



PROGRAM MATERIALS

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Update on Employer Obligations Under the NYC Fair Chance Act

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Update on NYC Fair Chance Act

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Overview

- Background on NYC Fair Chance Act/Summary of Key Amendments
- Fair Chance Act Protections for Job Applicants
 - Before a Conditional Offer of Employment
 - Conditional Offer of Employment
 - After Conditional Offer of Employment
 - Evaluating the Applicant Using the Fair Chance Analysis
 - Withdrawing the Conditional Offer Using Fair Chance Process
- Fair Chance Act Protections for Employees
- Exemptions
- Best Practices

NYC Fair Chance Act

Background

- Since 1977, New York State Correction Law Article 23-A has prohibited employers from arbitrarily denying a job applicant a position based on a prior criminal conviction
 - Article 23-A requires employers to consider each of the several factors identified to help them assess whether there is a direct relationship between the conviction and the job that may present an undue risk. The factors include: nature and severity of offense, time elapsed since conviction, relationship of offense to job, and evidence of rehabilitation.
- Protections of Article 23-A were added to New York City Human Rights Law (NYCHRL) in 1991
- The Fair Chance Act (FCA) was added to the NYCHRL on October 27, 2015
- The FCA is a “ban-the-box” law which generally prohibits NYC employers from inquiring about an applicant’s criminal history prior to making a conditional offer of employment
- Prior to withdrawing a conditional offer of employment, the FCA also requires employers to evaluate certain risk factors and provide the applicant with a meaningful opportunity to respond before the employer could finalize its decision (the “Fair Chance Process”)
- The New York City Commission on Human Rights (the “Commission”) enforces the NYCHRL
 - Commission guidance does not have the force of law, but provides insights into how the Commission will interpret and enforce the FCA, as amended

Summary of the Amendments

- Amendments to the FCA took effect on July 29, 2021
- The Key Changes Include:
 - Expanded protections prohibiting employers from asking about or taking adverse action based on unsealed violations and unsealed non-criminal offenses
 - Expansion of the FCA to cover *pending* criminal cases
 - While employers may decide to fire or not hire someone because of a pending criminal charge or a criminal conviction, they must go through the Fair Chance Process before doing so
 - Expansion to cover employees, unpaid interns, independent contractors, and freelancers
 - New protections requiring employers to provide job applicants notice and an opportunity to respond before rejecting them based on a perceived intentional misrepresentation of their criminal history

Categories of Employment Protections

- Information Which Can No Longer Be Considered
 - Non-convictions
- Fair Chance Protections
 - Limits on when, and to what extent, employer may consider criminal history information
 - Procedures to ensure workers are not arbitrarily disciplined or excluded from employment opportunities when they do not pose an unreasonable risk of harm and there is no direct relationship between their criminal history and the job

Non-Convictions Protected

- Unless specifically required by law, all private employers and most public-sector employers are prohibited from seeking information about, or basing an adverse employment action on, a person's "non-conviction"
- Non-conviction:
 - a criminal action that has been adjourned in contemplation of dismissal
 - *non-pending* arrests that did not lead to convictions
 - e.g., charges dismissed, nolle prossed, acquittal
 - cases where person adjudicated as a youthful offender
 - convictions that were sealed, expunged, or reversed on appeal
 - convictions for violations, infractions, or other petty offenses such as disorderly conduct, trespass, or loitering (regardless of whether conviction sealed)

Commission Guidance on Non-Convictions

- To avoid soliciting non-conviction information, post-offer criminal history inquiries can be framed as follows:

- *Have you ever been convicted of a misdemeanor or felony?*

Answer “NO” if you received an adjournment in contemplation of dismissal (“ACD”) that has not been revoked and restored to the calendar for further prosecution or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as “disorderly conduct;” (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

FCA Protections for Job Applicants:

Before the Conditional Offer of Employment: Job Solicitations and Advertisements

- Unless an exemption applies, employers are prohibited from making statements related to criminal history in job postings, employment applications, and recruitment materials

Prohibited Statements	Permitted Statements
Background check required	People with criminal histories are encouraged to apply
No felonies	We value diverse experiences, including prior contact with the criminal legal system
Clean records only	Reference checks, employment and education verification, resume authentication
Applicant's criminal history will be considered in a manner consistent with applicable law	

Before the Conditional Offer of Employment: Interview Process

- Unless an exception applies, employers are prohibited from making an inquiry or statement related to criminal history until after the conditional offer of employment
- Examples of prohibited statements:
 - Questions, whether written or oral, during a job interview or on the initial application about criminal history;
 - Broad statements, whether written or oral, that individuals with convictions, or certain specific convictions, will not be hired or cannot work for the employer; and
 - Investigations into the applicant's criminal history, including using public or government records or the internet, whether conducted by an employer or for an employer by a third party
- Applicants can refuse to respond to any prohibited inquiry

Interview Process: Inadvertent Disclosure of Criminal History

You weren't supposed to tell us that - now what!

- Even if a legitimate inquiry leads to disclosure of criminal history or if the applicant voluntarily raises the issue, further questions or examination of the applicant's criminal history is prohibited (until after deciding whether to make a conditional offer)
- Interviewers should be trained on how to handle inadvertent disclosures. Permitted responses:
 - Criminal history information is not considered at this stage of the hiring process and it is not proper for us to discuss. Let's move on to a different topic
 - Commission Guidance: "by law, we only consider an applicant's criminal record once a conditional offer of employment is made"

Conditional Offer of Employment – Evaluation of Non-Criminal Information

- Conditional Offers must be the last step in your pre-employment screening process. Conditional offers can only be revoked based on criminal history or ADA-compliant medical examination
- All non-criminal information must be favorably evaluated *prior to* making the conditional offer of employment. This includes:
 - employment history and references
 - education verification
 - SSN traces
 - pre-employment drug screening
 - Interviews, writing samples, skills tests
- Driving abstracts should be reviewed *after* the conditional offer of employment because they often contain criminal and non-criminal information that cannot be segregated.
- Employers that make a conditional offer of employment and then change job duties or responsibilities in a manner that serves to disqualify the applicant are subject to a rebuttable presumption that the changes were done as a pretext for unlawful discrimination

Conditional Offer of Employment – Evaluation of Non-Criminal Information

- Two-Step or Bifurcated Process Recommended
 - Step One: Evaluate consumer report that contains only non-criminal information
 - Step Two: After a conditional offer of employment is made, evaluate a second report that contains the criminal history information
- If this is not possible, the Commission recommends establishing internal controls to segregate criminal history information from the decision maker until after the conditional offer of employment is made
 - Employers who take this route bear the burden of proving that the criminal information was inaccessible to decisionmakers until after a conditional offer

Conditional Offer of Employment – FCRA Notices

- The initial FCRA authorization notice should not state a background check will be done. Instead, the notice should request consent to conduct a “consumer report” or “investigative consumer report”
- If an applicant requests the scope of an investigative consumer report, the NYCHRL does not prohibit an employer from stating a criminal background check will be included in the scope of the investigative consumer report.

Conditional Offer of Employment: After-Acquired Non-Criminal Information

- The NYCHRL does not prohibit employers from considering non-criminal information after a conditional offer is made, **if** the employer can show as an affirmative defense, by a preponderance of the evidence, that:
 - the employer could not have reasonably known the information before the conditional offer; and
 - regardless of the results of the criminal background check, the employer would not have made the offer if it had known the information before the offer was extended.
- ** Information could “reasonably have been known” before a conditional offer if the information existed prior to the conditional offer and could have been obtained by an employer exercising reasonable due diligence.
 - Example of after-acquired information likely to be permitted:
 - non-criminal information on the driving abstract; late response from reference despite good faith efforts to receive the information timely

After the Conditional Offer of Employment

- At this stage the employer can:
 - Run criminal background checks
 - Ask applicants, either orally or in writing, whether they have a criminal history or pending cases (noting exclusion on non-convictions)
 - Ask applicants about circumstances that led to criminal conviction or pending case
 - Gather information related to a criminal conviction or pending case
- ** Remember –inquiries regarding non-convictions are always prohibited

Evaluating Applicant Criminal History Using Fair Chance Analysis

- If an employer is considering whether to withdraw a conditional offer of employment based on the applicant's criminal history, it must engage in a mandatory analysis of certain factors to determine whether:
 - there is a direct relationship between the applicant's conviction history or pending case and the prospective job; or
 - employing the applicant “would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public”
- Employers must use:
 - the Article 23-A factors for criminal convictions
 - NYC Fair Chance Factors for pending cases
- Employers can't presume a direct relationship or reject an applicant based on a perceived lack of good moral character without conducting the required Fair Chance Analysis
- Even if there is a direct relationship between the nature of the criminal conviction and the job, employers must evaluate whether these concerns are mitigated by other factors, such as the passage of time and evidence of good conduct or rehabilitation

Article 23-A Factors - Applicable to Convictions Employers Must Assess Each, Not Some

- The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses
- The specific duties and responsibilities necessarily related to the employment sought or held by the person
- The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on the person's fitness or ability to perform one or more such duties or responsibilities
- The time which has elapsed since the occurrence of the criminal offense or offenses (not the time since arrest or conviction)
- The age of the person at the time of occurrence of the criminal offense or offenses (not the age at arrest or conviction)
- The seriousness of the offense or offenses
- Any information produced by the person, or produced on the person's behalf, in regard to their rehabilitation or good conduct
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public
- Whether the person has a certificate or relief from disabilities or good conduct, which create a presumption of rehabilitation

NYC Fair Chance Act Factors – Applicable to Pending Cases

- The policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement;
- The specific duties and responsibilities necessarily related to the employment held by the person;
- 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;
- 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, which shall serve as a mitigating factor;
- The seriousness of such offense or offenses;
- The employer's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public; and
- Any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including but not limited to history of positive performance and conduct on the job or in the community.

Comparison of Factors

- Both consider age at the time of conviction, but:
 - Article 23-A Factors requires consideration of age in general;
 - NYC Fair Chance Factors directs that the employer considers whether the person was 25 years of age or younger at the time of the criminal offense.
- Both consider good conduct and rehabilitation, but:
 - Article 23-A Factors require consideration of whether the person has a certificate or relief from disabilities or good conduct which create a presumption of rehabilitation;
 - NYC Fair Chance Factors requires consideration of history of positive performance and conduct on the job or in the community.

Withdrawing the Conditional Offer Using the Fair Chance Process

- If, after conducting the Fair Chance Analysis, the employer wants to revoke the conditional offer of employment, it must follow the “Fair Chance Process” which requires the employer to:
 - Disclose the Criminal History Information to the applicant;
 - Provide the applicant with the Fair Chance Act Notice; and
 - Provide the applicant with a reasonable period of time to respond.

Withdrawing the Conditional Offer Using the Fair Chance Process

- Disclose the Criminal History Information:
 - The applicant must receive a complete and accurate copy of all information relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information;
 - Examples: consumer report, internet searches, public records searches
 - Written summaries of oral reports made to the employer;
 - The applicant must be able to see and challenge the same criminal history information relied on by the employer.
- Provide the Fair Chance Process Notice
 - This is the written notice describing the Fair Chance Analysis conducted by the employer;
 - NYC has published a form notice employer can use (see resources at end of presentation);
 - Fair Chance Process Notice informs the applicant of the time frame within which to respond and requests evidence of good conduct and rehabilitation;
 - Boilerplate denials that simply list the factors considered are not sufficient. The notice must articulate the employer's analysis and conclusion.
- Allowing time to respond
 - Applicants must be given at least 5 business days from receipt of the criminal history information and Fair Chance Notice;
 - During this process, the employer can't permanently fill the job position;
 - The Fair Chance Act Amendments changed this from 3 to 5 business days;
 - Background check authorization notices should require that the applicant or employee consent to exchange information electronically.

Withdrawing the Conditional Offer Using the Fair Chance Process

- Employers must consider any additional information provided by the applicant in response to the Fair Chance Notice
 - Employers must utilize the Fair Chance Analysis to assess the new information
- If, after assessing all information, the employer wishes to rescind the conditional job offer, any adverse decision must be in writing
 - Don't forget to coordinate with federal and state compliance
 - FCRA pre-and post-adverse action notices
 - NY Corrections Law Article 23-A requires a written statement setting forth the reasons for a denial of employment within 30 days of a request

Intentional Misrepresentations

- Employees can be disqualified for intentionally misrepresenting their conviction histories or pending cases
- A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive
- Before taking adverse action, the employer must provide the applicant with a copy of any information that led the employer to believe that the applicant intentionally misrepresented their criminal record
 - The applicant must be provided with a reasonable period of at least five business days to respond
- If the applicant “credibly demonstrates” either that the information provided was not a misrepresentation or that a misrepresentation was unintentional, the employer is required to perform the Fair Chance Analysis before taking adverse action against the applicant
- Typical issues:
 - failing to list a conviction that is believed to be too old or not relevant for job being applied for (e.g., DUI); original charge vs. nature of conviction

FCA Protections for Employees

Expansion of Protections for Employees

- Previously, NYS Article 23-A and Fair Chance Act only applied to applicants for employment
- The FCA Amendments now provide employers may not take adverse action against an employee (including independent contractors and freelancers) for criminal convictions or pending cases without going through the Fair Chance Analysis and Fair Chance Process
- Active employees can be placed on leave for a reasonable period of time during the Fair Chance Process
 - Commission recommends allowing an employee to use any available accrued paid leave
 - Employers can be held liable for unnecessarily extending the Fair Chance Process
 - Presumption is that anything longer than 5 days is unreasonable
- Employers can enforce attendance policies where an employee misses work because they are in custody, but the policy must be administered consistently to avoid discrimination claims
 - If an employer is concerned about future absences related to an arrest, it must conduct the Fair Chance Analysis prior to taking an adverse employment action

Temporary Help Firms/Staffing Agency

- The FCA applicable to staffing agencies and temporary help firms
- Nuance: The conditional offer of employment is the offer to place the individual in the labor pool or with a client
- Staffing agencies may not aid clients who wish to avoid these legal requirements by placing only those individuals who have no criminal histories
- Staffing agency clients who wish to review criminal history information can only do so after the worker has been assigned and they must follow the Fair Chance Process when vetting any criminal history

Exemptions from the FCA

Exemptions from the FCA

- Legally-mandated background checks under federal, state, or local law
- Employers required by self-regulatory organizations to conduct background checks
- Police and peace officers and law enforcement agencies
- City Agencies

Legally-Mandated Background Checks

- Federal, state, and local laws may require employers to conduct criminal background checks, but employers must comply with FCA to the extent not in conflict with these laws
- The NYC Commission characterizes the barriers as either mandatory or discretionary
 - Mandatory: laws that *require* an employer to deny employment to applicants or take designated adverse employment actions for individuals with certain criminal histories
 - Discretionary: Employers can, but are not required to, deny employment to applicants with criminal records

Legally-Mandated Background Checks

- Unless required by applicable law, job postings or announcements should not state that a background check will be required
- Once an individual applies, the employer can notify the applicant that a background check will be conducted prior to a conditional offer of employment
 - Employers should state the legal basis for the background check
- Positions that are not subject to a mandatory barrier must follow Fair Chance Analysis and Fair Chance Process

Legally-Mandated Exclusions

- Federal, state, or local law requires an employer to exclude an individual from consideration for a position due to a specific criminal offense
- Similar to required background checks, employers must comply with the FCA to the extent not inconsistent with applicable law
- Prior to the conditional offer of employment, the employer may ask whether the applicant whether they have been convicted of a *specific offense* subject to the legally-mandated exclusion
 - The applicant should not be asked about any offense at the pre-offer stage
- Employer must consider evidence that the disqualifying conviction is in error

Criminal Background Checks Required by Self-Regulatory Organizations (SRO)

- Employers in the financial services industry are exempt from the Fair Chance Process to the extent it conflicts with industry regulations promulgated by a SRO (e.g., FINRA)
- Employment decisions regarding other positions must still comply

Police, Peace Officer, and Law Enforcement Agencies

- Police and peace officers are exempt from the employment protections based on criminal history
- NYCHRL expressly recognizes that the following agencies are exempt from the Fair Chance Process as law enforcement agencies:
 - the New York City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Child Protection and the Division of Youth and Family Justice within the Administration of Children's Services, the Business Integrity Commission, and the District Attorneys' offices in each borough

New York City Agencies

- City agencies are not required to conduct the Fair Chance Analysis with respect to pending cases or convictions that occurred during an employee's employment if the employee is entitled to procedural protections against arbitrary discipline or dismissal under Civil Service Law §75, or disciplinary process required by law or administrative rules
- Exemptions also apply for certain City positions designated by the Commission of DCAS based on a determination that they involve law enforcement or are otherwise susceptible to bribery or corruption
 - Criminal background check can be performed prior to a conditional offer, but any criminal history concerns must be vetted through the Fair Chance Analysis and Fair Chance Process

Enforcement

- Private right of action for unlawful discrimination includes compensatory damages (back and front pay, emotional distress damages), punitive damages, and attorneys' fees, as applicable
- NYC Commission on Human Rights enforces the NYCHRL, which includes the FCA, and can impose civil penalties of up to \$125,000. Wilfull, wanton, or malicious actions may result in penalties of up to \$250,000
 - Civil penalties guided by the following factors:
 - Severity of the particular violation;
 - The existence of additional previous or contemporaneous violations;
 - Employer size, considering number of employees and revenue;
 - Whether the employer knew or should have known about the law.

Best Practices

Best Practices

- Review employment applications, recruitment materials, and applicant tracking systems to ensure compliance with FCA , New York State law, and FCRA
 - Job postings, applications, offer letters, FCRA disclosure and authorization forms,
 - Eliminate any reference to arrest or criminal history in advertisements or “background check” in offer letters and forms
- Review the background check process and consult/coordinate with any vendors
 - Background check reports should be bifurcated into non-criminal information provided prior to the conditional offer of employment and the post-offer criminal history and DMV report
 - If separate reports are not possible, implement procedures to segregate criminal history information from decision-makers until after the conditional offer of employment has been made

Best Practice

- Update internal policies and training for hiring managers and supervisors, including how to handle inadvertent disclosures, how to conduct the Fair Chance Analysis, required notices, and document retention
 - Review and update Fair Chance Notice and as well as written notice of withdrawal of conditional offer
 - Review coordination with required FCRA pre-adverse action notice /post-adverse action notices and Article 23-A explanation of decision FCRA (required upon request)
- Retain all records for any claimed exemption and related notices for three years from the date the exemption is used.
- The Commission recommends any exemption log contain:
 - Which exemption is claimed, how the position qualifies for the exemption;
 - a copy of any inquiry into the person's criminal history (with name of employee who made it);
 - a copy of the Fair Chance Analysis (and name of employee who participated);
 - and the final employment action taken.

Resources

- NYC Fair Chance Law Webpage
 - <https://www1.nyc.gov/site/cchr/law/fair-chance-law.page>
- NYC Commission on Human rights Legal Enforcement Guidance (last updated July 15, 2021)
 - <https://www1.nyc.gov/site/cchr/law/fair-chance-act.page>
- NYC Fair Chance Act FAQs
 - <https://www1.nyc.gov/site/cchr/media/fair-chance-faqs.page>
- NYS Article 23-A
 - <https://dol.ny.gov/system/files/documents/2021/02/correction-law-article-23a.pdf>
- NYC Fair Chance Act Notice (still not updated to reflect applicant has up to 5 days to return requested information)
 - https://www1.nyc.gov/assets/cchr/downloads/pdf/FairChance_Form23-A_distributed.pdf

Questions?







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NEW YORK CORRECTION LAW
ARTICLE 23-A

LICENSURE AND EMPLOYMENT OF PERSONS PREVIOUSLY
CONVICTED OF ONE OR MORE CRIMINAL OFFENSES

Section 750. Definitions.

751. Applicability.

752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited.

753. Factors to be considered concerning a previous criminal conviction; presumption.

754. Written statement upon denial of license or employment.

755. Enforcement.

§750. Definitions. For the purposes of this article, the following terms shall have the following meanings:

(1) "Public agency" means the state or any local subdivision thereof, or any state or local department, agency, board or commission.

(2) "Private employer" means any person, company, corporation, labor organization or association which employs ten or more persons.

(3) "Direct relationship" means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.

(4) "License" means any certificate, license, permit or grant of permission required by the laws of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession. Provided, however, that "license" shall not, for the purposes of this article, include any license or permit to own, possess, carry, or fire any explosive, pistol, handgun, rifle, shotgun, or other firearm.

(5) "Employment" means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include membership in any law enforcement agency.

§751. Applicability. The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

§752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited. No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

§753. Factors to be considered concerning a previous criminal conviction; presumption. 1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

(h) 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.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

§754. Written statement upon denial of license or employment. At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

§755. Enforcement. 1. In relation to actions by public agencies, the provisions of this article shall be enforceable by a proceeding brought pursuant to article seventy-eight of the civil practice law and rules.

2. In relation to actions by private employers, the provisions of this article shall be enforceable by the division of human rights pursuant to the powers and procedures set forth in article fifteen of the executive law, and, concurrently, by the New York city commission on human rights.

Frequently Asked Questions About New York City's Employment Protections Based on Criminal History

1. What were the major changes to the NYC Human Rights Law's employment protections for people with criminal records in 2019 and 2021?

The NYC Human Rights Law incorporates by reference protections under Executive Law § 296(16). As a result, an amendment to Executive Law § 296(16), effective July 11, 2019, made it an unlawful discriminatory practice for employers to ask about or take adverse action against someone based on an adjournment in contemplation of dismissal (unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution).

Local Law 4 (2021), which takes effect July 29, 2021, adds new employment protections for workers with a record of criminal system involvement. Key changes include:

- New protections requiring a Fair Chance Analysis for job applicants with pending criminal cases. While employers may decide to fire or not hire someone because of a pending criminal charge or a criminal conviction, they must go through the Fair Chance Process before doing so.
- New protections requiring a Fair Chance Analysis for current employees facing discipline or termination related to an arrest or conviction that occurs during employment.
- Expanded protections prohibiting employers from asking about or taking adverse action based on unsealed violations.
- New protections requiring employers to provide job applicants notice and an opportunity to respond before rejecting them based on a perceived intentional misrepresentation of their criminal history.

These new protections, in addition to existing ones, now prohibit New York City employers from acting against all prospective and current employees simply because they have been arrested for or convicted of a crime, and these protections apply regardless of whether the arrest or conviction happened before or during employment.

2. Are there size limits that determine which employers are covered by the NYC Human Rights Law's protections for workers with a criminal history?

Some protections under the New York City Human Rights Law apply to employers of all sizes, unless an exception applies. Others apply only to employers with four or more employees (which includes the business owner and independent contractors).

Non-convictions

Unless an exception applies, employers of all sizes are prohibited from asking about non-pending arrests that did not lead to convictions; adjournments in contemplation of dismissal (unless revoked and the case is restored to the calendar for further prosecution); convictions that were sealed, expunged, or reversed on appeal; convictions for violations, infractions, or other petty offenses such as "disorderly conduct" (regardless of whether they are sealed); cases that resulted in a youthful offender outcome; and convictions that were withdrawn after completion of a court program.

Employers of all sizes should also bear in mind that additional protections under the Family Court Act prohibit them from asking about juvenile delinquency proceedings.

Pending cases and convictions for misdemeanors or felonies

Unless an exception applies, employers with four or more employees are required to: wait until after a conditional offer of employment before requesting and reviewing criminal records; conduct an individualized assessment of the Relevant Fair Chance Factors to determine whether adverse action may be taken based on an applicant's or employee's criminal history; before taking adverse action, provide the person with a copy of the individualized assessment and the criminal history information on which the employer relied for its assessment; and give time (generally five business days) for the person to respond to the analysis and criminal history information.

3. Are there any exceptions that apply to the NYC Human Rights Law's employment protections based on criminal history?

Yes. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the exceptions.

4. Can an employer state that a "background check" is required for a position, or put "background check required" in a job advertisement or application?

No. Prior to a conditional offer of employment, an employer cannot state, including in a job ad or application, that a background check is required, unless an exception applies. The law defines prohibited inquiries and statements broadly, including those that express any limitation, directly or indirectly, based on a person's arrest or criminal conviction. Note that even some employers who are otherwise exempt to Section 8-107(11-a) because they are subject to federal, state, or local laws that require criminal background checks or prohibit the employment of people with certain criminal histories are prohibited from stating that a background check is required in a job advertisement or application.

Instead of using the term "background check," employers should be specific about what information they are seeking. An employer can state that it is conducting a "reference check," an "employment and education verification," or a "resume authentication," or may otherwise specifically indicate non-criminal information the employer is planning to investigate during the hiring process. The employer should not use the blanket term "background check," however, which is frequently understood to indicate a hiring limitation based on a person's criminal history.

5. How can an employer comply with the requirements of the Fair Credit Reporting Act ("FCRA") without violating the NYC Human Rights Law's protections related to criminal background checks?

Checks of all information other than criminal history must be completed before a conditional offer of employment is made. Employers seeking to use consumer reports as part of the hiring process must take several steps to ensure compliance with both the NYC Human Rights Law and FCRA.

- The employer generally must review all non-criminal hiring information prior to the conditional offer. Employers who request background checks on applicants should first receive the non-criminal information, evaluate it, and then separately receive and evaluate the criminal information. Employers may do this either by (1) working with a background check company to receive two separate reports, first one for non-criminal information, and after a conditional offer, another one for criminal information; or (2) establishing a system to separate the criminal history information from the non-criminal information contained in a single report and ensuring that the criminal information is available to hiring decisionmakers only after a conditional offer has been made. Employers who take the

second route bear the burden of proving that the criminal information was inaccessible to decisionmakers until after a conditional offer. The Commission recommends the approach of receiving two separate reports, first one for non-criminal information prior to a conditional offer and then a separate report on criminal history after a conditional offer has been made.

- Prior to a conditional offer, employers should omit any mention of criminal background check in the FCRA notice and should use the term “consumer report” rather than “background check”.
 - If, prior to a conditional offer, the employer will be performing an “investigative report,” within the meaning of FCRA (that is, a report based on personal interviews concerning a person’s character, general reputation, personal characteristics, and lifestyle), the NYCHRL does not prohibit the employer from complying with FCRA’s requirement that, *upon the written request of the subject of the report*, the employer must disclose the scope of the investigative report, including that the investigative report will include a review of criminal history information. See 15 U.S. Code § 1681d. However, the employer should not include mention of the criminal history in its initial FCRA notice and is prohibited from investigating or considering criminal background information prior to a conditional offer, absent an exception under the NYC Human Rights Law.
- In drafting their FCRA notices, employers should bear in mind that, unless an exception applies, the NYC Human Rights Law also prohibits them from considering credit history as part of the hiring process.

6. How should driving records be handled during the hiring process?

It generally is not practicable to segregate or separately access the criminal and non-criminal information in a person’s driving record. For this reason, driving records may only be reviewed after a conditional offer of employment has been extended, but an employer may decide to withdraw its conditional offer based on either criminal or non-criminal information in the record.

Although employers are generally prohibited from using non-criminal information after a conditional offer of employment, the Commission considers the non-criminal information in an applicant’s driving abstract to be “other information the employer could not have reasonably known before making the conditional offer,” and the employer is permitted to consider it after the conditional offer without violating the NYC Human Rights Law.

Information about criminal convictions and pending criminal cases for driving offenses must be reviewed consistent with the Fair Chance Process. This means employers must review the person’s conduct—whether it resulted in a conviction or is alleged in a pending case—in light of the Relevant Fair Chance Factors; provide the applicant with a written copy of its analysis and the information on which it relied if it wants to withdraw its offer; and give the applicant a reasonable period of at least five days to respond. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the process.

7. After a conditional offer of employment, what can an employer ask an applicant about their arrest/conviction history?

After a conditional offer, an employer may ask an applicant about certain convictions and about pending cases (which do not include adjournments in contemplation of dismissal or “ACDs”). An

employer may also ask about the circumstances that led to any conviction or pending charge to determine how serious the applicant's conduct was and whether it relates to the responsibilities of the job or raises concerns for the safety or wellbeing of people or property. Note that employers have an affirmative obligation to inquire about the factors they are required to consider in the Fair Chance Analysis, including asking about their evidence of rehabilitation or good conduct.

Absent an exemption, an employer must never ask about arrests that did not lead to convictions; adjournments in contemplation of dismissal (unless they are revoked and the case is restored to the calendar for further prosecution); convictions that were sealed, expunged, or reversed on appeal; convictions for violations, infractions, or other petty offenses such as "disorderly conduct" (whether sealed or unsealed); cases that resulted in a youthful offender or juvenile delinquency finding in Family Court; or convictions that were withdrawn after completion of a court program. The following is an example of a permissible question after a conditional offer:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if you received an adjournment in contemplation of dismissal ("ACD") or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

8. Do the protections of the NYC Human Rights Law apply when a person has convictions from outside New York, particularly if the conviction is not a crime in New York?

Yes, the law applies to all criminal convictions, no matter where they occurred.

9. Do the protections of the NYC Human Rights Law apply to volunteers or unpaid interns at an organization?

The New York City Human Rights Law, does not apply to volunteers, but it does apply to unpaid interns. An intern is covered under the New York City Human Rights Law if: (a) the individual works for a fixed period of time at the end of which there is no expectation of employment; (b) the individual performing the work is not entitled to wages for the work performed; and (c) the work performed: (i) supplements training given in an educational environment that may enhance the employability of the intern; (ii) provides experience for the benefit of the individual performing the work; (iii) does not displace regular employees; and (iv) is performed under the close supervision of existing staff.

10. Does an employer's conditional offer have to be in writing?

No, the conditional offer may be made orally. However, there are other important steps in the employment process that must be made in writing. Specifically, if an employer is considering withdrawing a conditional offer after reviewing an applicant's conviction history, it must provide its Fair Chance Analysis in writing, which may be accomplished by using the Commission's Fair Chance Notice. If, after an applicant responds to an employer's Fair Chance Analysis, the employer still wants to withdraw its conditional offer, the employer's decision must also be in writing. Please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of the process.

11. If a position is exempt from the Fair Chance Process under Section 8-107(11-a)(g) of the NYC Human Rights Law, does the employer still have to review a job applicant's criminal history in light of the Relevant Fair Chance Factors under Section 8-107(10)?

In many cases, yes. Under Section 8-107(11-a)(g) of the NYC Human Rights Law, employers need not wait until after a conditional offer to discuss a job applicant's criminal history or to conduct a criminal background check when the position is for a police officer or peace officer; at a law enforcement agency (as defined in Article 23-A of the New York Correction Law); listed as exempt on the NYC Department of Citywide Administrative Services website; or subject to a law requiring a criminal background check or barring employment based on a particular criminal history.

These employers, however, may not be exempt from Section 8-107(10) of the NYC Human Rights Law, which prohibits adverse employment actions based on criminal convictions and pending charges. For a full discussion of these exemptions, please consult the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History* for a detailed discussion of exemptions.

Employers should also note that an applicant who is denied employment based on a Fair Chance Analysis of their pre-employment conviction history are entitled under New York Correction Law § 754 to request an explanation, which the employer must provide within 30 days.

12. Can a job posting say that an “employer will consider qualified applicants with criminal histories, consistent with the law”?

Generally, no. Saying that qualified applicants with criminal histories will be considered “consistent with the law” (or using similar neutral language about criminal history), communicates that criminal histories will be considered during the hiring process and could discourage qualified applicants from applying for a job, in violation of the NYC Human Rights Law. If you are conducting recruitment in NYC and another jurisdiction with different advertising requirements related to criminal background checks in employment, you should contact the Commission's policy office at policy@cchr.nyc.gov.

13. Are there other laws that provide employment protections based on criminal history in New York?

Yes. Other protections for workers with criminal system involvement arise under New York Family Court Act § 380.1, Executive Law § 296, and Correction Law Article 23-A. You should consult an attorney if you have questions about how these laws may apply to your situation.

14. May an employer discipline or terminate an employee who is unable to report to work because they are in custody?

Yes. The NYC Human Rights Law does not prohibit an employer from maintaining its standard attendance policies. However, the Commission's Law Enforcement Bureau will consider whether an attendance policy has been used as a pretextual basis for discriminating against an employee based on their criminal history if, for example, the employer typically does not discipline or terminate employees who miss work for other reasons.

If the employer is acting based on an employee's actual absence from work, as opposed to the fact that they were arrested, it may discipline the employee consistent with its regular absentee



policy without performing a Fair Chance Analysis of the employee's pending case. However, if the employer is concerned about the person's ability to perform the duties of their job because of future absences resulting from their arrest, it is required to conduct a Fair Chance Analysis of the pending case.



NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History

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Note: This guidance has been updated to reflect amendments to the New York City Human Rights Law under Local Law 4 (2021), which takes effect July 29, 2021.

I Introduction

The New York City Human Rights Law (“NYCHRL”) prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. Pursuant to the 2005 Civil Rights Restoration Act, the NYCHRL must be construed “independently from similar or identical provisions of New York state or federal statutes,” such that “similarly worded provisions of federal and state civil rights laws [are] a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”¹

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the discriminatory act, or if the complaint concerns alleged gender-based harassment, within three (3) years of the discriminatory act. Alternatively, a complaint may be filed in New York State Supreme Court within three (3) years of the discriminatory act. The portions of the NYCHRL discussed in this guidance apply to employers with four or more employees. Exemptions are discussed in Part IX.

The NYCHRL provides protections for people with a record of criminal system involvement in the areas of employment, licensure, and credit.² This Guidance focuses on protections in employment. Broadly, the NYCHRL establishes two categories of employment protections based on a person’s history of criminal system involvement. First, the NYCHRL prohibits most employers from *ever* asking about or taking action against a worker for certain types of low-level or sealed cases and cases with favorable outcomes for the defendant (cases that this Guidance defines as “non-convictions”). Second, the NYCHRL provides “fair chance” protections to workers with criminal convictions and pending cases, limiting when and to what extent most employers may consider workers’ criminal history and ensuring that workers are not arbitrarily disciplined or excluded from employment opportunities when they do not pose an unreasonable risk of harm and there is no direct relationship between their criminal history and the job. Protections under the NYCHRL “relating to employees apply to interns, freelancers and independent contractors.”³

¹ LOCAL LAW NO. 85 (2005). “The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably worded to provisions of this title have been so construed.” N.Y.C. Admin. Code § 8-130.

² N.Y.C. Admin. Code §§ 8-107(9)(a)(3)–(11-b). There are also limited protections in housing, mirroring with those set forth in New York Executive Law § 296(16). See N.Y.C. Admin. Code § 8-107(11)(a); N.Y. EXEC LAW § 296(16) (making it an unlawful discriminatory practice to make any inquiry in connection with housing about “... any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law”).

³ N.Y.C. Admin. Code § 8-107(23).

II Legislative History and Intent

The NYCHRL protects workers against arbitrary denials of employment opportunities based on criminal history and ensures that job applicants are considered based on their qualifications before their criminal history. These protections reduce collateral employment consequences for New Yorkers who have been arrested or convicted of a crime, helping to level the playing field, particularly for communities that are disproportionately impacted by the criminal legal system, such as people of color and LGBTQ people.⁴ In addition, by providing comparable protections for pending cases and convictions, the NYCHRL empowers the legally innocent to defend themselves in court without fear that doing so will hinder their employment prospects.⁵

The Commission has protected workers against employment discrimination based on criminal history since 1977, sharing joint enforcement authority over Correction Law Article 23-A with the New York State Division of Human Rights.⁶ The protections of Article 23-A, which were expressly incorporated into the NYCHRL in 1991,⁷ prevent employers from arbitrarily denying an applicant a job based on a criminal conviction.⁸ An employer is prohibited from rejecting an otherwise qualified job applicant because of their conviction record unless there is a direct relationship between the conviction and the job or an unreasonable risk to people or property, taking into account specific considerations—such as the recency and severity of the offense, its relationship to the nature of the job, and evidence of rehabilitation.⁹ The NYCHRL also incorporates protections set forth in the New York State Human Rights Law § 296(16), related to an applicant’s record of arrests in non-pending cases that resolved in the person’s favor; youthful offender adjudications; sealed cases; and cases adjourned in contemplation of dismissal (“ACDs”).¹⁰

The Fair Chance Act (“FCA”) was added to the NYCHRL on October 27, 2015, because the City determined that, despite the requirement that employers must fairly assess candidates under Article 23-A of the Correction Law, many employers were disregarding candidates who disclosed criminal histories early in the hiring process. The FCA makes it an unlawful discriminatory practice for most employers, labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants prior to extending a conditional offer of employment. The FCA also requires employers seeking to withdraw a conditional job offer based on the applicant’s conviction history to provide the applicant a meaningful opportunity to respond to the employer’s assessment before the employer finalizes its decision.

Local Law 4 of 2021, effective July 29, 2021, adds new protections for people whose criminal history includes unsealed violations and unsealed non-criminal offenses.¹¹ Local Law 4 also expands the protections of the Fair Chance Act to cover current employees and to reach pending cases.¹²

⁴ See REP. OF THE GOVERNMENTAL AFFAIRS DIVISION, NEW YORK CITY COUNCIL COMM. ON CIVIL RIGHTS, Int. No. 318-A, (June 9, 2015); see also Michelle Alexander, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* (2012); German Lopez, *5 ways LGBTQ people fall into the criminal justice system — and suffer the worst once in*, VOX (Feb. 23, 2016, 8:10 AM), <https://www.vox.com/2016/2/23/11095980/lgbtq-gay-transgender-prison>.

⁵ See *Hearing on Int. 1314-A Before the Comm. on Civil and Human Rights* (Jan. 22, 2020) (testimony of Councilmember Mathieu Eugene, Chair, Comm. on Civil and Human Rights) (noting that, in the absence of protections for pending cases, “attorneys often counsel their client to plead guilty to avoid employment consequences”).

⁶ N.Y. CORRECT. LAW. § 755 (1977).

⁷ N.Y.C. LOCAL LAW 39 (1991).

⁸ Article 23-A does not apply to “membership in any law enforcement agency.” N.Y. CORRECT. LAW § 750(5) (defining “employment”).

⁹ *Id.* §§ 752–753.

¹⁰ N.Y.C. Admin. Code § 8-107(11).

¹¹ N.Y.C. LOCAL LAW 4 (2021).

¹² *Id.*

III Definitions and Rules of Construction

Any time this Guidance or related provisions of the NYCHRL or Rules of the City of New York (“RCNY”) concerning protections based on criminal history require notices and disclosures to be printed or in writing, they may also be communicated by email, if such method of communication is mutually agreed on in advance by the employer and the applicant or employee.

For the purpose of this Guidance, key terms are defined as follows:

Applicant

A person seeking initial employment or a current employee who is seeking or being considered for promotion or transfer.¹³

Article 23-A Factors¹⁴

The factors that employers must consider concerning applicants’ and employees’ pre-employment criminal conviction histories under section 753 of Article 23-A of the New York Correction Law. These factors are:

1. The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
2. The specific duties and responsibilities necessarily related to the employment sought or held by the person.
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on the person’s fitness or ability to perform one or more such duties or responsibilities.
4. The time which has elapsed since the occurrence of the criminal offense or offenses.
5. The age of the person at the time of occurrence of the criminal offense or offenses.
6. The seriousness of the offense or offenses.
7. Any information produced by the person, or produced on the person’s behalf, in regard to their rehabilitation and good conduct.
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
9. Whether the person has a certificate or relief from disabilities or good conduct, which create a presumption of rehabilitation.¹⁵

¹³ 47 RCNY § 2-01.

¹⁴ *Id.*

¹⁵ The absence of a certificate of good conduct or a certificate of relief from disabilities is not evidence of a lack of rehabilitation. Certificates of good conduct and certificates of relief from disabilities relieve a person of a bar to employment that was automatically imposed by law due to a particular conviction. See N.Y. CORRECT. LAW §§ 701, 703-a.

Conditional Offer of Employment

An offer of employment, promotion or transfer which may only be revoked based on one of the following:

1. The results of a criminal background check conducted in accordance with chapter 1 of title 8 of the Administrative Code;
2. The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. § 12101 et seq.;¹⁶ or
3. Other information the employer could not have reasonably known before the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.

For temporary help firms, a conditional offer is the offer to place an applicant in the firm's labor pool, which is the group of individuals from which the firm selects candidates to send for job opportunities.

Conviction History

Records of an individual's conviction of a felony or misdemeanor as defined by New York law¹⁷ federal law, or the law of the state in which the individual was convicted.¹⁸

Criminal Background Check

When an employer, employment agency or agent thereof orally or in writing either:

1. Asks a person whether or not they have a criminal history; or
2. Searches for publicly available or government records, including through a third party, such as a consumer reporting agency, the internet, or private databases, for a person's criminal history.¹⁹

Criminal History

Records of an individual's convictions or non-convictions, including arrests or currently pending criminal cases.²⁰

Employer

An employer as defined by N.Y.C. Administrative Code § 8-102.

Fair Chance Analysis

The process for evaluating convictions and pending cases as required by N.Y.C. Administrative Code § 8-107(10), which is based on the Article 23-A Factors when analyzing a person's convictions that occurred prior to the start of their employment and on the New York City Fair Chance Factors when analyzing convictions that occur during a person's employment or cases that are pending.

¹⁶ The Americans with Disabilities Act ("ADA") prohibits employers from conducting medical exams until after a conditional offer of employment. 42 U.S.C. § 12112(d)(3). To comply with the NYCHRL and the ADA, employers may condition an offer of employment on the results of a criminal background check and then, after the criminal background check, a medical examination.

¹⁷ A misdemeanor is an offense, other than a "traffic infraction," for which a person may be incarcerated for more than fifteen days and less than one year. N.Y. PENAL LAW § 10.00(4). A felony is an offense for which a person may be incarcerated for more than one year. *Id.* § 10.00(5).

¹⁸ 47 RCNY § 2-01.

¹⁹ *Id.*

²⁰ *Id.*

Fair Chance Process

The post-conditional offer process required by N.Y.C. Administrative Code § 8-107(11-a), when, based on a person's pending case or conviction history, an employer elects to withdraw a conditional offer of employment, deny a promotion or transfer, or take other adverse employment action. Key components of the Fair Chance Process include requesting from the applicant or employee information that is necessary to conduct the Fair Chance Analysis; carrying out the Fair Chance Analysis; providing the applicant or employee with a written copy of the Fair Chance Analysis and inquiry; and providing the applicant or employee the opportunity to respond.

Inquiry

Any oral or written question asked for the purpose of obtaining a person's criminal history, including without limitation questions in a job interview about an applicant's criminal history and any search for a person's criminal history, including through the services of a third party, such as a consumer reporting agency.²¹

Non-conviction

A criminal action that has been adjourned in contemplation of dismissal pursuant to sections 170.55, 170.56, 210.46, 210.47, or 215.10 of the New York Criminal Procedure Law ("CPL") unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution,²² or a criminal action that is not currently pending and was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by CPL § 160.50, even if not sealed;
2. Adjudication as a youthful offender, as defined by CPL § 720.35, even if not sealed or marked confidential;
3. Conviction of a violation, as defined in Penal Law § 10.00, even if not sealed;
4. Conviction of a non-criminal offense, as defined by a law of another state, even if not sealed; or
5. Convictions that have been sealed under CPL § 160.58 or § 160.59.

"Non-conviction" includes a disposition of a criminal matter under federal law or the law of another state that results in a status comparable to a "non-conviction" under New York law as defined here.

A non-exhaustive list of the types of criminal histories that qualify as non-convictions is provided in Part IV.

NYC Fair Chance Factors

The factors employers must consider before making an employment decision, in the case of job applicants, based on pending cases at the time of their application for employment and, in the case of employees, based on pending cases or convictions that occur during employment. These factors are:

1. The policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement;

²¹ *Id.*

²² See N.Y. State Sen., S.B. 1505C, subpt. O, § 2, 2019 Leg. (N.Y. 2019) (amending N.Y. EXEC. LAW § 296(16) to add protections for adjournments in contemplation of dismissal); N.Y. State Assemb., Assemb. B. 2005C, subpt. O, § 2, 2019 Leg. (N.Y. 2019) (same); N.Y.C. Admin. Code § 8-107(11) (incorporating protections under N.Y. EXEC. LAW § 296(16)).

2. The specific duties and responsibilities necessarily related to the employment held by the person;
3. 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;
4. 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, which shall serve as a mitigating factor;
5. The seriousness of such offense or offenses;
6. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public; and
7. Any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including but not limited to history of positive performance and conduct on the job or in the community.

Pending Case

A criminal action that has not been concluded at the time of the employer's Fair Chance Analysis. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time of the employer's assessment, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

Relevant Fair Chance Factors

The factors employers must consider before making an employment decision based on an applicant's or employee's criminal history. With respect to arrests or convictions preceding employment, other than arrests or criminal accusations pending at the time of application for employment, this means the Article 23-A Factors. 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, this means the NYC Fair Chance Factors.

Statement

Any communications made, orally or in writing, to a person for the purpose of obtaining criminal history, including without limitation stating that a background check is required for a position.²³

Temporary Help Firms

Businesses that recruit, hire, and assign their own employees to perform work or services for other organizations to support or supplement the other organization's workforce or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.²⁴

²³ 47 RCNY § 2-01.

²⁴ *Id.*; N.Y. LAB. LAW § 916(5).

IV Non-convictions are Completely Protected

Unless specifically required or permitted by law, all private employers and most public-sector employers are prohibited from seeking information about, expressing or implying an employment limitation related to, or basing an adverse employment action on, a person's non-conviction.²⁵

A non-exhaustive list of the types of criminal histories that qualify as non-convictions includes the following:²⁶

- Instances when the police decided not to charge a person following their arrest;²⁷
- Cases in which the prosecutor declined to prosecute the person following their arrest;²⁸
- Cases that were adjourned in contemplation of dismissal (unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution);²⁹
- Cases in which all charges were dismissed;³⁰
- Cases that resulted in an acquittal on all charges;³¹
- Cases in which the verdict was set aside or the judgment was vacated by the court and no new trial was ordered, nor is any appeal by the prosecution pending;³²
- Cases in which the person was adjudicated as a youthful offender;³³
- Cases that resolved in a conviction for a violation,³⁴ even if not sealed, including but not limited to:
 - Trespass;³⁵
 - Disorderly conduct;³⁶
 - Failing to respond to an appearance ticket;³⁷
 - Loitering;³⁸
 - Harassment in the second degree;³⁹
 - Disorderly behavior;⁴⁰
 - Loitering for the purpose of engaging in a prostitution offense;⁴¹

²⁵ As an exception to this general rule, law enforcement agencies hiring for civilian positions can consider all non-convictions, except criminal actions followed by an ACD or terminated in favor of the applicant, as defined by New York Criminal Procedure Law § 160.50. N.Y.C. Admin. Code §§ 8-107(11)(a), (11)(b); N.Y. EXEC. LAW § 296(16). Law enforcement agencies hiring for police or peace officer positions may consider all non-convictions without exception. N.Y.C. Admin. Code §§ 8-107(11)(a), (11)(b); N.Y. EXEC. LAW § 296(16).

²⁶ In the list that follows, all protections under the NYCHRL flow from § 8-107(11) of the N.Y.C. Administrative Code. That provision incorporates the protections of New York Executive Law § 296(16) which, in turn, provides protection for certain types of cases listed in New York Criminal Procedure Law § 160.50 and other provisions in the Criminal Procedure Law. In the interest of brevity, citations in the following list are to the legal source that explicitly discusses a particular type of case outcome. Employers should also be aware that there are separate prohibitions against asking about or considering a person's juvenile delinquency records, pursuant to Family Court Act § 380.1.

²⁷ N.Y. CRIM. PROC. LAW § 160.50(3)(j).

²⁸ *Id.* § 160.50(3)(i).

²⁹ N.Y. EXEC. LAW § 296(16).

³⁰ N.Y. CRIM. PROC. LAW §§ 160.50(3)(a)-(b), (d), (h), (l).

³¹ *Id.* § 160.50(3)(c).

³² *Id.* §§ 160.50(3)(e), (f).

³³ N.Y. EXEC. LAW § 296(16).

³⁴ *Id.*

³⁵ See N.Y. PENAL LAW § 140.05 (defining the offense as a violation).

³⁶ See *id.* § 240.20 (defining the offense as a violation).

³⁷ See *id.* § 215.58 (defining the offense as a violation).

³⁸ See *id.* § 240.35 (defining the offense as a violation).

³⁹ See *id.* § 240.26 (defining the offense as a violation).

⁴⁰ See N.Y.C. Admin. Code § 10-179 (noting that the offense is punishable by "imprisonment of up to 5 days or a fine of up to 200 dollars"); N.Y. PENAL LAW § 10.00(3) (defining a violation as "an offense, other than a 'traffic infraction,' for which a sentence to a term of imprisonment in excess of fifteen days cannot be imposed.").

⁴¹ N.Y.C. Admin. Code § 8-107(11)(b)(ii).

- Cases that resolved in a conviction for a non-criminal offense under the laws of a state other than New York;⁴²
- Convictions that have been sealed.⁴³

Employers should review Part V(C) below for recommendations about how to permissibly ask about a person's conviction history without violating the NYCHRL's prohibition on inquiries about non-convictions. Employers are prohibited from disqualifying an applicant from prospective employment based on their refusal to respond to an illegal question about non-convictions.⁴⁴

V Additional Protections for Job Applicants During the Hiring Process

During the hiring process, the NYCHRL prohibits employers from making statements related to criminal history in job postings and recruitment materials. For example, employers must not say "criminal background check required" or "no felonies."

The NYCHRL also prohibits employers from asking about or considering information about an applicant's conviction history or pending cases until after the employer has assessed all other job qualifications and made a conditional offer of employment to the applicant. After the conditional offer, employers who wish to withdraw the conditional offer based on the applicant's criminal history must comply with specific requirements of the Fair Chance Process and can only withdraw the offer in limited circumstances.

This section discusses in greater detail the specific requirements that employers must follow if they wish to consider conviction histories or pending cases during the hiring process.

A. Before a Conditional Offer

Unless an exemption applies, criminal history may not be sought or considered by employers before a conditional offer of employment. The employer's focus during this period must instead be on an applicant's qualifications. The following are examples of common hiring practices that are affected by the NYCHRL's protections for applicants and employees with criminal histories.

i. **Solicitations, Advertisements, and Publications for Employment Cannot Mention Criminal History**

Employers are prohibited from expressing any limitation or specification based on criminal history in their job advertisements.⁴⁵ Ads cannot say, for example, "no felonies," "background check required," or "clean records only." Solicitations, advertisements, and publications encompass a broad variety of items, including, but not limited to, employment applications, fliers, handouts, online job postings, and materials distributed or statements made at employment fairs and by temporary help firms and job readiness organizations.

Solicitations, advertisements, and publications may include people-first language that welcomes those with criminal records to apply. For example, permissible language includes "People with criminal histories are

⁴² *Id.*

⁴³ N.Y. EXEC. LAW § 296(16) (covering any "conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law"). New York Criminal Procedure Law § 160.59 allows a person to apply to a court for sealing of certain records after 10 years. N.Y. CRIM. PROC. LAW § 160.59; see N.Y. State Unified Court System, *Sealed Records: After 10 Years (CPL 160.59)*, <http://www.courts.state.ny.us/CourtHelp/Criminal/sealedAfter10years.shtml> (last accessed June 11, 2021). New York Criminal Procedure Law § 160.58 allows a person to apply to a court for the sealing of certain drug-related offenses after the completion of a treatment program and subject to other conditions. N.Y. CRIM. PROC. LAW § 160.58; see N.Y. Unified Court System, *Sealed Records: Drug-Related Cases (CPL 160.58)*, <http://nycourts.gov/courthelp/criminal/sealedDrugCases.shtml> (last accessed June 11, 2021).

⁴⁴ N.Y.C. Admin. Code § 8-107(11-a)(f).

⁴⁵ N.Y.C. Admin. Code § 8-107(11-a)(a)(1).

encouraged to apply,” and “We value diverse experiences, including prior contact with the criminal legal system.” Employers should avoid using stigmatizing and dehumanizing language, like “ex-felon” and “former inmate.”⁴⁶

In general, employers are not permitted to make unsolicited neutral statements about criminal background checks before a conditional offer, including statements noting the employer’s compliance with laws protecting applicants with criminal histories (such as “Applicants’ criminal history will be considered consistent with the requirements of the New York City Fair Chance Act.”).

ii. Employers Cannot Inquire About Criminal History During the Interview Process

Unless an exemption applies, the NYCHRL prohibits employers from making any inquiry or statement related to an applicant’s criminal history until after a conditional offer of employment. Examples of prohibited statements and inquiries include, but are not limited to:

- Questions, whether written or oral, during a job interview about criminal history;
- Assertions, whether written or oral, that individuals with convictions, or certain specific convictions, will not be hired or cannot work for the employer; and
- Investigations into the applicant’s criminal history, including using public or government records or the internet, whether conducted by an employer or for an employer by a third party.

The NYCHRL does not prevent employers from looking into other aspects of an applicant’s background and experience to verify their qualifications for a position, including asking for resumes and references and performing general internet searches (e.g., Google, LinkedIn, etc.). Searching an applicant’s name is legal, but trying to discover an applicant’s conviction history is not. In connection with an applicant, employers cannot search for terms such as “arrest,” “mugshot,” “warrant,” “criminal,” “conviction,” “jail,” or “prison.” Nor can employers search websites that contain or purport to contain arrest, warrant, conviction, or incarceration information for the purpose of obtaining an applicant’s criminal history prior to a conditional offer.

The NYCHRL allows an applicant to refuse to respond to any prohibited inquiry or statement. Employers are prohibited from disqualifying an applicant from prospective employment based on their refusal to respond to an illegal question about criminal history.⁴⁷

iii. Inadvertent Disclosures of Criminal Record Information Before a Conditional Offer of Employment Do Not Create Employer Liability

Prior to a conditional offer, the NYCHRL prohibits any inquiry or statement made for the purpose of obtaining an applicant’s criminal history. If a legitimate inquiry not made for that purpose leads to the inadvertent revelation of an applicant’s criminal history, the employer should continue its hiring process and must not examine the applicant’s conviction history information until after deciding whether or not to make a conditional offer of employment.

If the applicant raises their criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant’s criminal history further. The employer should state that, by law, it will only consider the

⁴⁶ See Lisette Bamenga, *Good Intentions Don’t Blunt the Impact of Dehumanizing Words*, Marshall Project (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/good-intentions-don-t-blunt-the-impact-of-dehumanizing-words> (“As a formerly incarcerated woman, I cringe every time I hear or read terms such as ‘inmate,’ ‘ex-offender,’ ‘prisoner’ and ‘ex-convict.’ These words are dehumanizing because, as previously incarcerated activist Eddie Ellis writes, ‘they identify us as ‘things’ rather than people.’”); Lawrence Bartley, *I Am Not Your ‘Inmate’*, Marshall Project (Apr. 12, 2021), <https://www.themarshallproject.org/2021/04/12/i-am-not-your-inmate> (“Words like ‘inmate,’ ‘prisoner,’ ‘convict,’ ‘felon’ and ‘offender’ are like brands. They reduce human beings to their crimes and cages.”).

⁴⁷ N.Y.C. Admin. Code § 8-107(11-a)(f).

applicant's record if it decides to make them a conditional offer of a job. Similarly, if an applicant asks an employer during the interview if they will be subject to a criminal background check, the employer may state that a criminal background check will be conducted only after a conditional offer of employment (though employers may, of course, hire applicants without performing a criminal background check at all). The employer must then move the conversation to a different topic. Employers who make a good faith effort to exclude information regarding criminal history before extending a conditional offer of employment will not be liable under the NYCHRL.

B. The Conditional Offer of Employment

Under the NYCHRL, a conditional offer is conditioned on the results of a criminal background check and, if applicable, the results of a medical exam as permitted by the Americans with Disabilities Act ("ADA").⁴⁸ This review constitutes the last step of the hiring process. Employers cannot circumvent the requirements of the NYCHRL by calling an offer "conditional" before they have assessed all other employment qualification factors (e.g., academic records or references) aside from criminal history and medical information. The duties and responsibilities for a job should be clearly defined before a conditional offer is extended and there is a rebuttable presumption that an employer that alters the job's duties and responsibilities in a manner that serves to disqualify the applicant after making a conditional offer of employment has done so as a pretextual basis for unlawful discrimination.

Employers can only request and review criminal history information after favorably evaluating the candidate's non-criminal information. Employers who request background checks on applicants should first receive the non-criminal information, evaluate it, and then receive and evaluate the criminal information. Receiving the information in two stages, non-criminal information before the conditional offer and criminal information after, also insulates the employer from liability for criminal history discrimination if it disqualifies a candidate with criminal history at the first stage. Though most background check companies can produce separate reports for criminal and non-criminal information, employers whose background check vendor can only produce one report with both criminal and non-criminal information, or who otherwise face a substantial impediment to conducting two separate background checks, must establish a system to internally segregate criminal history information to ensure that it is available to decisionmakers only after a conditional offer has been made. Employers who take this route bear the burden of proving that the criminal information was inaccessible to decisionmakers until after a conditional offer. Employers should omit mention of a criminal background check when seeking an applicant's authorization for an employment related background check prior to a conditional offer. Employers are encouraged to use terms such as "consumer report" or "investigative consumer report" rather than "background check" in an authorization notice used prior to a conditional offer.⁴⁹

The NYCHRL does not prohibit employers from considering non-criminal information after a conditional offer if the employer can show as an affirmative defense, by a preponderance of the evidence, that (1) the employer could not have reasonably known the information before the conditional offer and (2) regardless of the results of the criminal background check, the employer would not have made the offer if it had known the information before the offer was extended. Information could reasonably have been known before a conditional offer if the information

⁴⁸ As discussed below, a conditional offer may also be revoked based on other information the employer could not have reasonably known before the conditional offer.

⁴⁹ The Fair Credit Reporting Act ("FCRA") does not require employers to disclose the specific scope of a credit report or the fact that the report will include criminal information when the employer provides its initial FCRA authorization notice. As such, employers seeking authorization for a credit report prior to a conditional offer should refrain from mentioning criminal background checks in their initial FCRA notice. However, to the extent that FCRA requires employers to disclose the scope of an investigative consumer report *upon the request of a job applicant*, the NYCHRL does not prohibit an employer from stating at that time that a criminal background check will be included in the scope of the investigative consumer report. See 15 U.S.C. § 1681d.

existed prior to the conditional offer and could have been obtained by an employer exercising reasonable due diligence.

Because it is often impracticable to separate criminal and non-criminal information contained in a driving abstract, employers must not review driving abstracts until after a conditional offer has been extended. The employer may treat non-criminal information on the driving abstract as a form of non-criminal information that the employer could not have reasonably known before the conditional offer.

C. After the Conditional Offer of Employment

After extending a conditional offer of employment, as defined in Part III of this Guidance, an employer may, if it chooses, then inquire about an applicant's conviction history or any pending cases against the applicant. An employer may:

- Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case. Employers should consider using language along the lines of that suggested below to avoid unlawful inquiries about non-convictions.
- Run a criminal background check and/or, after giving the applicant notice and getting their permission,⁵⁰ use a consumer reporting agency to do so;⁵¹ and
- Once an employer knows about an applicant's conviction or pending case, ask them about the circumstances that led to it and begin to gather information relevant to each Article 23-A Factor for prior convictions, and, for pending cases, each New York City Fair Chance Factor.

Employers must never inquire about or act on non-conviction information.⁵² To guard against soliciting or considering non-conviction information, employers may frame inquiries by using the following language after a conditional offer is made:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if you received an adjournment in contemplation of dismissal ("ACD") that has not been revoked and restored to the calendar for further prosecution or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

If an employer wishes to proceed with hiring the applicant after learning about their criminal history, it may do so and nothing further is required under the NYCHRL. However, if an employer wishes to reconsider its conditional offer based on an applicant's conviction history or pending case, it must do so in accordance with the Fair Chance Process, as discussed in further detail below. There is a rebuttable presumption that an employer

⁵⁰ The Fair Credit Reporting Act requires that a consumer provide written authorization before another person procures their consumer report. See 15 U.S.C. § 1681b(b)(2). See Part V(B) above for additional information about the timing of the consumer report.

⁵¹ The consumer report cannot contain credit information. Under the Stop Credit Discrimination in Employment Act, employers, labor organizations, and employment agencies cannot request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. N.Y.C. Admin. Code §§ 8-102, 8-107(24).

⁵² However, law enforcement agencies hiring for civilian positions can consider all non-convictions, except criminal actions followed by an ACD or terminated in favor of the applicant, as defined by CPL § 160.50. N.Y.C. Admin. Code §§ 8-107(11)(a)–(b); N.Y. EXEC. LAW § 296(16). Law enforcement agencies hiring for police or peace officer positions may consider all non-convictions without exception. N.Y.C. Admin. Code §§ 8-107(11)(a)–(b); N.Y. EXEC. LAW § 296(16). In addition, an employer may consider a non-conviction "where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct." N.Y.C. Admin. Code § 8-107(11)(b)(4).

that revokes a conditional offer after conducting a criminal background check but without following the Fair Chance Process acted with discriminatory motive based on the applicant's criminal record.

D. Evaluating the Applicant Using the Fair Chance Analysis

If an employer is considering withdrawing a conditional offer of employment based on a criminal background check, it should gather the information necessary to assess each of the relevant fair chance factors, for example by requesting evidence of rehabilitation or good conduct from the candidate and confirming the applicant's date of birth as relevant to consideration of the person's age when the alleged or convicted crime occurred. An employer cannot deny employment based on an applicant's conviction history or pending case unless, after conducting an analysis of the relevant fair chance factors, it properly:

1. Determines that there is a direct relationship between the applicant's conviction history or pending case and the prospective job; or
2. Shows that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."⁵³

An employer who declines to hire an applicant based on the applicant's conviction history or pending criminal case and does not meet either exception noted above will be liable for discrimination under the NYCHRL. An employer cannot simply presume that a direct relationship or unreasonable risk exists because the applicant has a criminal record.⁵⁴ Instead, the employer must analyze the applicant's prior conviction history based on the Article 23-A Factors and analyze any currently pending cases against the applicant under the NYC Fair Chance Factors (which are similar but not identical to the Article 23-A Factors). If an applicant has both a conviction history and a pending case, the employer must separately analyze each according to the relevant set of factors required under the law.

To properly establish a direct relationship between an applicant's criminal record and the job, the employer must show a connection between the specific nature of the alleged conduct in a pending case or convicted conduct and the specific nature of the job.⁵⁵ An employer may not reject an applicant based on a perceived lack of good moral character because of the applicant's criminal history without having complied with the Fair Chance Process.⁵⁶ If a direct relationship exists between the applicant's criminal history and the job, the employer must still determine, based on the Article 23-A Factors or the NYC Fair Chance Factors, as applicable, whether the concerns presented by the direct relationship have been mitigated, for example by the passage of time and evidence of good conduct or rehabilitation.⁵⁷

To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant fair chance factors combine to create an unreasonable risk to people or property.⁵⁸

⁵³ N.Y. CORRECT. LAW § 752.

⁵⁴ *Matter of Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 613–14 (1988).

⁵⁵ *Matter of Marra v. City of White Plains*, 96 A.D.2d 17, 22–23 (2d Dep't 1983) ("A direct relationship can be found where the applicant's prior conviction was for an offense related to the industry or occupation at issue... or the elements inherent in the nature of the criminal offense would have a direct impact on the applicant's ability to perform the duties necessarily related to the license or employment sought.").

⁵⁶ N.Y.C. Admin. Code § 8-107(10).

⁵⁷ See *Bonacorsa*, 71 N.Y.2d at 613–14; *Soto v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 26 Misc. 3d 1215(A) at *9 (Sup. Ct. Kings Cty. 2010) (citing *Marra*, 96 A.D.2d at 22 – 23).

⁵⁸ *Bonacorsa*, 71 N.Y.2d at 613; *Matter of Exum v. N.Y.C. Health & Hosps. Corp.*, 37 Misc. 3d 1218(A) at *6 (Sup. Ct. Kings Cty. 2012).

The Article 23-A Factors applicable to conviction history are:

- The public policy of New York State to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- The specific duties and responsibilities necessarily related to the employment sought or held by the person.
- The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on the person's fitness or ability to perform one or more such duties or responsibilities.
- The time which has elapsed since the occurrence of the criminal offense or offenses (not the time since arrest or conviction).
- The age of the person at the time of occurrence of the criminal offense or offenses (not the age at arrest or conviction).
- The seriousness of the offense or offenses.⁵⁹
- Any information produced by the person, or produced on the person's behalf, in regard to their rehabilitation or good conduct.
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
- Whether the person has a certificate or relief from disabilities or good conduct, which create a presumption of rehabilitation.⁶⁰

The NYC Fair Chance Factors applicable to pending cases are:

- The policy of New York City to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement;
- The specific duties and responsibilities necessarily related to the employment held by the person;
- 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;
- 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, which shall serve as a mitigating factor;
- The seriousness of such offense or offenses;
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public; and
- Any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including but not limited to history of positive performance and conduct on the job or in the community.

⁵⁹ Employers may judge the seriousness of an applicant's criminal record based on the number of felony and misdemeanor convictions, along with whether the acts underlying those convictions involved significant violence, theft, or corruption.

⁶⁰ N.Y. CORRECT. LAW § 753(2). An employer may not disregard an applicant because they do not possess a certificate.

The Commission will review employers' adverse employment decisions to ensure that they correctly consider the relevant fair chance factors and do not disqualify applicants in the absence of a direct relationship between the criminal history and the job or an unreasonable risk. The Commission will begin with the purpose of the NYCHRL: "to overcome stigma toward" and the "unnecessary exclusion" from employment of people with criminal system involvement.⁶¹ The Commission will also consider relevant case law interpreting Article 23-A and applicable provisions of the NYCHRL.⁶² Employers must make a reasoned evaluation of each relevant fair chance factor;⁶³ they cannot ignore evidence favorable to the applicant;⁶⁴ and they cannot simply engage in a pro forma review of the relevant fair chance factors.⁶⁵ Employers should consider applicants' successful performance of their job duties in past employment, along with evidence, in the case of convictions, that they have addressed the causes of their criminal activity.⁶⁶ The Commission will presume that any negative non-criminal information known to the employer before its conditional offer is not a legitimate reason to later withdraw the offer once the employer is aware of an applicant's criminal history.

E. Withdrawing an Offer Pursuant to the Fair Chance Process

If, after evaluating the applicant according to the relevant fair chance factors, an employer wishes to withdraw an offer of employment because the employer properly finds a direct relationship between the criminal record and the job or an unreasonable risk to people or property, it must follow the Fair Chance Process:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history;
2. Share with the applicant a written copy of its Fair Chance Analysis; and
3. Allow the applicant a reasonable period of at least five business days from receipt of the inquiry and analysis to respond to the employer's concerns.

These steps are discussed in further detail below.

i. Disclosing the Inquiry

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer.

Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the consumer reporting agency's report about the applicant.⁶⁷ Consumer reporting agencies

⁶¹ N.Y.C. Admin. Code § 8-102 (including City's policy in the definition of "relevant fair chance factors").

⁶² Nearly all reported cases concern public agencies' employment decisions, which cannot be reversed unless "arbitrary and capricious." N.Y. CORRECT. LAW § 755; see N.Y. C.P.L.R. § 7803(3). The "arbitrary and capricious" standard does not apply to private employers.

⁶³ See *Acosta v. N.Y.C. Dep't of Educ.*, 16 N.Y.3d 309, 316 (2011) ("A failure to take into consideration each of these factors results in a failure to comply with the Correction Law's mandatory directive"); *Marra*, 96 A.D.2d at 23 ("the direct bearing which emanates from the inherent nature of the offense may have been attenuated by other factors, such as the issuance of a certificate of relief from disabilities or a certificate of good conduct to the applicant; other information with respect to his rehabilitation and good conduct produced by the applicant or on his behalf, '[t]he time which has elapsed since the occurrence of the criminal offense [and]... [t]he age of the person at the time of occurrence of the criminal offense'"); *Boone v. N.Y.C. Dep't of Educ.*, 38 N.Y.S.3d 711, 721 (Sup. Ct. N.Y. Cty. 2016).

⁶⁴ *Gallo v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 830 N.Y.S.2d 796, 798 (3d Dep't 2007).

⁶⁵ *Acosta*, 16 N.Y.3d at 320; *Soto*, 26 Misc. 3d 1215(A) at *7.

⁶⁶ *Odems v. N.Y.C. Dep't of Educ.*, No. 400637/09, 2009 WL 5225201, at *5 (Sup. Ct. N.Y. Cty. Dec. 16, 2009); *Matter of El v. N.Y.C. Dep't of Educ.*, 23 Misc.3d 1121(A) at *4-5 (Sup. Ct. N.Y. Cty. 2009).

⁶⁷ 15 U.S.C. § 1681d; N.Y. GEN. BUS. LAW § 380-b(b).

must ensure that they do not aid or abet employment discrimination based on criminal history, in violation of the NYCHRL. For example, a consumer reporting agency would be liable for aiding and abetting discrimination if it advised an employer to approve or deny an applicant based on a list of specified conviction histories that the employer wishes to categorically exclude, because doing so would unlawfully deny the applicant an individualized assessment of their conviction history and violate the Fair Chance Process.

Employers who rely on criminal record information from sources other than a consumer report must also give that information to the applicant. Employers who search the internet to obtain criminal histories must print out the pages they relied on, and such printouts must identify their source so that the applicant can verify or contest them. Employers who check public records must provide copies of those records. Employers who rely on oral information must provide a written summary of the portion of their conversation that relates to criminal history.

ii. Providing the Fair Chance Notice

The NYCHRL directs the Commission to determine the manner in which employers inform applicants about their Fair Chance Analysis.⁶⁸ The Commission has prepared a Fair Chance Notice (the “Notice”)⁶⁹ that employers may use to comply with this requirement. As long as the material substance concerning the specific factors in the Fair Chance Analysis does not change, the Notice may be adapted to an employer’s preferred format.

The Notice informs the applicant of their time to respond, which must be reasonable and no fewer than five business days, and provides contact information for the person to whom the response must be sent, including the contact person’s phone number or email address.

The Notice requires employers to evaluate each relevant fair chance factor and state whether the employer has identified a direct relationship to the job or an unreasonable risk to people or property. The Notice also contains space where the employer must articulate its conclusion.⁷⁰ Boilerplate denials that simply list the relevant fair chance factors violate the NYCHRL. For example, an employer cannot simply say it considered the time since the alleged or convicted criminal conduct; it must identify how many years and/or months have elapsed. An employer also cannot list specific facts but then fail to describe how, based upon those facts, it concluded that the applicant’s record evidenced either a direct relationship to the job or an unreasonable risk to people or property. Rather, the employer must explain how its weighing of all of the factors in the Fair Chance Analysis contributed to its determination to withdraw the conditional offer.

Finally, the Notice requests evidence of good conduct and evidence of rehabilitation. The Notice provides examples of such information. Employers may identify specific examples of rehabilitation or good conduct that would be most relevant to its analysis, but examples must be included.

iii. Allowing Time to Respond

Employers must give applicants a reasonable period of at least five business days to respond to the employer’s inquiry and Notice. During this time, the employer may not permanently place another person in the applicant’s prospective position. The five-day period begins running when an applicant receives both the inquiry and Notice. Employers may therefore wish to confirm receipt by disclosing the information in person, electronically, or by registered mail. The method of communication should be mutually agreed on in advance by the applicant and employer.

⁶⁸ N.Y.C. Admin. Code § 8-107(11-a)(b)(4).

⁶⁹ The Notice is available on the Commission’s website, <http://www.nyc.gov/FairChanceNYC>.

⁷⁰ N.Y. CORRECT. LAW § 753(1)(h).

By giving an applicant a reasonable period of at least five business days to respond, the NYCHRL contemplates a process in which employers discuss their reasons for finding that an applicant's criminal record is directly related to the job or poses an unreasonable risk, so an applicant can respond orally or in writing and both address the employer's concerns and provide additional information about any of the relevant fair chance factors.⁷¹ It also provides the applicant an opportunity to address errors on the employer's background report, as discussed below.

After receiving additional information from an applicant, an employer must examine whether the new information changes the employer's Fair Chance Analysis. If, after communicating with an applicant, the employer decides not to hire them, it must relay that decision to the applicant in writing within a reasonable period of time.

iv. Handling Errors in the Background Check

Errors on background checks are remarkably common.⁷² Errors can occur, for example, because the background check was run for the wrong person or because of recordkeeping errors by police, prosecutors, or the court.⁷³ If an applicant identifies an error on the background report, they should promptly notify the employer and the employer must then conduct the Fair Chance Analysis based on the corrected criminal background information, to ensure its decision is not tainted by the previous error. As before, if the employer can show a direct relationship or unreasonable risk and intends to take an adverse action on that basis, it must follow the Fair Chance Process: the applicant must be given a copy of the corrected inquiry, the employer's Fair Chance Analysis, and a reasonable period of at least five business days to respond, with an opportunity to provide any additional information for the employer to review and re-examine its analysis.

v. Handling Applicants' Intentional Misrepresentations of Their Pending Cases or Conviction Histories

The NYCHRL does not prohibit an employer from disqualifying an applicant based on the applicant's intentional misrepresentation about their conviction history or pending cases. A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive. A covered employer may never, however, disqualify an applicant based on their representations about non-convictions.⁷⁴

Where an employer properly bases its decision to deny employment on an intentional misrepresentation by the applicant, it is not required to perform the Fair Chance Analysis. Before disqualifying an applicant based on a perceived intentional misrepresentation, the employer is required to provide the applicant with a copy of any information that led the employer to believe that the applicant intentionally misrepresented their criminal record and afford the applicant a reasonable period of at least five business days to respond.⁷⁵ If the applicant credibly demonstrates either that the information provided was not a misrepresentation or that a misrepresentation was unintentional, the employer is required to perform the Fair Chance Analysis before taking adverse action against the applicant.

⁷¹ N.Y.C. Admin. Code § 8-107(11-a)(b).

⁷² See, e.g., *The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions*, City Limits (Mar. 3, 2015), <https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/> ("By one estimate, an astonishing 2.1 million New York state residents have mistakes on their criminal justice histories."); Legal Action Center, *The Problem of RAP Sheet Errors: An Analysis By the Legal Action Center*, https://www.lac.org/assets/files/LAC_rap_sheet_report_final_2013.pdf (last accessed June 23, 2021) (reviewing criminal history records of approximately 3,500 people in New York from 2008 to 2011 and finding "that at least 30% of these records contained at least one error, and some contained as many as ten or more.").

⁷³ *The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions*, City Limits (Mar. 3, 2015), <https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/>.

⁷⁴ See note 52, *supra*, for a list of limited exceptions to this general rule.

⁷⁵ N.Y.C. Admin. Code § 8-107(10)(g).

Some discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation. Discrepancies can arise despite the absence of an intentional misrepresentation because, among other reasons, the applicant incorrectly assumed a conviction was too old to be considered or was not relevant to the employer's assessment or the job; the applicant confused the charge initially filed against them with the one for which they were convicted; or because of an error in the criminal history record. It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Process violate the NYCHRL.

VI Additional Protections for Employees After Hire

The NYCHRL also protects current employees from arbitrary and unfair discipline, including termination, based on a conviction history or pending case. The protections are similar to those for job applicants.

A. Evaluating the Employee Using the Fair Chance Analysis

An employer cannot discipline or terminate a current employee based on their conviction history or pending case unless, after conducting a Fair Chance Analysis, the employer properly:

1. Determines that there is a direct relationship between the alleged or convicted conduct and the job; or
2. Shows that continuing to employ the person "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."⁷⁶

The employer must analyze any convictions that predate the person's employment based on the Article 23-A Factors and must analyze any pending cases and convictions that occur during the person's employment based on the NYC Fair Chance Factors (which are similar but not identical to the Article 23-A Factors). For more information about the Fair Chance Analysis, see Part V(D).

The Commission will review employers' adverse employment decisions to ensure that they correctly perform the Fair Chance Analysis and do not discipline employees based on their criminal record in the absence of a proper determination of a direct relationship of the criminal record to the job or an unreasonable risk. As discussed above, employers must make a reasoned evaluation of each relevant fair chance factor;⁷⁷ they cannot ignore evidence favorable to the applicant;⁷⁸ and they cannot simply engage in a pro forma review of the relevant fair chance factors.⁷⁹ Among other things, employers should consider employees' successful performance of their job duties as evidence of good conduct.⁸⁰

B. Complying with the Fair Chance Process for Current Employees

If, after completing the Fair Chance Analysis, an employer wishes to discipline or terminate an employee because it has identified a direct relationship between the criminal record and the job or an unreasonable risk to people or property, the employer must follow the Fair Chance Process. As with job applicants, discussed in Part V(E), the employer is required to:

⁷⁶ N.Y.C. Admin. Code § 8-107(10)(c).

⁷⁷ See *Acosta*, 16 N.Y.3d at 316 ("A failure to take into consideration each of these factors results in a failure to comply with the Correction Law's mandatory directive"); *Boone*, 38 N.Y.S.3d at 721.

⁷⁸ *Gallo*, 830 N.Y.S.2d at 798.

⁷⁹ *Acosta*, 16 N.Y.3d at 320; *Soto*, 26 Misc. 3d 1215(A) at *7.

⁸⁰ *Odems*, 2009 WL 5225201 at *5; *Matter of El*, 23 Misc.3d 1121(A) at *4–5.

1. Disclose to the employee a written copy of any inquiry it conducted into the employee's criminal history;
2. Share with the employee a written copy of the employer's Fair Chance Analysis; and
3. Allow the employee a reasonable period of at least five business days from receipt of the inquiry and analysis to respond to the employer's concerns.

The NYCHRL does not prohibit the employer from placing the employee on leave for a reasonable period of time while it conducts the Fair Chance Process, as explained in further detail below.

i. Placing the Employee on Leave (Optional)

An employer is permitted, but not required, to place an employee on temporary leave while it undertakes the Fair Chance Process.⁸¹ If the employee has accrued leave time, they should be permitted to use that time consistent with the employer's regular leave policies. If paid leave is unavailable, the employer may place the employee on unpaid leave while it completes the Fair Chance Process. However, an employer will be liable for violating the NYCHRL if it unnecessarily prolongs the Fair Chance Process while keeping an employee on leave because the employer will be deemed to have taken an adverse action based on criminal history prior to the employer having completed the Fair Chance Process. Though the determination of whether the Fair Chance Process was completed in a reasonable amount of time is a fact-specific inquiry, there is a presumption that delays in excess of five business days, from the time the person is placed on leave to the time they receive the Fair Chance Notice from the employer, are unreasonable. It is the employer's burden to show that any delay in excess of five business days was reasonable under the circumstances.

ii. Disclosing the Inquiry

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an employee has a criminal record, along with the date and time the employer accessed the information. For more details about this process, see Part V(E)(i).

iii. Providing the Fair Chance Notice

Employers are required to provide employees with a written copy of the Fair Chance Notice before taking any adverse action. For more details about the Notice and how it must be completed, see Part V(E)(ii).

iv. Allowing Time to Respond

Employers must give employees a reasonable period of at least five business days to respond to the employer's inquiry and Notice. During this time, the employer may not permanently place another person in the employee's position or take any final disciplinary or adverse action against the employee. This time period begins running when the employee receives both the inquiry and Notice. See Part V(E)(iii) for more information.

v. Handling Errors in the Background Check and Employees' Intentional Misrepresentations of Their Criminal Histories

See Part V(E)(iv) for how to handle errors in a background check that are identified during the Fair Chance Process and Part V(E)(v) for how to handle intentional misrepresentations by employees about their criminal history.

⁸¹ N.Y.C. Admin. Code § 8-107(10)(d).

VII *Per Se* Violations of the NYCHRL

The following acts are distinct, chargeable violations of the NYCHRL:

1. Declaring, printing, or circulating – or causing the declaration, printing, or circulation of – any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history, *even if no adverse action follows*. This includes, but is not limited to, advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”
2. Making any statement or inquiry for the purpose of obtaining an applicant’s criminal history before a conditional offer of employment has been made, *even if no adverse action follows*.
3. Withdrawing a conditional offer of employment or terminating an employee based on the person’s criminal history before completing the Fair Chance Process when it is required as outlined in Parts V(E) and VI(B) of this Guidance. Each of the following is a separate, chargeable violation of the NYCHRL when the Fair Chance Process is applicable:
 - a) Failing to disclose to the person a written copy of any inquiry an employer conducted into the person’s criminal history;
 - b) Failing to share with the person a written copy of the employer’s Fair Chance Analysis;
 - c) With respect to job applicants, failing to hold the prospective position open for at least five business days from an applicant’s receipt of both the inquiry and Fair Chance Analysis, to allow the applicant to respond.
 - d) With respect to employees, failing to allow the employee at least five business days from receipt of the inquiry and Fair Chance Analysis to respond to the employer’s concerns before taking an adverse action.
4. Taking an adverse employment action because of an applicant’s or employee’s non-conviction.
5. Before disqualifying an applicant based on their intentional misrepresentation about their criminal history, failing to provide the applicant a copy of the information that the employer is relying on as evidence of the intentional misrepresentation and an opportunity to respond.

The Commission’s rules provide an early resolution process for handling cases involving *per se* violations of the provisions of the NYCHRL that protect against discrimination based on criminal history.⁸² If the Law Enforcement Bureau determines that early resolution of a *per se* violation is in the public interest and permissible under the Commission’s rules, it will send the respondent an early resolution notice, along with a copy of the complaint, and provide the respondent with the opportunity to enter an expedited settlement, under which it will admit guilt and agree to undergo a mandatory free training from the Commission, post a notice of rights under the NYCHRL, and pay a fine under the penalty schedule set forth in the Commission’s rules.⁸³ Only Commission-initiated complaints may be resolved through the early resolution process, and reaching a resolution does not preclude an individual complainant from filing an independent complaint with the Commission or in court.⁸⁴

⁸² 47 RCNY § 2-04(i).

⁸³ *Id.*

⁸⁴ *Id.*

VIII Temporary Help Firms Under the Fair Chance Act

Temporary help firms employ individuals, either as direct or joint employers, and place them in job assignments at the firms' clients. The NYCHRL applies the same way to temporary help firms as it does to any other employer. The only difference is that, for temporary help firms that vet candidates for multiple potential temporary employment placements at a single time, a conditional offer of employment is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients. Before a temporary help firm withdraws a conditional offer of employment after discovering an applicant's conviction history, it must follow the Fair Chance Process, according to Part V(E) of this Guidance. For applicants placed in a labor pool, the temporary help firm should only consider the basic skills necessary to be placed in the pool when evaluating the job duties in its Fair Chance Analysis.

Employers who accept placements from temporary help firms and who wish to inquire about temporary workers' criminal histories must also follow the Fair Chance Process. They may not make any statements or inquiries about an applicant's criminal record until after the worker is assigned to the employer and they must follow the Fair Chance Process if they wish to decline employment because of an applicant's criminal record.

As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences. For example, a temporary help firm cannot, based on an employer's instructions, refer only temporary workers who do not have criminal histories or who have "less serious" criminal histories. They also may not disclose a worker's criminal history to an employer until the employer has completed its evaluation of the worker's non-criminal attributes.

IX Positions and Actions Exempt from Certain Protections Under the NYCHRL

Consistent with the Local Civil Rights Restoration Act of 2005, all exemptions to coverage under the NYCHRL's anti-discrimination provisions must be construed narrowly.⁸⁵ Employers who invoke an exemption to defend against liability have the burden of proving the exemption by a preponderance of the evidence. Other than the employers described in Subparts C and D of this Part, the Commission does not assume that an entire employer or industry is exempt and will investigate how an exemption applies to a particular position or role. Positions that are exempt from some or all of the NYCHRL's procedural requirements under § 8-107(11-a) are not necessarily exempt from the law's substantive protections against discrimination based on criminal history under § 8-107(10) or § 8-107(11).

A. Actions Taken Pursuant to Federal, State, or Local Law Requiring Criminal Background Checks or Barring Employment Based on Certain Criminal Histories

A network of federal, state, and local laws creates employment barriers for people with criminal records. The Commission characterizes these barriers as either mandatory or discretionary. Mandatory barriers require an employer to deny applicants or take designated action against employees with certain specified criminal histories and afford no discretion to the employer. Employers should bear in mind that a mandatory legal bar often can be removed by an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct. Discretionary barriers allow, but do not require, an employer to deny applicants with criminal records and may or may not enumerate presumptively disqualifying criminal histories.

The NYCHRL's protections based on criminal history control when an employment-related action of an employer who is not exempt, as described Subparts C and D, is discretionary, meaning it is not explicitly mandated by law. Employers who are not exempt and who employ a mix of workers, some of whom are covered

⁸⁵ N.Y.C. LOCAL LAW No. 85 (2005); N.Y.C. Admin. Code § 8-130.

by a mandatory barrier and some of whom are not, must follow the Fair Chance Process for positions that are not subject to a mandatory barrier.

The NYCHRL's protections based on criminal history apply when an employer who is not exempt hires people who require licensure or approval by a government agency, even if the license or approval has mandatory legal barriers. In that case, prior to a conditional offer an employer can only ask and give consideration to whether an applicant has the required license or can obtain one within an acceptable period of time. An inquiry into an applicant's criminal record before a conditional offer of employment is not allowed, unless one of the exceptions discussed below applies. An applicant who cannot obtain a required license because of their conviction record may have their conditional offer withdrawn or employment terminated for such legitimate nondiscriminatory reason. Employers may require employees to provide periodic proof of licensure and/or to notify the employer of any change of status to their licensure.

i. Legally Mandated Background Checks

If a federal, state, or local law requires an employer to perform a criminal background check, the employer is still required to undertake all other actions required by the NYCHRL that are not in conflict with the requirements of the federal, state or local law.⁸⁶ Unless the employer is explicitly required or permitted by another law to state in a job posting that a background check is required, the employer is prohibited by the NYCHRL from doing so in a job advertisement.⁸⁷ The employer may, however, advise applicants once they apply for a position that a background check is required and will be conducted prior to a conditional offer of employment. The employer must notify the applicant of the specific legal basis for the required criminal background check when invoking this exemption. An employer that is legally required to undertake a criminal background check of an applicant may conduct the background check prior to a conditional offer, but must still conduct a Fair Chance Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Notice and a reasonable period of at least five days to respond.⁸⁸

Example: An employer is hiring for a home health aide position and is required under the Public Health Law to request that the New York Department of Health ("DOH") check prospective employees' criminal background.⁸⁹ The employer is still prohibited by the NYCHRL from stating "background check required" in the job posting. After applicants apply for the job but, prior to a conditional offer, the employer requests that DOH check their criminal records. The employer advises all applicants that the job requires a criminal background check pursuant to Public Health Law § 2899-a. The following scenarios unfold.

Scenario 1: After completing its review, DOH notifies the employer that nothing in an applicant's criminal record requires the employer to reject the applicant and provides the employer a copy of the applicant's criminal record. Based on its own review of the applicant's criminal record, the employer still has reservations about hiring them for the job. Before rejecting the applicant, the employer is required to properly conduct a Fair Chance Analysis of the applicant's criminal history, provide the applicant a summary of the DOH criminal background check and the completed Fair Chance Notice, and allow the applicant at least five days to respond.

Scenario 2: After completing its review, DOH notifies the employer that they must reject the applicant for employment. The employer must provide the employee a copy of the DOH notice, but may reject the applicant without performing a Fair Chance Analysis or providing them a completed Fair Chance Notice.

⁸⁶ N.Y.C. Admin. Code § 8-107(11-a)(g)(3) (stating that § 8-107(11-a) "shall not apply to any *actions* taken... [p]ursuant to any federal, state or local law... barring employment based on criminal history") (emphasis added).

⁸⁷ *Id.* § 8-107(11-a)(a)(1).

⁸⁸ *Id.* § 8-107(11-a)(g)(3); *see also id.* § 8-130(b).

⁸⁹ N.Y. PUB. HEALTH LAW § 2899-a.

ii. Legally Mandated Exclusions from Employment Based on Certain Criminal Histories

If a federal, state or local law requires an employer to exclude a person from employment because they have been convicted of one or more specific offenses, an employer who is not exempt as described in Subparts C and D is still required to undertake all other actions required by the NYCHRL that are not in conflict with the requirements of the federal, state or local law.⁹⁰ Unless the employer is explicitly required or permitted by another law to state in a job posting that applicants with certain criminal histories are legally disqualified (e.g. “no felonies”), the employer is prohibited by the NYCHRL from doing so in a job advertisement.⁹¹ The employer may, however, advise applicants once they apply about any criminal histories that are disqualifying for the position due to a legally mandated exclusion. The employer should advise the applicant of the legal citation for the mandatory exclusion when invoking this exemption. Prior to a conditional offer, the employer may ask the applicant whether they have been convicted of any of the specific offenses subject to the legally mandated exclusion for which they have not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct; however, the employer should not ask broadly whether an applicant has been convicted of *any* crime. An employer that is hiring for a position subject to a legally mandated exclusion may conduct a criminal background check prior to making a conditional offer of employment and may reject a candidate based on any conviction that is subject to the legally mandated exclusion without performing a Fair Chance Analysis or providing a copy of the Fair Chance Notice.⁹² It is a best practice for the employer to provide the job applicant with a copy of the information on which the employer relied in determining that a legally mandated exclusion bars the applicant’s employment. Furthermore, because this exemption applies only to the extent that an applicant or employee is truly subject to a mandatory legal bar to employment, the employer must consider evidence demonstrating that the disqualifying conviction is an error and, if appropriate, reassess the person’s corrected criminal record consistent with the NYCHRL. If the applicant has a criminal history about which the employer has concerns but that is not subject to the legally mandatory bar, the employer must conduct the Fair Chance Analysis and provide the applicant a copy of the inquiry and Fair Chance Notice and a reasonable period of at least five days to respond.⁹³

Example: A licensed private investigator is looking to hire an administrative assistant and is prohibited by General Business Law § 81 from knowingly employing anyone who has been convicted of a felony or any of the offenses listed in General Business Law § 74(2)⁹⁴ who has not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct.⁹⁵ The employer makes no mention of background checks or disqualifying convictions in its job posting. On the job application form, the employer provides a list of the convictions that are disqualifying under General Business Law § 81 and permissibly asks applicants “Have you ever been convicted of a felony or one or more of these offenses, for which you have not received an executive pardon removing the disability or a certificate of relief from disabilities or a certificate of good conduct?” The employer also performs a criminal background

⁹⁰ N.Y.C. Admin. Code § 8-107(11-a)(g)(3) (stating that § 8-107(11-a) “shall not apply to any *actions* taken... [p]ursuant to any federal, state or local law requiring criminal background checks for employment purposes”) (emphasis added).

⁹¹ *Id.* § 8-107(11-a)(a)(1).

⁹² *Id.* §§ 8-107(10)(i), 8-107(11)(b)(4), 8-107(11-a)(d)(2).

⁹³ *Id.* § 8-107(11-a)(g)(3).

⁹⁴ These include “(a) illegally using, carrying or possessing a pistol or other dangerous weapon; (b) making or possessing burglar’s instruments; (c) buying or receiving or criminally possessing stolen property; (d) unlawful entry of a building; (e) aiding escape from prison; (f) unlawfully possessing or distributing habit forming narcotic drugs; (g) ... [jostling] or [fraudulent accosting]; (h) ... [offenses against the right to privacy contained in article two hundred fifty of the penal law].” N.Y. GEN. BUS. LAW § 74(2).

⁹⁵ *Id.* § 81(1).

check on all applicants without first making a conditional offer of employment. The following scenarios unfold.

Scenario 1: An applicant for the job has a felony conviction that is subject to the mandatory legal exclusion. The employer does not conduct a Fair Chance Analysis or provide the applicant with a Fair Chance Notice. The employer notifies the applicant that they will not be hired because, “based on your felony conviction for assault in the second degree you are subject to a mandatory legal bar from this position, under General Business Law § 74(2).” Though not required by law, the employer provides the applicant a copy of the criminal background check.

Scenario 2: An applicant has a criminal history that is neither a felony nor listed in General Business Law § 74(2), but which causes the employer to have some reservations about hiring the candidate. The employer is required to conduct a Fair Chance Analysis of the applicant’s criminal history, provide the applicant a copy of the criminal background check and the completed Fair Chance Notice, allow the applicant at least five business days to respond, and communicate in writing if the employer ultimately declines to hire the applicant.

Scenario 3: When the employer runs a criminal background check for an applicant with a common name, it appears that the applicant has a felony conviction that is subject to the mandatory legal exclusion under General Business Law § 74(2). The employer does not conduct a Fair Chance Analysis or provide the applicant with a Fair Chance Notice, but notifies the applicant, “Based on your felony conviction for computer tampering in the first degree you are subject to a mandatory legal bar from this position, under General Business Law § 74(2),” and provides the applicant with a copy of the criminal background check. The applicant promptly notifies the employer that it has incorrectly relied on the criminal record of a different person with the same name. The employer conducts a new background check and learns that the applicant was convicted of a misdemeanor drug offense that is not subject to the legally mandatory bar, is unrelated to the job duties, and poses no risk to people or property. Because the applicant is qualified for the job, the employer extends them a job offer.

B. Employers Required by a Self-Regulatory Organization to Conduct a Criminal Background Check of Regulated Persons

Employers in the financial services industry are exempt from the Fair Chance Process to the extent that it conflicts with industry-specific rules and regulations promulgated by a self-regulatory organization (“SRO”).⁹⁶ This exemption only applies to those positions regulated by SROs. Employment decisions regarding other positions must still comply with the Fair Chance Process.

C. Police and Peace Officers and Law Enforcement Agencies

Police and peace officers are exempt from the NYCHRL’s employment protections based on criminal history.⁹⁷ Under the NYCHRL, police and peace officers refer to those positions as defined under the Criminal Procedure Law.⁹⁸ Other positions at law enforcement agencies, including civilian positions, are protected from

⁹⁶ 15 U.S.C. § 78c(a)(26); N.Y.C. Admin. Code § 8-107(11-a)(g)(3).

⁹⁷ N.Y.C. Admin. Code §§ 8-107(10)(f), 8-107(11)(a), 8-107(11)(b)(3), 8-107(11-a)(g)(1); N.Y. EXEC. LAW § 296(16). Police and peace officers are not protected by Article 23-A of the Corrections Law or by NYCHRL § 8-107(10)(a). See N.Y. CORRECT. LAW § 750(5) (excluding Article 23-A protection from “membership in any law enforcement agency”); N.Y.C. Admin. Code § 8-107(10)(a) (making it an unlawful discriminatory action to take an adverse action in violation of Article 23-A, which does not apply to “membership in a law enforcement agency”). Such workers are also not entitled to a Fair Chance Analysis with respect to pending cases or convictions that occur during their employment. N.Y.C. Admin. Code § 8-107(10)(f).

⁹⁸ N.Y.C. Admin. Code §§ 8-107(10)(f), 8-107(11)(b)(3), 8-107(11-a)(g)(1); see N.Y. CRIM. PROC. LAW §§ 1.20(33), (34).

discrimination based on an ACD or a favorable outcome under Criminal Procedure Law § 160.50,⁹⁹ but are not protected against inquiries or adverse actions based on a conviction, youthful offender adjudication, or pending case, and are not entitled to the Fair Chance Process before adverse action is taken based on such cases.¹⁰⁰

D. Other Exempt City Government Positions

City agencies are not required to perform a Fair Chance Analysis under NYCHRL § 8-107(10) with respect to a pending case or conviction that occurred during a person's employment if the employee is otherwise entitled to procedural protections against arbitrary discipline or dismissal under Civil Service Law § 75 or through a disciplinary process that is required by law or pursuant to administrative rules adopted after public notice-and-comment.¹⁰¹

The NYCHRL also allows for exemptions from the Fair Chance Process under NYCHRL § 8-107(11-a) for City positions that are designated by the Commissioner of DCAS, based on a determination that they involve law enforcement; are susceptible to bribery or other corruption; or entail the provision of services to, or the safeguarding of, people vulnerable to abuse.¹⁰² Once DCAS exempts a position, applicants may be asked about their conviction history at any time during the hiring process. Under this exemption, however, applicants who are denied employment because of their conviction history must receive a written copy of the employer's Fair Chance Analysis.¹⁰³

X Best Practices for Employers

Employers can help to advance racial equity in New York City and minimize the collateral consequences of the criminal legal system by opting not to conduct criminal background checks on job applicants and employees, unless required by law.

An employer claiming an exemption to the Fair Chance Process must be able to show that the position falls under one of the categories in Part IX of this Guidance. Employers availing themselves of exemptions should inform applicants and employees of the exemption they believe applies and the Commission recommends that employers keep a record of their use of such exemptions for a period of three (3) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information in the event of an investigation and can serve as evidence of an employer's compliance with the NYCHRL.

The Commission recommends that an exemption log include the following:

- Which exemption is claimed;
- How the position or the employer's action fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption under Subparts IX(A) or (B) of this Guidance;
- A copy of any inquiry into a person's criminal history, along with the name of the employee who made it;

⁹⁹ N.Y.C. Admin. Code § 8-107(11)(a); N.Y. EXEC. LAW § 296(16).

¹⁰⁰ N.Y.C. Admin. Code §§ 8-107(10)(a), 8-107(10)(f), 8-107(11)(b)(3), 8-107(11-a)(g)(1); N.Y. CORRECT. LAW § 750. Section 8-107(11-a) of the NYCHRL expressly recognizes that the following agencies are exempt from the Fair Chance Process as law enforcement agencies: the New York City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Child Protection and the Division of Youth and Family Justice within the Administration of Children's Services, the Business Integrity Commission, and the District Attorneys' offices in each borough. N.Y.C. Admin. Code § 8-107(11-a)(g)(1).

¹⁰¹ N.Y.C. Admin. Code § 8-107(10)(h).

¹⁰² See Dep't of Citywide Admin. Servs., *The Fair Chance Act – Local Law 63 of 2015*, <https://www1.nyc.gov/site/dcas/employment/fair-chance-act-local-law-63-2015.page>.

¹⁰³ N.Y.C. Admin. Code § 8-107(11-a)(g)(2).

- A copy of the employer's Fair Chance Analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant's criminal history.

The Commission recommends that the results of any inquiry into an applicant's or employee's criminal history be collected and maintained on separate forms and kept confidential. An applicant's or employee's criminal history should not be used, distributed, or disseminated to anyone other than those involved in making an employment decision about an applicant or employee.

XI Enforcement

The Commission vigorously enforces the provisions of the NYCHRL that protect against employment discrimination based on criminal history. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the particular violation;
- The existence of additional previous or contemporaneous violations;
- The employer's size, considering both the total number of employees and its revenue; and
- Whether or not the employer knew or should have known about the law.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with emotional distress damages.

The Commission is dedicated to eradicating workplace discrimination against people with a history of criminal system involvement. If you believe you have been subjected to unlawful discrimination on the basis of your criminal history or another protected category, please contact the Commission at 311 or at (212) 416-0197 to file a complaint of discrimination with the Commission's Law Enforcement Bureau.



Applicant Name _____

Fair Chance Act Notice

After extending a conditional offer of employment, we checked your criminal record. Based on the enclosed check, we have reservations about hiring you for the position of _____, and may decide to retract our job offer for reasons explained below. We invite you to provide us with any information that could help us decide to offer you the job. If you choose to provide us with additional information you have _____ days (must be at least three business days) from the date you receive this to do so.

If you wish to respond, please contact _____.

In your response, you may:

- Tell us about any errors on your criminal record;
- Give us any additional information you'd like us to consider after reviewing this notice.

The following factors were considered, as required by Article 23-A of the New York State Correction Law, before making our determination:

A.	<input type="checkbox"/> The government encourages employers to hire people with criminal records.
B.	<input type="checkbox"/> The specific duties and responsibilities of the job, which are:
1.	_____
2.	_____
3.	_____
4.	_____
C.	<input type="checkbox"/> We believe your record impacts your fitness or ability to perform these duties and responsibilities because:
[To be completed only with respect to convictions, not pending cases.]	
D.	<input type="checkbox"/> How long ago your criminal activity, not your conviction, occurred: _____ years _____ months
E.	<input type="checkbox"/> Your age when your alleged/convicted criminal activity (not your arrest or conviction) occurred: _____ years old If you were 25 or younger, we consider this a mitigating factor.
F.	<input type="checkbox"/> The seriousness of the conduct that led to your criminal record, which is:
G.	<input type="checkbox"/> Your evidence of rehabilitation and good conduct, which is listed below.
1.	_____
2.	_____
3.	_____
<i>If you have additional documents we should consider, please send them, including evidence that you attended school, job training, or counseling; or are involved with your community. They can include letters from people who know you, like teachers, counselors, supervisors, clergy, and parole or probation officers.</i>	
H.	<input type="checkbox"/> Our legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public, which is:
I.	<input type="checkbox"/> Your certificate(s) of relief or certificate of good conduct shows that you are rehabilitated. If you did not have a certificate, we did not hold that against you.

Based on these factors, we may deny you the job because (choose one or both below):

We believe there is a direct relationship between your criminal record and the job we offered to you, and the factors listed above do not lessen that relationship because:

Your criminal record creates an unreasonable risk to specific persons, the general public, or our property because: