

# CREDIT AND CRIMINAL HISTORY DISCRIMINATION

NYC Commission on Human Rights

# NYC Commission on Human Rights

The NYC Commission on Human Rights enforces the City's Human Rights Law and educates the public on their rights and responsibilities under the Law through three separate divisions:

1. Law Enforcement Bureau
2. Community Relations Bureau
3. Office of the Chairperson

# NYC Commission on Human Rights

## Law Enforcement Bureau:

- Accepts complaints from the public and initiates its own investigations;
- Brings cases before the City's Office of Administrative Trials and Hearings; and
- Negotiates settlements and mediates disputes.

## Community Relations Bureau:

- Hosts trainings and presentations; and
- Works with schools, community groups, and faith communities.



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# NYC Commission on Human Rights

## Office of the Chairperson:

- Issues final Decisions and Orders in cases brought by the Law Enforcement Bureau.
- Issues legal guidance, rules and regulations.
- Works on policy and legislation.

*See our website for more information:  
[nyc.gov/humanrights](https://nyc.gov/humanrights)*

# What is the Human Rights Law?

The NYC Human Rights Law prohibits discrimination in several areas:

- Employment;
- Public accommodations;
- Housing;
- Discriminatory harassment; and
- Bias-based policing.

*Covers events that occurred in NYC **within the last year.***

Claims may also be filed in state court up to three years after the discriminatory act instead of going to the Commission.

# Protected classes in employment

- Age
- Alienage or citizenship status
- Arrest and conviction record
- Color
- Creed
- Disability
- Gender
- Gender identity
- Marital or partnership status
- National origin
- Pregnancy
- Race
- Sexual orientation
- Status as a victim of domestic violence, sexual violence, or stalking
- Unemployment status

## New protections:

- Credit history, Sept. 3
- Fair Chance Act, Oct. 27



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# NYC employers must comply with the Human Rights Law

Covers “**employers,**” which have at least four employees in NYC. An employer her- or himself counts, as do employees that work in separate locations.

Many kinds of **employees** have rights under the Human Rights Law:

- Interns;
- Undocumented workers;
- Domestic workers;
- Independent contractors; and
- Probationary and part-time employees.



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# New protections

1. Employers may not request or use **credit history** in an employment decision.
2. Employers may not request or use **criminal history** in an employment decision until a conditional offer. If an employer wishes to rescind the offer, it must first follow the Fair Chance Process.

Separate exemptions apply to both laws.



# Stop Credit Discrimination in Employment Act

Signed May 6, 2015 | Effective Sept. 3, 2015



# Requesting or using CREDIT HISTORY is now illegal

It is illegal under the NYC Human Rights Law for an employer to **request**, either orally or in writing, or **use** consumer credit history in employment decisions for:

- Potential employees and
- Current employees

**No employer or industry** is completely exempt from the Credit History Ban.

- Instead, exemptions apply only to particular positions at an employer.



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# Exemptions to the Credit History Ban

1. Police officers and peace officers;
  - Peace officers include many govt. inspectors; court, correction, and school safety officers; parole and probation officers, etc.
2. Law enforcement or investigative positions with NYC Dept. of Investigation;
3. Positions requiring security clearance under federal or state law; and
  - Security clearance is the ability to access classified information, not an employer's self-described "clearance process."

# Exemptions to the Credit History Ban

4. Positions requiring the employee to be bonded by the city, state, or federal law or regulation;
  - **Only six:** Bonded Carrier for U.S. Customs; Harbor Pilot, Pawnbroker; Ticket Seller & Reseller; Auctioneer; and Tow Truck Driver.
5. Positions where a credit check is required by federal or state law; and
  - **Only one:** Licensed mortgage loan originator.

# Exemptions to the Credit History Ban

6. Positions at securities firms regulated by the Financial Industry Regulatory Authority (“FINRA”);
  - Only individuals registered with FINRA.
7. Positions with regular access to trade secrets, intelligence or national security information; and
  - Not recipes, formulas, or customer lists regularly used or collected by non-salaried employees and their supervisors.

# Exemptions to the Credit History Ban

8. Positions with signatory authority over third-party funds or assets or the ability to contract for \$10,000 or more;
  - Executive-level positions with financial control over the company.
9. Positions that involve modifying digital security systems.
  - Chief Technology Officers and IT staff who can access all parts of a company's computer system.

# Exemptions to the Credit History Ban are narrow

Exemptions to the Credit History Ban are very narrow and **do not include**, for example:

- Bank tellers;
- Cashiers;
- Salespeople;
- Clerical workers and administrative staff;
- Restaurant or bar workers; and
- Private security workers.

# We will investigate exemptions to the Credit History Ban

The application process for **nearly all jobs** in NYC can no longer include a credit check.

1. Employers that use a public record to discover an employee's credit history should keep a copy that includes the date and time it was obtained.
2. Employers who claim to be exempted should inform employees why and be prepared to prove that to the Commission.

*Employees with questions should **contact the Commission** so we can investigate.*



# Fair Chance Act

Enacted June 28, 2015 | Effective Oct. 27, 2015



# Discovery and use of CRIMINAL HISTORY is now restricted

1. Criminal history should play no part in the employment process until **after a conditional offer** of employment.
  - Applies to both potential and current employees
2. After a conditional offer, employers have the **same rights and obligations** as before the Fair Chance Act.
3. Employers who want to hire someone with a record **need not** follow any additional steps.
4. Employers who wish to decline employment based on an applicant's criminal record have to follow the **Fair Chance Process**.



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# Criminal history is excluded from the hiring process

1. Criminal history should play no part in the employment process until **after a conditional offer** of employment.
  - No solicitation, advertisement, or publication for employment should express **any limitation or specification** based on criminal history.
  - Applicants **may not be asked** whether they have a record, either on an application or in an interview.
  - **No statements** about criminal history or background checks may be made.
  - A background check, either through a company or the Internet, **may not be done**.

# Criminal history is excluded from the hiring process

1. Criminal history should play no part in the employment process until **after a conditional offer** of employment.
  - Cannot ask about **pending criminal cases**.
  - If an employer **inadvertently discovers** an applicant's criminal history, it should ignore the info and continue the hiring process.
  - If an **applicant asks** whether a background check will be done, an employer should say it will make that decision only after a conditional offer.

# Conviction history inquiries after a conditional offer

2. After a conditional offer, employers **may** do everything they could do before the Fair Chance Act.
- Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case;
  - Check the applicant's criminal record; and
  - Ask the applicant about the circumstances that lead to any criminal conviction.

# Conviction history inquiries after a conditional offer

2. After a conditional offer, employers **may** do everything they could do before the Fair Chance Act.

Employers also have the **same constraints**, however, so they **may not** ask about or base a decision on a non-conviction:

- **Favorable termination** or youthful offender adjudication, even if not sealed;
- Sealed convictions for non-criminal **violations**; or
- Convictions **sealed** under Criminal Procedure Law § 160.58.

# Employers should review existing forms & retrain staff

3. Employers who want to hire someone with a record **need not** follow any additional steps.

To comply with the FCA until **this point** of the hiring process, an employer need only:

- Ensure all employment forms **no longer ask** about convictions or authorize background checks; and
- Retrain employees to **make no statements or inquiries**, either of the applicant or another source, about criminal history before a conditional offer.



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# The Fair Chance Process

4. Employers who wish to decline employment based on an applicant's criminal record have to follow the **Fair Chance Process**, which involves:
  1. Evaluating the applicant under Correction Law **Article 23-A**;
  2. **Sharing** that written evaluation with the applicant;
  3. Giving the **applicant a copy** of any criminal background check regarding the applicant; and
  4. Allowing the applicant three business days to **respond**.



# The Fair Chance Process:

## 1. Article 23-A analysis

When considering whether to deny a job to an applicant with a criminal record, employers must consider:

1. New York's **public policy** in favor of employing people with criminal histories.
2. How the conviction relates to applicant's fitness and ability to perform **job duties**.
3. How **long ago** and how **serious** the crime was; the applicant's **age** at the time.
4. The applicant's evidence of **rehabilitation**.
5. The ER's **interest** in protecting people and property.
6. A **certificate** showing rehabilitation, if possessed.

# The Fair Chance Process:

## 1. Article 23-A analysis

Employers **may not** decline to hire someone because of a criminal record unless that record poses:

1. A **direct relationship** to the prospective job, and that connection is not mitigated by the preceding factors; or
  - Consider the elements of the crime or the facts leading to conviction.
2. An **unreasonable risk**, after looking at all of the factors.
  - Begin by assuming no risk exists; then see if the factors combine to create a risk.

These are **exceptions** to the rule that convictions may not form the basis of an adverse employment action.

# The Fair Chance Process:

## 1. Article 23-A analysis

Employers **may not** use matrices or grids to decide that certain criminal convictions automatically disqualify a person.

- Article 23-A factors require a more nuanced, **individualized determination**.
- Under the NYCHRL, no type of conviction history is a **per se disqualification** from any job.

# The Fair Chance Process:

## 2. Sharing the analysis

Applicants must be given the **employer's analysis**, which:

- **Specifies** whether the employer is relying on the direct relationship or unreasonable risk exception;
- Lists **specific facts** going to each factor;
- Describes how, **considering those facts**, the employer reached its conclusion; and
- Notifies the applicant that she or he **has three business days** to respond.

# The Fair Chance Process:

## 3. Sharing the criminal history

Applicants must be given any info the employer relied upon to determine the applicant's criminal record. ERs that:

- Hire consumer reporting agencies to conduct **background checks** must turn over those reports.
- Search the **internet or public records** must provide copies, including the date and time accessed.
- Use **oral information** must ID the source and summarize the information relied upon.

Applicants should be able to see and challenge **the same criminal history information** the employer relied upon.

# The Fair Chance Process:

## 4. Time to respond

Applicants must be given at least **three business days** to respond to the ER's analysis and criminal record info.

- Begins running when the applicant **receives info**.
- Upon request, employers should engage in a **constructive conversation**, discussing their conclusions and identifying how an applicant might address them.
- Employers may offer a **similar position** that mitigates an employer's concerns.



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# Temp agencies have unique obligations under the FCA

For **temporary hire firms**, a “conditional offer of employment” is an offer to place an applicant in a pool to be sent on job assignments.

- Cannot aid and abet an employer’s discriminatory hiring preferences.
- Cannot fail to send people with records to assignments or give less desirable placements.

# Employers exempted from the FCA

1. Employers required by federal, state, or local law to conduct background checks or bar employment based on particular convictions.
2. Police and peace officers, law enforcement agencies, and other exempted City agencies;
3. City positions designated by the Department of Citywide Administrative Services;
4. FINRA members when making employment decisions about people who are required to register with FINRA.



# Employers exempted from the Fair Chance Act

1. Employers required by federal, state, or local law to conduct background checks or bar employment based on particular convictions.
  - Exemption only applies when an employer's decision is compelled by law. If an employer's choice is discretionary, the FCA applies.
  - If an occupational license has criminal record barriers, an employer is not exempt: it may only ask whether the person has the required license.

# Document the use exemptions for both Credit and Fair Chance

The application process for **nearly all jobs** in NYC can no longer include a credit or criminal check. If employers decide that a position is subject to an exemption, employers should inform employees what exemption they are using and keep an **exemption log** recording the following information:

- 1) which exemption is claimed;
- 2) how the applicant/employee fits into the exemption;
- 3) qualifications of the applicant/employee for the position/promotion;
- 4) name and contact information of applicant/employee;
- 5) nature of the credit history information considered and a copy of such information;
- 6) how the credit history information was obtained; and
- 7) how credit history impacted employment action.

*Employers may be required to share their exemption log with the Commission upon request. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.*



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# Commission process



# Contact the NYC Human Rights Commission

See our website for more information about the Credit History Ban:

- One-page guides for employers and the public;
- Frequently Asked Questions; and
- Legal Guidance.

Learn more at [nyc.gov/humanrights](https://nyc.gov/humanrights)