

Effective July 28, 2021

## NEW YORK CITY EXPANDS FAIR CHANCE ACT

<https://legistar.council.nyc.gov/LegislationDetail.aspx?ID=3786108&GUID=4A060880-19DB-443B-8F74-D3F567F64A9F&Options=&Search=>

The Fair Chance Act (FCA) was enacted in 2015 and generally covers New York City employers with four or more employees. It prohibits most inquiries into applicants' criminal history until *after* a conditional offer of employment. Before a conditional offer of employment can be withdrawn due to criminal history, the employer must conduct a multi-factor assessment set forth in New York Correction Law Article 23-A.

### FCA EXPANSIONS

Taking effect July 28, 2021, changes in the Fair Chance Act include:

- **Expansion of “criminal history” scope to include pending arrests and other “criminal accusations.”** The Fair Chance Process must be applied in considering pending arrest or other “criminal accusation,” not just convictions, before rescinding a conditional job offer.
- **Addition of new factors to be considered in an individualized assessment for pending arrests or criminal charges, or employee convictions that occur during employment.** Notably, for pending matters, the employer must consider whether the applicant is age 25 or younger at the time of the offense
- **Prohibition of any inquiry at any time concerning specified criminal history matters.** At no time may an employer inquire about or take an adverse employment action against an applicant or employee based on that person's (i) violations; (ii) non-criminal offenses; (iii) non-pending arrests or criminal accusations; (iv) adjournments in contemplation of dismissal; (v) youthful offender adjudications; or (vi) sealed offenses, if disclosure of such matters would violate the New York State Human Rights Law.
- **Requiring employers to solicit from applicants information related to the Fair Chance Process.** Currently, the FCA only requires employers to solicit evidence of rehabilitation and good conduct. Under the expansion, employers must solicit *any* information relevant to the applicable fair chance factors.
- **Expands the time applicants have to respond to the employer's written assessment from three to five business days.**
- **Codifies guidance from the New York City Commission on Human Rights on when an employer may revoke a conditional offer of employment.** Employers may only revoke the conditional offer based on (i) the findings of a criminal background check following an individual assessment conducted pursuant to the Fair Chance Process, (ii) the results of a medical examination, consistent with the Americans with Disabilities Act; or (iii) other information obtained by the employer after making the conditional offer, if the employer could not be reasonably expected to have that information prior to making the offer and the employer would not have made the offer if it had possessed such information.
- **Requires providing evidence to the applicant or employee where the employer takes adverse action pursuant to an alleged misrepresentation by the applicant/employee.** The expanded Law continues to allow an employer to rescind a job offer based on applicant misrepresentation but will require that it provide the employee or applicant with the documents or other materials that support the employer's claim of misrepresentation and permit the individual a “reasonable” amount of time to respond prior to taking the adverse action.

### RECOMMENDED ACTIONS IN PREPARATION FOR JULY 28, 2021

Employers with operations in New York City should take steps to ensure compliance, including:

- Updating criminal background check policies and processes to ensure compliance with the new Law.
- Reviewing employment and background screening related forms.
- Training human resources personnel, as well as supervisors and managers, on any changes made to current policies and practices pursuant to the Law.

- NOTE: This information is offered as general direction and in no way should be construed or accepted as legal advice. Each individual employer may have particular regulatory and other requirements which may alter this general direction. Furthermore, each individual position may have unique duties, responsibilities, and characteristics which may influence this general direction.