



NYC Employers: Do Not Order Pre-Offer Background Checks

New York City's Fair Chance Act (FCA) became effective on October 27, 2015, and now prohibits most employers operating within the City from making any inquiries into an applicant's criminal history until after a conditional offer of employment is made. During this time before a conditional offer is made, an employer must not seek or obtain an applicant's criminal history, and must instead focus on an applicant's qualifications. Thus, employers should ensure that their practices are fully compliant with this new law and that no background checks are being ordered until after a conditional offer is made.

In line with this requirement that background checks only be conducted after a conditional offer is made, the FCA now explicitly prohibits employers from expressing any limitation or specification based on criminal history in their job advertisements, which includes a prohibition on requiring applicants to authorize a background check as part of the initial employment application. Job advertisements cannot say, for example, "no felonies," "background check required," or "clean records only."

Solicitations, advertisements and publications encompass a broad variety of items, including, without limitation, employment applications, fliers, handouts, online job postings and materials distributed at employment fairs and by temporary help firms and job readiness organizations. Employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check.¹ Thus, employers must ensure that applicants are only being asked to authorize the procurement of a background check after a conditional offer of employment has been made.

Employers should also remember that they cannot inquire about criminal history during the interview process. Examples of prohibited statements and inquiries include, without limitation:

- Questions, whether written or oral, during a job interview about criminal history;

¹ NYC Commission on Human Rights, Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 4-5 (2015), <http://www.nyc.gov/html/cchr/downloads/pdf/FCA-InterpretiveGuide.pdf>.



- Assertions, whether written or oral, that individuals with convictions, or certain convictions, will not be hired or cannot work at the employer; and
- Investigations into the applicant's criminal history, including using public records or the Internet, whether conducted by an employer or for an employer by a third party.

The FCA does not prevent employers from otherwise looking into an applicant's background and experience to verify her or his qualifications for a position, including asking for resumes and references and performing general Internet searches (e.g., Google, LinkedIn, etc.). Searching an applicant's name is legal, but trying to discover an applicant's conviction history is not. In connection with an applicant, employers cannot search for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison." Nor can employers search websites that contain or purport to contain arrest, warrant, conviction or incarceration information.

The FCA allows an applicant to refuse to respond to any prohibited inquiry or statement. Such refusal or response to an illegal question shall not disqualify the applicant from the prospective employment.²

There are additional requirements under the FCA that apply after a conditional offer when the criminal history inquiry and background check become permissible, including the Article 23-A evaluation. For additional information on the FCA, please see our Compliance Alert titled "[New York City 'Bans the Box.'](#)"

² Id. at 5.