



July 2021

## NYC Imposes New Limits on Use of Criminal History in Hiring and Employment

By Timothy A. Gumaer

Inquiries into the criminal histories of job candidates and employees will be limited even further under amendments to New York City's Fair Chance Act (FCA) that take effect July 29, 2021.

With the FCA's expanding protection, employers are urged to review their job applications (as well as job postings, pre-hire paperwork, and onboarding documents) to ensure that they are in compliance with these new requirements.

### Background

As explained in our July 2017 [alert](#), the FCA, also known as the "Ban the Box" law, prohibits, with limited exceptions, New York City private employers with at least four employees from seeking information from job applicants regarding their criminal history prior to making a conditional offer of employment. In short, an employer's job postings/advertisements, applications, and interview questions cannot include inquiries into an applicant's criminal record until a conditional offer of employment is made.

Under the FCA, once a conditional offer is made, an employer is permitted to inquire about the individual's criminal history, but may use that history to withdraw the offer/reject the applicant only if the employer:

- Provides the applicant with a written copy of the criminal background check;
- Analyzes the applicant's criminal history using the eight factors set forth in [New York Correction Law](#)

[Article 23-a](#) (as explained below), and documents the analysis;

- Provides the applicant with a written copy of the analysis; and
- Gives the applicant at least three business days to respond to the written analysis (while holding the position open).

The law does not apply where applicable law requires a criminal background check or limits employment based on criminal history, such as certain educational institutions and in the securities industry.

In the eight-factor analysis, the employer must consider:

1. New York's public policy encouraging the hiring of individuals with prior criminal offenses;
2. The job applicant's specific duties and responsibilities necessarily related to the position;
3. The bearing, if any, the criminal offense(s) for which the person was previously convicted will have on the job applicant's ability to perform the duties and responsibilities of the position;
4. The time which has elapsed since the occurrence of the criminal offense(s);
5. The age of the person at the time of the occurrence of the criminal offense(s);
6. The seriousness of the offense(s);

7. Any information produced by the job applicant (or on their behalf) with respect to their rehabilitation and good conduct; and
8. The “legitimate interest” of the private employer in “protecting property and the safety and welfare of specific individuals or the general public.”

Only after this four-step process has been completed may an employer withdraw a conditional offer of employment, and even then, the employer may only do so if it determines that (a) there is a direct relationship between the criminal offense and the specific job the employee is seeking, or (b) hiring the applicant would pose an unreasonable risk to property or the safety/welfare of individuals or the general public.

#### What Will Change on July 29, 2021?

On July 15, 2021, the New York City Commission on Human Rights (NYCCHR) released [guidance](#) to help employers better understand the expanded FCA. The amendments (which take effect July 29, 2021) modify and expand the FCA’s protections by:

- Covering current employees and independent contractors prior to an employer taking an adverse employment action, such as termination (the law currently covers only applicants).
- Prohibiting employers from taking an adverse action based on an employee’s or applicant’s pending arrest or criminal charge without considering the relevant fair chance factors.
- Prohibiting inquiries into an employee’s or applicant’s non-pending arrests and criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications and convictions sealed under certain

sections of the criminal procedure law.

- Amending the relevant fair chance factors to be considered when rescinding a conditional offer of employment or taking an adverse action against a current employee recently convicted of a criminal offense.

Situations where an employer may **never** inquire about an employee’s or applicant’s prior criminal history (for both job applicants and current employees) include:

- non-convictions (e.g., arrests that were not prosecuted; acquittals; dismissed charges; expunged cases; and vacated convictions)
- cases adjourned in contemplation of dismissal
- youthful offender cases
- violations (e.g., disorderly conduct)
- non-criminal offenses (with the exception of driving infractions)
- sealed cases

Employers must ignore any information they learn about that involves any of the above types of cases and may not withdraw an applicant’s conditional offer of employment or take adverse action against a current employee based on the above scenarios.

Employers **are** permitted to consider (for both job applicants and current employees):

- open or pending cases
- misdemeanor convictions
- felony convictions
- driving infractions

The amendments also expand the four-step analysis an employer must satisfy prior to withdrawing a job applicant’s conditional offer of employment or taking an adverse action against a current employee. Effective July 29, 2021, employers must now:

- Provide the applicant with a written copy of the criminal background check;
- Request from the applicant/employee information relating to the eight factors set forth in [New York Correction Law Article 23-a](#);
- Analyze the applicant's/employee's criminal history using the eight factors set forth in New York Correction Law Article 23-a, and document the analysis;
- Analyze the applicant's/employee's criminal history using the factors set forth in the [FCA](#) (which are similar to, but slightly different from, New York Correction Law Article 23-a);
- Provide the applicant with a written copy of the analysis by using the NYCCHR's [FCA Notice Form](#) (or similar document that describes the relevant factors and the employer's detailed explanation of their analysis), which shall include supporting documentation that helped form the basis for the analysis; and
- Allow the applicant at least five business days to respond (while holding the position open), or, for current employees, a "reasonable time to respond" before taking an adverse action.

Only after an employer conducts this enhanced analysis may it withdraw a conditional offer of employment or take an adverse action against a current employer who has been previously convicted of a criminal offense. And, as explained above, an employer may still do so only if it also determines that (a) there is a direct relationship between the criminal offense and the specific job the employee is seeking or (b) hiring the application would pose an unreasonable risk to property or the safety/welfare of individuals or the general public.

Employers are reminded that discriminating against an individual with a criminal history is forbidden under the New York State and City Human Rights Laws, and employers are warned that they may be in violation of the law if they do not properly conduct this newly expanded analysis. The FCA's amendments make this process more complex, and it may prove difficult for employers to properly follow.

Therefore, employers are strongly encouraged to consult with an experienced employment attorney to ensure (1) that their pre-employment documentation is in compliance with the FCA; and (2) that all steps are properly taken prior to withdrawing a conditional offer of employment or taking adverse action against a current employee related to conviction of a criminal offense.

*For more information or questions about this Alert, please contact Carolyn D. Richmond at [crichmond@foxrothschild.com](mailto:crichmond@foxrothschild.com) or 212.878.7983, Glenn S. Grindlinger at [ggrindlinger@foxrothschild.com](mailto:ggrindlinger@foxrothschild.com) or 212.905.2305, Timothy A. Gumaer at [tgumaer@foxrothschild.com](mailto:tgumaer@foxrothschild.com) or 646.601.7652, or any member of Fox Rothschild's New York Labor & Employment Department.*

Attorney Advertisement

© 2021 Fox Rothschild LLP. All rights reserved. All content of this publication is the property and copyright of Fox Rothschild LLP and may not be reproduced in any format without prior express permission. Contact [marketing@foxrothschild.com](mailto:marketing@foxrothschild.com) for more information or to seek permission to reproduce content. This publication is intended for general information purposes only. It does not constitute legal advice. The reader should consult with knowledgeable legal counsel to determine how applicable laws apply to specific facts and situations. This publication is based on the most current information at the time it was written. Since it is possible that the laws or other circumstances may have changed since publication, please call us to discuss any action you may be considering as a result of reading this publication.  
[www.foxrothschild.com](http://www.foxrothschild.com)