
New York City Bars Employers from Considering Criminal History before Extending a Job Offer

By Julia E. Judish and Kenneth W. Taber

On June 29, 2015, Mayor de Blasio signed the Fair Chance Act, a new law that generally prohibits New York City employers from discriminating against job applicants with a criminal record and that prohibits inquiries about applicants' criminal records before a job offer is extended. The law applies to all private-sector New York City employers with four or more employees. For purposes of calculating coverage, the Act includes individual independent contractors performing work for the employer, if those individuals do not themselves have employees. The law becomes effective on October 27, 2015, which is 120 days after the Mayor signed the bill into law.

The Fair Chance Act now defines as unlawful employment discrimination denying employment to any applicant or taking adverse action against any employee because of the individual's criminal conviction history "or by reason of a finding of a lack of 'good moral character,'" based on the individual's criminal history conviction, unless that adverse action meets one of the limited exceptions under New York Correctional Law 23-A. Those exceptions allow a covered employer to reject an applicant or take adverse action against an employee only if there is "a direct relationship between one or more of the previous criminal offenses and the specific ... employment sought or held by the individual," or if continuing to employ the individual "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."

Employers must not specify in job advertisements or other written statements that any position entails restrictions based on criminal records, unless expressly allowed by law (e.g., for law enforcement agencies). Under the Act, an employer must not "[m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant." A prohibited "statement" under the Act "means a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal

background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check.” Because the federal law Fair Credit Reporting Act (“FCRA”) requires that employers using third parties to conduct background checks of applicants must obtain authorization for the background check from applicants, New York City employers should consider waiting to request FCRA authorization until after an offer has been extended or expressly excluding criminal history from the scope of any FCRA authorization form provided to applicants before the offer stage.

Post-offer inquiries about criminal conviction history are permissible, but they must be in writing, and the employer must conduct an individualized evaluation of any criminal conviction it discovers pursuant to the factors under existing New York State law. The required factors for consideration in conducting the mandatory analysis are:

- (a) The public policy of the State of New York, as expressed in N.Y. Correction Law Art. 23-A, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b) The specific duties and responsibilities necessarily related to the employment sought or held by the person.
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) 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.
- (i) The private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

If the employer takes an adverse action based on the individual’s conviction record, the employer must provide a written copy of the individualized analysis to the applicant and explain the reasons for the adverse action. The employer must then hold the position open for at least three business days, in order to allow the applicant to respond.

In no event may an employer inquire about or base an employment decision on an applicant’s or employee’s arrest record, unless those criminal charges are still pending. Employers also may not inquire about, or base an employment decision on, a youthful offender adjudication or a sealed conviction.

The Fair Chance Act does not apply to positions for which an employer is subject to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history.

In enacting this law, New York City joins a growing list of jurisdictions with so-called “Ban the Box” laws that seek to improve opportunities for individuals with criminal records to obtain gainful employment and lead productive lives. Pillsbury’s August 13, 2014 [Client Alert](#) addressed similar “Ban the Box” laws in other states and localities.

If you have any questions about the content of this alert, please contact the Pillsbury attorney with whom you regularly work, or the authors below.

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