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Expert Analysis

New City Law Limits Use of Criminal Background in Employment Process

New York City recently amended its Human Rights Law pursuant to a statute known as the Fair Chance Act (FCA). The new law materially impacts how and when a New York City employer may (i) obtain the criminal conviction and pending arrest history of a job applicant, and (ii) make an adverse employment decision based on such information.[1] The NYC Commission on Human Rights (HRC), on Nov. 20, 2015, issued a Legal Enforcement Guidance identifying per se violations of the act, and extensive compliance and "best practices" recordkeeping obligations.[2]

The FCA, among other things, provides that "unless specifically required or permitted by any other law," it "shall be an unlawful discriminatory practice" for "any person" to (i) deny employment to an applicant or act adversely upon an employee by reason of, or (ii) make an inquiry[3] regarding, "any arrest or criminal accusation" when such denial or adverse action would violate N.Y. Exec. Law §296(16).[4] Admin. Code, §8-107(11) (a) and (b).

The act also makes it unlawful for "any employer, employment agency or agent," either directly or indirectly, to advertise, solicit, or publish an employment limitation based on an arrest or criminal conviction, or inquire into "the pending arrest or criminal conviction record of any person who is in the process of applying for employment" until after employer or agent has "extended a conditional offer of employment." See Admin. Code §8-107(11a)(a)(1) and (2).[5]

Aspects of the Law

Public Policy Underlying the FCA. The act "reflects the City's view that job seekers must be judged on their merits before their mistakes" and "is intended to level the playing field" so New Yorkers "who have been arrested or convicted of a crime 'can be considered for a position among other equally qualified candidates,' and 'not overlooked during the hiring process simply because they have to check a box.'" Guidance, Sec. I at 1. In seeking to implement this commendable policy, however, the act and HRC Guidance create risks and burdens for employers.

By **Lawrence D. Bernfeld**

The Scope of the Act. The FCA delays inquiry into an applicant's conviction history until the employer makes a "conditional offer of employment." HRC's Guidance interprets "applicant" to encompass potential and current employees, and states the provisions of the act apply throughout the "hiring process," which includes "hiring, termination, transfers, and promotions." Guidance, Sec. II at 2.

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The Interplay Between the FCA and Various Criminal Law Statutes. "Conviction history" consists of "[a] previous conviction of a felony or misdemeanor under New York law, or a crime as defined by the law of another state." "Non-convictions" encompass a criminal action not currently pending that concluded in (i) termination favoring the individual, even if not sealed (CPL §160.50), (ii) a youthful offender adjudication, even if not sealed (CPL §720.35), (iii) conviction of a sealed non-criminal violation (CPL §160.55), or (iv) convictions sealed under CPL §160.58. Guidance, Sec. I at 3.[6]

Exemptions From FCA Coverage. The FCA "shall not apply" to (i) applicants seeking employment for positions such as police or peace officer, or at a law enforcement agency [Admin. Code § 8-107(11a) (f)(1)] or (ii) actions taken "pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history."[7] "Federal law" includes "rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934." Admin. Code §8-107(11a)(e).[8]

Processes and Information

The FCA prohibits employers from inquiring into or considering criminal history before making a conditional offer. Admin. Code §8-107(11-a) (a)(2); Guidance, Sec. IVA at 4-5. After extending the offer, an employer may "inquire about the applicant's arrest or conviction record." See Admin. Code §8-107(11-a)(b).[9] Should an applicant inadvertently disclose criminal record information, the Guidance suggests the employer "should state that, by law, it will only consider the applicant's record if it decides to offer her or him a job." Similarly, if the applicant asks about criminal background checks, the employer should state any check "will be conducted only after a conditional offer of employment" is made. The Guidance recites that the employer "must then move the conversation to a different topic." Employers making "a good faith effort to exclude [such] information…before extending a conditional offer of employment will not be liable under the FCA." Guidance, Sec. IV-A at 5.

The Fair Chance Process:

> 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.…[A]pplicant must be able to see and challenge the same criminal history information relied on by the employer.

(Emphasis added.) Guidance, Sec. V-A at 8; see Admin. Code §8-107(11-a)(b).

An employer that hires a consumer reporting agency (CRA) to conduct a background check may satisfy its obligation to provide such information by supplying the CRA report. HRC observes: "CRAs can be held liable for aiding and abetting discrimination under the NYCHRL," and therefore advises CRAs to "ensure that their customers only request criminal background reports after [making] a conditional offer of employment." Guidance, Sec. V-A at 8.

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Article 23-A Analysis

Article 23-A of the New York Correction Law "has long protected people with criminal records from employment discrimination." Guidance, Sec. I at 1.[10] The City nonetheless has:

> determined…such discrimination still occurred when applicants were asked about their [criminal] records before completing the hiring process because many employers were not weighing the [Article 23-A] factors[.]

Guidance, Sec. I at 1-2. The FCA accordingly requires employers, before taking adverse action based on an inquiry response, to provide the applicant with a written Article 23-A analysis. Admin. Code §8-107(11-a)(b); see Guidance Sec. VB at 9.

HRC recently issued a model Fair Chance Notice that an employer may use or adapt to provide the Article 23-A analysis.[11] The act requires an employer "to evaluate each Article 23-A factor and…articulate its conclusion." It is insufficient to list factors, since "[b]oilerplate denials…violate the FCA." The Notice must advise that the applicant has "time to respond" and to provide "evidence of rehabilitation and good conduct." Guidance, Sec. VB at 9.

Steps That Must Precede Withdrawal of a Conditional Offer. The employer may not base an adverse decision on criminal history unless the conduct has a direct relationship to the job or would create unreasonable risk to the property, safety, or welfare of specific individuals or the general public. See N.Y. Corr. L. §752.

Employers must take the Article 23-A factors into account, including time passed since a criminal conviction; applicant's age at the time of the offense; the seriousness of the conviction; and evidence of rehabilitation and good conduct. Other factors include: duties and responsibilities of the prospective position; how the offense may bear on applicant's fitness or ability to perform the job; New York's public policy encouraging employment of individuals having criminal records; and the employer's legitimate interest in protecting property, safety, and welfare of specific individuals or the general public. Guidance Sec. IV-C at 6-7.

Presumptions

The act does not preclude the employer from making an adverse employment decision for reasons unrelated to an applicant's prior criminal history. Admin. Code §8-107(11-a)(c). Also, should the employer obtain new criminal background information after making a conditional offer, it may revoke the offer if the employer (i) could not reasonably have known of such information before extending the offer, and (ii) "can show the information is material to job performance." Guidance, Sec. II at 2. HRC, however, interprets the act to isolate the conditional employment offer in a way that could block the employer from making an adverse decision based on reasons that previously would have constituted legitimate grounds for denying employment.

HRC "will presume, unless rebutted" that the applicant's criminal record *motivated* the employer to withdraw a conditional offer. HRC also "will presume that any reason known to… employer *before* [making] its conditional offer is *not* a legitimate reason to later withdraw the offer." (Emphasis added.) Guidance, Sec. IX at 13. Additionally, HRC has proposed consequential "best practices" recordkeeping guidance that would apply when an employer wishes to rely on an exemption, and whenever an inquiry results in the employer obtaining the applicant's criminal history.[12]

When the employer makes a criminal background inquiry, it must give the applicant a reasonable time (at least three business days from documented notice) to "address any errors in employer's background report," during which time the employer must hold open the conditional offer. Admin. Code §8-107(11-a)(b)(iii). After considering such additional information, the employer may choose not to hire the applicant but must relay the adverse decision to the applicant. Guidance, Sec. V C at 9.

HRC's presumptions, best practices, and procedural requirements could lead employers to make early adverse decisions rather than to extend conditional offers. Employers could make such early decisions for reasons that would not require them to obtain the applicants' criminal background. Those reasons could include subjective reactions to gaps in resumes or employment applications.

Relief from Article 23-A Obligations Where Employer Concludes Applicant Has Made a Misrepresentation Concerning Criminal Background. Discrepancies may exist between (i) criminal history applicants disclose during the Fair Chance Process (Guidance, Sec. V at 8-10) and (ii) information the employer obtains through background reports received after making a conditional offer. If the applicant "cannot or does not demonstrate…any discrepancy due to…error," and the employer concludes the applicant has made a misrepresentation, the employer may "choose not to hire" the applicant and "need not evaluate…applicant's record under Article 23-A." Guidance, Sec. VCi and ii at 10.

Per Se Violations

The act identifies what HRC describes as per se violations, and creates various compliance obligations. E.g., Guidance, Secs. III, IV, and V. The act may also expose the employer to commission sanctions. Guidance, Sec. IX at 13. The per se violations, among others, include advertising "background check required," asking about the applicant's criminal background before making a conditional employment offer, and withdrawing a conditional offer before completing the Fair Chance Process. Guidance, Sec. III at 4.[13]

HRC also may impose civil penalties for violations of the act. Guidance, Sec. IX at 13. Applicants seeking to vindicate their rights may file a complaint with the HRC Law Enforcement Bureau within one year or in the State Supreme Court within three years of an alleged discriminatory act. Guidance at 1.

1. New York City Administrative Code ("Admin. Code") §8-107(11) and (11-a).

2. The Legal Enforcement Guidance reflects HRC's interpretation of the act and will likely be the basis for rules HRC will propose (see Admin. Code §8-105[11]) as part of a formal rulemaking process pursuant to New York City Administrative Procedure Act Sec. 1043. Until then, employers and employees may expect HRC when conducting enforcement proceedings to act in accordance with its Guidance. New York courts may also consider the Guidance in evaluating applicant challenges to adverse employment decisions.

3. An "inquiry" under the act includes any question to an applicant and any search of publicly available records or consumer reports to obtain the applicant's criminal background information. A "statement" is a communication made to obtain "applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check." Admin. Code §8-107(11-a)(a)(2).

4. See fn. 6, infra.

5. A "conditional offer of employment" is one an employer may revoke only based on (a) the results of a criminal background check, (b) the results of a medical exam permitted under the Americans with Disabilities Act, or (c) information employer could not reasonably have known prior to making the conditional offer if, based on such information, employer (i) would not have made the employment offer, and (ii) can show the information is material to job performance. Guidance, Sec. II at 2. An offer to be placed in a temporary help firm's "general candidate pool shall constitute a conditional offer of employment." Admin. Code §8-107(11-a)(a)(2); see Guidance, Secs. II at 2 and VI at 10.

6. New York Executive Law §296 makes it an "unlawful discriminatory practice, unless required or permitted by statute" to inquire about or take adverse employment action based upon an "arrest or criminal accusation" that, in substance, would constitute a "non-conviction" within the meaning of the Guidance. Sec. I at 3.

7. Admin. Code §8-107(11-a)(e); see HRC Guidance, Sec. VII at 10-12.

8. "[E]mployers 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)." However, "[t]his exemption *only* applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the FCA." (Emphasis added.) Sec. VII-B at 11.

9. The interplay between the FCA and N.Y. Exec. Law §296(16) suggests that when an employer has made a conditional employment offer, subject to pertinent FCA provisions the employer may inquire into and take adverse employment action based on a pending arrest.

10. Violation of Article 23-A is an independent unlawful discriminatory practice under the NYCHRL. See Admin. Code §8-107(10).

11. The HRC form of Notice providing an Article 23-A analysis is available on the HRC website at http://www.nyc.gov/html/cchr/downloads/pdf/FairChance_Form23-A-distributed.pdf.

12. The Guidance, for example, states employers:

> claiming an exemption must…show…the position falls under one of the categories [of exemption identified] in Section VII of this Guidance[,]…should inform applicants of the exemption they believe applies[,] and keep a record of [reliance on] such exemptions for…*five (5) years* from the date [employer uses] an exemption…. (Emphasis added.)

"Keeping an exemption log will help…employer respond to Commission requests for information.…Employers may be required to share their exemption log with the Commission. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices." Sec. VIII at 12.

13. The FCA is enforceable against public agencies in a CPLR Article 78 proceeding, and by HRC against private employers through an administrative procedure. Admin. Code §8-107(11 a)(g).