions to ensure compliance with the amended FCA.

COVID-19 Compliance check-in

Buck's latest version of the **COVID-19 Compliance check-in** is updated to reflect the retirement, health, labor and employment issues facing employers now. Review the checklist to help your team manage priorities and determine next steps.

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