

NYC Commission on Human Rights Issues Updated Enforcement Guidance on Consideration of Criminal History in Hiring and Employment

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The New York City Commission on Human Rights (the “Commission”) has issued [updated legal enforcement guidance](#) on the NYC Fair Chance Act (“FCA”) and employers’ consideration of criminal history in hiring and during employment.

The updated guidance, which does not have the force of law but which provides significant insight into the Commission’s interpretation of these topics, is being issued in connection with the **July 29, 2021 effective date of [Local Law 4](#)**, which adds significant new protections to the NYC Human Rights Law (“NYCHRL”) regarding applicant and employee criminal history, including a notable new requirement that employers take certain steps before denying or terminating employment based on **currently pending arrests or criminal accusations**.

Local Law 4’s Amendments to the NYCHRL

Codification of Article 23-A Factors in Considering Prior Criminal Convictions

Local Law 4 amends the NYCHRL to codify the existing requirement under New York State Correction Law Article 23-A that an employer considering rescinding an offer of employment or taking adverse action against an existing employee based on a prior criminal conviction first evaluate specific factors enumerated under Article 23-A. These factors include the duties/responsibilities of the role in question, the nature of the offense leading to the conviction, and the time that has elapsed since the underlying offense. Employers must analyze these factors to determine whether: (i) there is a direct relationship between the criminal conviction and the employment held by (or to be held by) the person; or (ii) 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.

Consideration of Currently Pending Arrests or Criminal Accusations

Perhaps most significantly, Local Law 4 now requires employers to also evaluate specific factors before taking adverse action against applicants or employees based on a *currently pending* arrest or criminal accusation. Up until this amendment, the law did not require employers to take any factors into consideration before acting based on a currently pending arrest or criminal accusation.

These factors, which are very similar (but not identical) to the Article 23-A factors noted above, include:

1. the policy of NYC to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in the areas of licensure and employment;
2. the specific duties and responsibilities necessarily related to the employment held by (or to be 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 fact shall serve as a mitigating factor;
5. the seriousness of such offense or offenses;
6. 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; 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 history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

Similar to the requirement for prior criminal convictions, employers are now required to evaluate the above factors to decide whether adverse action may be taken based on a pending arrest or criminal accusation either because there is a direct relationship between the alleged wrongdoing and the job or employment would involve an unreasonable risk to property or people's safety.

In addition, before taking any adverse employment action based on a pending arrest or criminal accusation, an employer is now required to:

- request information from the applicant or employee regarding the enumerated factors;
- consider the impact of each of the factors on the “direct relationship” and “unreasonable risk” analyses;
- provide the applicant/employee with a written copy of such analysis, as well as any supporting documents and the employer’s reasons for taking the adverse action; and
- allow the applicant/employee a reasonable time to respond before taking adverse action.

This is the same process that is presently required under the FCA before an employer may take adverse action based on a prior criminal conviction (referred to by the Commission as the “Fair Chance Process”).

Codified Definition of “Conditional Offer of Employment”

Under the FCA employers are prohibited from making inquiries into or considering an applicant’s criminal history until a conditional offer of employment has been made. In its original form, the statute did not include a definition of what constitutes such a conditional offer, though the Commission set forth a definition in its legal enforcement guidance on the law.

Local Law 4 now codifies the definition of “conditional offer of employment” as “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 the provisions of this chapter;
2. The results of a medical exam as permitted by the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12112; or
3. Other information the employer could not have reasonably known before making 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.”

Expanded Definition of “Non-convictions”

Prior to this amendment, the NYCHRL provided that employers may never consider certain aspects of an applicant's or employee's criminal history in making employment decisions, including criminal actions adjourned in contemplation of dismissal and criminal actions not currently pending that were: terminated in favor of the individual or adjudicated as a youthful offender, whether or not sealed; or involving a sealed conviction for a non-criminal violation or any other conviction that was sealed under applicable law. Such excluded matters are referred to as "non-convictions."

Local Law 4 expands the definition of "non-convictions" to add the following types of matters, whether or not sealed:

- convictions of a violation as defined in Penal Law Section 10.00; and
- convictions of a non-criminal offense.

Increased Time to Respond to a Notice of Adverse Action

Local Law 4 increases the amount of time that employers must give applicants and employees to respond to the information contained in the employer's analysis of the Fair Chance factors and to submit any mitigating information from a minimum of three business days to "a reasonable period of at least five business days."

Revised Legal Enforcement Guidance

Below are some key highlights from the revised legal enforcement guidance, which addresses each of these amendments to the NYCHRL and provides other clarification and additional information on certain issues relating to consideration of criminal history in employment.

Definitions Under the FCA

Along with incorporating updated definitions of terms such as "criminal history" and "conditional offer of employment," the revised guidance:

- states that the definition of "criminal background check" includes not only asking an applicant/employee directly about criminal history or obtaining a report from a consumer reporting agency, but also searching for publicly available or government records via the internet or other private databases;
- defines a "pending case" as "[a] criminal action that has not been concluded at the time of the employer's Fair Chance Analysis" but which does not include an action

adjourned in contemplation of dismissal “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;” and

- further expands upon the definition of “non-conviction” to include a “non-exhaustive list of the types of criminal histories that qualify as non-convictions,” including cases in which the prosecutor declines to prosecute following arrest; resolved cases for violations such as trespass, disorderly conduct/behavior, failing to respond to an appearance ticket, loitering (including for the purposes of engaging in a prostitution offense), and second degree harassment; and convictions for non-criminal offenses under any other state’s laws.

When a Conditional Offer Has Occurred and the Background Check Process

As discussed above, Local Law 4 incorporates a specific definition of “conditional offer of employment” into the NYCHRL. The revised guidance states that “[u]nless an exemption applies, *criminal history may not be sought or considered* by employers before a conditional offer of employment” and employers are prohibited 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.” (Emphasis added).

The revised guidance goes on to state:

“Employers who request background checks on applicants should first receive the non-criminal information, evaluate it, and then receive and evaluate the criminal information. . . . 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.”

In addition:

“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.”

It is worth noting, however, that the revised guidance states that “[b]ecause 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.”

As an additional note, employers are reminded that the requirements of the federal Fair Credit Reporting Act (FCRA) continue to apply to authorizations being obtained from candidates or employees in connection with background checks and investigative reports being conducted by consumer reporting agencies.

Intentional Misrepresentations by Applicants or Employees

The revised guidance makes clear that 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” and that adverse action taken on the basis of such misrepresentation does not require the employer to first undertake an FCA analysis. That being said, before taking such adverse action, the employer must provide the applicant or employee with a copy of any information that led the employer to believe the individual engaged in such intentional misrepresentation, and the individual must be afforded at least five business days to respond before any adverse action may be taken.

Evaluating Convictions or Current Arrests/Accusations for Current Employees

The revised guidance notes that, as set forth in Local Law 4, an employer is permitted to place an employee on temporary leave while it undertakes the required FCA process in connection with either a criminal conviction or pending arrest or criminal accusation. To that end, the guidance states that while the determination of whether the Fair Chance Process was completed in a reasonable amount of time is a “fact-specific inquiry,” there will be a presumption that delays in excess of five business days from the time the individual is placed on leave to the time of providing notice of the FCA analysis are unreasonable. The guidance also states that “[i]f the employee has accrued leave time, they should be permitted to use that time consistent with the employer’s regular leave policies.”

Exceptions to the FCA

The guidance notes that while certain federal, state and local laws may create mandatory bars to employment based on criminal history and would thus create exceptions to the requirements of the FCA, such a barrier must be truly mandatory in order to qualify for an exception, and “[t]he NYCHRL’s protections based on criminal history control when an employment-related action . . . is discretionary, meaning it is not explicitly mandated by law.”

The guidance also states that where a federal, state or local law requires an employer to perform a criminal background check (but does not necessarily wholly bar an individual with a criminal history from employment), an employer “may . . . 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” and may conduct such check prior to a conditional offer being made. However, such employers must also “notify the applicant of the specific legal basis for the required criminal background check” and still follow the Fair Chance Process before taking any adverse action based on criminal history information.

For employers in the financial services industry who are required by a self-regulatory agency to conduct criminal background checks of regulated persons, the revised guidance now states that such employers “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’).” (Emphasis added). Previously, the guidance stated that such employers are exempt from the FCA “when complying” with industry-specific rules and regulations.

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Local Law 4 and the revised legal enforcement guidance bring significant changes for NYC employers with regard to consideration of criminal history. Employers are advised to review their current background check forms and processes, and to consult with their Proskauer attorneys regarding next steps.

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