

# COMPLIANCE TO CONSIDER

## New York City's Fair Chance Act

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## Introduction

- “Compliance to Consider”
  - Webcast series for clients
  - Covering pressing compliance issues in the industry
- Speaker:
  - Sadeq Khan, Associate General Counsel/Director of Compliance
- New York City’s Fair Chance Act



## Overview

- Became effective on October 27, 2015
- Prohibits most employers from making any inquiries into an applicant's criminal history until after a conditional offer of employment is made
- Includes additional requirements:
  - Article 23-A analysis
  - Follow NYC's "Fair Chance Process" (if applicable)
- Exemptions
- Compliance even more important given recent decision in *Chauca v. Abraham*



### Pre-Conditional Offer Requirements

- Cannot ask about criminal history or obtain criminal history information until after a conditional offer
- Cannot ask for authorization to conduct criminal background check until after a conditional offer
- Cannot express any limitation or specification based on criminal history in job advertisements
- Applicant may refuse to respond to any prohibited inquiry or statement



# Post-Conditional Offer Requirements

- Commission interprets FCA as requiring a two-step, bifurcated screening process, separating criminal components of a background check from all other components both in time (with the criminal portion to occur later) and space (criminal portion to be on a separate report)
- Criminal history inquiries must be limited to only pending arrests and conviction records
- If adverse action is contemplated based on criminal information, employer must first conduct an **Article 23-A analysis** using the New York City Commission on Human Rights' ("Commission")

### **Fair Chance Act Notice**



# COMPLIANCE TO CONSIDER

Article 23-A Evaluation Form

\_\_\_\_\_  
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. Below explains why. 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. ☐ The government encourages employers to hire people with criminal records.

B. ☐ The specific duties and responsibilities of the job, which are:

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_
4. \_\_\_\_\_

C. ☐ We believe your record impacts your fitness or ability to perform these duties and responsibilities because:

\_\_\_\_\_

D. ☐ How long ago your criminal activity, not your conviction, occurred: \_\_\_\_\_ years \_\_\_\_\_ months

E. ☐ Your age when your criminal activity, not your conviction, occurred: \_\_\_\_\_ years old

F. ☐ The seriousness of the conduct that led to your criminal record, which is:

\_\_\_\_\_

G. ☐ Your evidence of rehabilitation and good conduct, which is listed below.

1. \_\_\_\_\_
2. \_\_\_\_\_
3. \_\_\_\_\_

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.

H. ☐ Our legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public, which is:

\_\_\_\_\_

I. ☐ 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:

\_\_\_\_\_

For more information about the law, visit: [nyc.gov/FairChanceNYC](http://nyc.gov/FairChanceNYC)



**NYC**  
Commission on  
Human Rights

BILL DE BLASIO  
Mayor  
CARMELYN P. MALALIS  
Commissioner/Chair

100 Gold Street, Suite 4600  
New York, NY 10038  
[nyc.gov/humanrights](http://nyc.gov/humanrights)  
NYCCHRI



# Post-Conditional Offer Requirements

- Article 23-A requires employers to undertake a multifactor, case-specific analysis to evaluate whether there is a direct relationship between the applicant's prior criminal history and the position sought.
- Employers prohibited from discriminating against applicants based on prior criminal conviction(s), unless:
  - There is a direct relationship between the previous criminal offense and the specific position sought; or
  - Hiring the individual would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.



# Post-Conditional Offer Requirements

- If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment or take an adverse employment action because a direct relationship or unreasonable risk exists, it must follow NYC's "Fair Chance Process" by:
  - Providing the applicant with a written copy of any inquiry it conducted into the applicant's criminal history;
  - Providing the applicant with a copy of the Article 23-A analysis that was conducted using the [Commission's Fair Chance Act Notice](#) (and including any supporting documentation that formed the basis for the adverse action and the employer's reason for taking the adverse action); and
  - Allowing the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns, and holding the position open for the applicant during this period of time.
- These notice requirements are completely separate from and in addition to the pre-adverse and adverse action notices required by the FCRA.





### Post-Conditional Offer Requirements

- Further, employers operating in the State of New York must also ensure that they are complying [with Sec. 380-g\(d\)](#) of the New York Fair Credit Reporting Act (N.Y. Gen. Bus. Law § 380-g(d)), which requires employers to provide applicants and employees with a copy of [Article 23-A](#) when a consumer report is received that includes conviction information.



# Exemptions Provided by the FCA

- The FCA provides an exemption for and does not apply to the following:
  - Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on criminal history;
  - Employers required by a Self-Regulatory Organization to conduct a criminal background check of regulated persons;
  - Police and peace officers, law enforcement agencies, and other exempted city agencies;
  - Certain city positions designated by the Department of Citywide Administrative Services (“DCAS”).



# Exemptions Provided by the FCA

- All exemptions to the FCA are to be construed narrowly
  - “Employers may assert the application of an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence.”
- Employers availing themselves of exemptions to the FCA should inform applicants of the exemption they believe applies and keep a record of their use of such exemptions for a period of five (5) years
  - Keeping an exemption log will help the employer respond to Commission requests for information



### Noteworthy cases

#### *Brooks v Barclays Center* –

- Plaintiff filed this proposed class action, alleging that Barclays allegedly discriminated against him by rejecting his employment when it found out that he had a past criminal conviction and failed to perform the requisite “***individualized assessment***” as required by the New York State and New York City Human Rights Law
- Plaintiff contends that Barclays failed to follow the FCRA’s ***pre-adverse action process***.
- Plaintiff also contends that Barclays failed to provide Plaintiff with ***a copy of Article 23-A*** when the consumer report contained criminal record information, as required by section 380-g(d) of the NY FCRA

#### See also:

- *Millien v. The Madison Square Garden Company*
- *Keels v. The GEO Group (settled for \$900k)*



### Conclusion

- Compliance with the FCA, while complicated and burdensome, is necessary given the Commission's active involvement in implementation and enforcement, as well as the New York Court of Appeals' decision that a showing of malice or awareness of the violation of a protected right is not required for punitive damages to be awarded.
- Employers would be well-advised to review their policies and practices to ensure compliance with the FCA as well as with the Commission's Enforcement Guidance and its other recent interpretations of the law.



### Contact

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