

# LABOR AND EMPLOYMENT LAW INFORMATION MEMO

JULY 28, 2021

## NYC Amends Fair Chance Act

The Fair Chance Act (FCA), which was added to the New York City Human Rights Law (NYCHRL) on Oct. 27, 2015, provides “fair chance” protections to workers with criminal convictions and limits when and to what extent employers can consider an individual’s criminal history in making employment decisions. On July 15, 2021, the New York City Commission on Human Rights (NYCCHR) issued new guidance<sup>1</sup> interpreting key amendments to the FCA that go into effect on July 29, 2021.

### Additional Factors to Consider

With respect to arrests or convictions preceding employment, other than pending arrests or criminal accusations, employers must consider Correction Law Article 23-A<sup>2</sup> factors prior to revoking a conditional offer of employment. With respect to arrests or criminal accusations pending at the time of an application for employment and for arrests or convictions that have occurred during employment, employers must consider the NYC FCA factors prior to making an adverse employment action. These factors are based on the Article 23-A factors and are as follows:

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

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<sup>1</sup> Guidance is available [here](#).

<sup>2</sup> The Article 23-A factors are as follows: (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 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 the 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; and (9) Whether the person has a certificate or relief from disabilities or good conduct, which create a presumption of rehabilitation.

## **Rescinding of a Conditional Offer**

Since its inception, the FCA has mandated that employers can look into an employee's background only after a conditional offer of employment has been made. The amendments to the FCA now explicitly state that a conditional offer of employment can only be rescinded based on:

1. The result of a criminal background check conducted in accordance with the requirements of the FCA;
2. The results of a medical examination when permitted by the Americans with Disabilities Act; or
3. Other information that (a) the employer could not have reasonably known before the conditional offer and (b) based on the new information, it would not have made the offer regardless of the results of the criminal background check.

The guidance makes clear that employers must have assessed all other employment qualification factors (e.g., academic records or references) before making a conditional offer of employment. Employers can only request and review criminal history information after evaluating all of the candidate's non-criminal information.

## **Non-convictions are Completely Protected**

The guidance clarifies that non-convictions are completely protected. Non-convictions may not be considered in making an employment decision. Non-convictions include but are not limited to:

- Instances when the police decided not to charge a person following their arrest;
- Cases in which the prosecutor declined to prosecute the person following their arrest;
- Cases that were adjourned in contemplation of dismissal;
- Cases in which all charges were dismissed;
- Cases that resulted in an acquittal on all charges;
- 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;
- Cases in which the person was adjudicated as a youthful offender;
- Cases that resulted in a conviction for a violation, even if not sealed, including but not limited to:
  - Trespass;
  - Disorderly conduct;
  - Failing to respond to an appearance ticket;
  - Loitering;
  - Harassment in the second degree;
  - Disorderly behavior;
  - Loitering for the purpose of engaging in a prostitution offense;
  - Cases that resulted in a conviction for a non-criminal offense under the laws of a state other than New York; and
  - Convictions that have been sealed.

Employers must never inquire about or act on non-conviction information. Employers are also prohibited from disqualifying an applicant from prospective employment based on their refusal to respond to an illegal question about non-convictions.

## **Time to Respond to the Fair Chance Act Notice is Increased to Five Business Days**

If an employer wishes to withdraw a conditional offer of employment, it must follow the fair chance process. This requires the employer to: (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;<sup>3</sup> and (3) allow the applicant a reasonable period of time of at least five business days from receipt of the inquiry and analysis to respond to the employer's concerns.

The amendments increased the length of time that applicants have to respond to the employer's concerns from three business days to five business days.

If you have any questions about the information presented in this memo, please contact [Mallory Campbell](#), any [attorney](#) in Bond's [Labor and Employment practice](#) or the Bond attorney with whom you are regularly in contact.

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<sup>3</sup> See [here](#) for copy of a sample Fair Chance Notice.

