whitepaper

NYC EMPLOYERS: ENSURE COMPLIANCE WITH THE FAIR CHANCE ACT

The New York City (NYC) Fair Chance Act (FCA)[1] became effective on Oct. 27, 2015, and 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.[2]

Specifically, the FCA applies to employers with four or more employees, and only when the position is in NYC. The law does not apply extraterritorially—it applies when the position is in NYC or the job requires the individual to be in New York City such that New York City is the "locus of the job." It generally does not apply to New York City residents applying for jobs outside the City, even if the company's headquarters and HR team are based in New York City.[3]

The FCA includes additional requirements beyond delaying criminal inquiries and background checks until after a conditional offer, including requiring employers to conduct an Article 23-A analysis before a criminal record can be used to take an adverse employment action, and additional

1 *See* New York City's Fair Chance Act (Int. 0318-2014); *see also* NYC Commission on Human Rights, Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015), https://www1.nyc.gov/site/cchr/law/fair-chance-act.page.

2 The New York City Commission on Human Rights ("Commission") has indicated that it interprets the FCA as requiring a two-step, bifurcated screening process, specifically 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). It has stated that its interpretation is based on a reading of the FCA's "conditional offer" language to require that the final stage of the screening process be conditioned solely on the criminal background check. Recent activity has indicated that the Commission may be pursuing this two-step screening process with employers in New York City. For additional information, please see our News to Note.

3 Michelle Gyves, *NYC Commission on Human Rights Clarifies Background Screening Laws*, Proskauer (Nov. 21, 2015), https://www.lawandtheworkplace.com/2015/11/nyc-commission-on-human-rights-clarifies-background-screening-laws/.

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notice requirements that go beyond the federal Fair Credit Reporting Act (FCRA). The law includes some narrow exceptions, including when hiring for positions where a criminal background check is legally required or when employment is barred based on criminal history, as well as when a criminal background check is required by the rules of a self-regulatory organization (SRO).

Ensuring compliance with the various FCA requirements has become particularly important recently due to the New York Court of Appeals' recent decision in Chauca v. Abraham, where the court concluded that punitive damages are appropriate under the FCA in cases with "conduct having a high degree of moral culpability which manifests a conscious disregard of the rights of others or conduct so reckless as to amount to such disregard"—a standard that requires neither a showing of malice nor awareness of the violation of a protected right (and is much broader than the standard under Title VII of the federal Civil Rights Act of 1964).

1. Pre-Conditional Offer Requirements

During the period of 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. Employers should ensure that their practices are fully compliant with this requirement and that no background checks are being ordered until after a conditional offer is made. **If your organization is ordering screening reports in NYC, the assumption is that you have already extended a conditional offer of employment to the individual.**

In line with this requirement, the FCA also requires employers to delay asking applicants for authorization to obtain a background check until after a conditional offer of employment is made. The law 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 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.[4] **Thus, employers must**

4 Legal Enforcement Guidance on the Fair Chance Act, *supra* note 1, at 4-5.

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ensure that applicants are only being asked to authorize the procurement of a background check after a conditional offer of employment is made.

The FCA allows an applicant to refuse to respond to any prohibited inquiry or statement. Such refusal or response to an illegal question cannot disqualify the applicant from the prospective employment.[5]

2. Post-Conditional Offer Requirements

After a conditional offer is made and the criminal history inquiry and background check become permissible, there are additional requirements under the FCA that may apply, including the Article 23-A evaluation requirement.

After extending a conditional offer of employment, employers are permitted to inquire into an applicant's criminal history, but such inquiries must be limited to only pending arrests or conviction records.[6] If an employer learns about criminal record information at this time and contemplates taking an adverse action based on such information, the employer must first conduct an Article 23-A analysis using the New York City Commission on Human Rights' ("Commission") Fair Chance Act Notice.

This Article 23-A analysis is set forth in the New York State Corrections Law and 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. Both city and state laws prohibit employers from discriminating against applicants based on their prior criminal conviction(s), unless:

1) There is a direct relationship between the previous criminal offense and the specific position sought; or

2) Hiring the individual would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

5 *Id.* at 5.

6 The New York State Human Rights Law makes it an unlawful discriminatory practice for an employer to inquire about or take an adverse action based upon an applicant or employee's prior arrest records or a criminal accusation that is not currently pending against that individual, or which has been resolved in favor of that individual, resolved by a youthful offender adjudication or resulted in a sealed conviction. *See* New York State Human Rights Law § 296(16).

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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:

1) Providing the applicant with a written copy of any inquiry it conducted into the applicant's criminal history;

2) 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

3) 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.[7]

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer. Employers who conduct background checks through consumer reporting agencies (CRAs) can fulfill this obligation by supplying a copy of the CRA's report on the applicant, provided the consumer report is the only information relied upon.

If the employer receives additional information from the applicant after sending the above notices, the employer must examine whether it changes its Article 23-A analysis. If requested by the applicant, the employer must engage in a "constructive conversation" to discuss the employer's conclusions and how the applicant can address the employer's concerns. If, after communicating with an applicant, the employer decides not to hire him or her, it must relay that decision to the applicant.

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.

7 These notice requirements are completely separate from and in addition to the pre-adverse and adverse action notices required by the FCRA.

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3. Exemptions Provided by the FCA

The FCA provides an exemption for and does not apply to the following:

A) Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on criminal history;

B) Employers required by a Self-Regulatory Organization to conduct a criminal background check of regulated persons;

C) Police and peace officers, law enforcement agencies, and other exempted city agencies;

D) Certain city positions designated by the Department of Citywide Administrative Services ("DCAS").

According to the Commission, 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." Other than the employers described in C and D above, "the Commission does not assume that an entire employer or industry is exempt and will investigate how an exemption applies to a particular position or role. Positions that are exempt from the FCA are not necessarily exempt from Article 23-A."[8]

A. Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment base on criminal history

"The FCA does not apply to the actions of employers or their agents that are taken pursuant to any state, federal, or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. The purpose of this exemption is to not delay a criminal background inquiry when the results of that inquiry might legally prohibit an employer from hiring an applicant."[9]

However, the Commission has indicated that the exception for situations in which employment is barred based on criminal history applies only if the employer's decision is compelled by law. If the employer's choice is

8 Legal Enforcement Guidance on the Fair Chance Act, *supra* note 1.
9 *Id.*

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discretionary, then the FCA applies. "A network of federal, state, and local laws creates employment barriers for people with criminal records. The Commission characterizes these barriers as either mandatory or discretionary. Mandatory barriers require a licensing authority or employer to deny applicants with certain convictions enumerated in law. Discretionary barriers allow, but do not require, a licensing authority or employer to deny applicants with criminal records, and may or may not enumerate disqualifying convictions. The FCA controls any time an employer's decision is discretionary, meaning it is not explicitly mandated by law."[10]

For example, state law contains mandatory barriers for – and requires background checks of – applicants to employers regulated by the state Department of Health ("DOH"), Office of Mental Health ("OMH"), and Office of People with Developmental Disabilities ("OPWDD"). These agencies require the employers they regulate to conduct background checks because the agencies are charged by state law to ensure that individuals with certain convictions are not hired to work with vulnerable people. Employers regulated by DOH, OMH, and OPWDD are therefore exempt from the FCA when hiring for positions where a criminal history check is required by law. For positions that do not require a criminal history check, however, such employers have to follow the FCA."[11]

Further, the Commission has stated that the "FCA applies when an employer hires people who require licensure, or approval by a government agency, even if the license has mandatory barriers. In that case, an employer can only ask whether an applicant has the required license or can obtain one within an acceptable period of time. Any inquiry into the applicant's criminal record – before a conditional offer of employment – is not allowed. An applicant who has a license has already passed any criminal record barriers and been approved by a government agency. An applicant who cannot, because of her or his conviction record, obtain a required license may have her or his conditional offer withdrawn or employment terminated for such legitimate nondiscriminatory reason."[12]

B. Employers required by a Self-Regulatory Organization to conduct a criminal background check of regulated persons

10 *Id.*

11 *Id.*

12 *Id.*

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> "Employers in the financial services industry are exempt from the FCA when complying with industry-specific rules and regulations promulgated by a self-regulatory organization ("SRO"). This exemption only applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the FCA."[13]

An employer claiming an exemption must be able to show that the position falls under one of the categories in Section VII of the Commission's Guidance. "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 from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

- Which exemption(s) is claimed;
- How the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption under Sections VII(A) or (B) of the Commission's Guidance;
- A copy of any inquiry, as defined by Section V(A) of the Guidance, along with the name of the employee who made it;
- A copy of the employer's Article 23-A analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant's criminal history."[14]

Conclusion

Compliance with the Fair Chance Act, 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.

13 *Id.*
14 *Id.*

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