

Amendments to the New York City Fair Chance Act Further Complicate the Hiring Process for New York City Employers

This week the Fair Chance Act ("FCA") amendments take effect, complicating the hiring process for New York City employers.

On October 27, 2015, the FCA was added to the New York City Human Rights Law. Generally, the FCA prohibits covered New York City employers from making inquiries into an applicant's criminal history until after a conditional offer of employment is made. In the event an employer wants to withdraw the conditional offer of employment, the FCA requires that the employer consider numerous factors to analyze the job-relatedness of the applicant's criminal history.

The New York City Council recently amended the FCA to expand protections for applicants and employees with criminal charges or pending arrests further complicating the hiring process for New York City employers. These changes will take effect on July 29, 2021.

Under these amendments, employers cannot request and review an applicant's criminal history until after the employer reviews the applicant's non-criminal information and extends a conditional offer of employment. Employers are also now tasked with requesting that the consumer reporting agency bifurcate reports to ensure compliance with this new requirement. When the consumer reporting agency cannot bifurcate reports, employers must have an internal system to separate the criminal history and non-criminal history. Employers are now being instructed not to request driving records until after review of the non-criminal history, as driving records may include criminal information.

This amendment may pose the biggest complications for employers. At the outset, this process may cause significant delay for the employer, which may cause employers to lose strong candidates. It also imposes a burden on current employees who are tasked with separating and reviewing criminal and non-criminal information.

This two-step process also requires that employers obtain authorization from applicants to run a background check, which can run afoul of the FCA. Specifically, an authorization that indicates there will be a criminal background check before a conditional offer of employment is extended violates the FCA. The New York City Commission on Human Rights ("NYCCHR"), which issued guidance on the FCA amendments, is encouraging employers to avoid using the term "background check" and instead use terms such as "consumer report" or "investigative consumer report" in an authorization notice use before an offer of conditional employment is extended.

Additionally, the amendments now require employers to consider seven FCA factors when considering an applicant's or employee's pending criminal charges or a current employee's conviction during employment. Specifically, an employer is required to consider:

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 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.

An employer can only withdraw an offer of employment if, after conducting an analysis of the above seven factors, the employer finds "a direct relationship between the criminal record and the job or an unreasonable risk to people or property." If an employer does withdraw a conditional offer of employment, the employer must follow the Fair Chance Process to notify the applicant in writing, and must also

allow the applicant five business days, instead of three, to respond.

The amendments also prohibit employers from considering non-convictions during the hiring process or during employment. The NYCCHR's guidance provides a non-exhaustive list of non-convictions that includes 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, and cases that resulted in an acquittal on all charges. Non-convictions also include cases that resolved in a conviction for a violation such as trespass, disorderly conduct, and harassment in the second degree.

New York City employers who require criminal background checks should promptly review their hiring policies, and documents used during the hiring and screening process to ensure compliance with the FCA amendments.

KD IS HERE TO HELP

If you have questions about these developments, complying with the FCA or are in need of assistance in implementing the new policies, please contact one of KD's experienced Labor & Employment Law attorneys, noted below.

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