

August 7, 2017

New York City Commission on Human Rights Adopts Rules Implementing the Fair Chance Act; Proposes Rules Implementing the Stop Credit Discrimination in Employment Act

The New York City Commission on Human Rights (the Commission) recently published [final rules](#) to clarify the procedures and application of the New York City Fair Chance Act. The rules became effective on August 5, 2017. In addition, the Commission also recently issued [proposed rules](#) implementing the Stop Credit Discrimination in Employment Act and is accepting public comments on the proposed rules through August 17, 2017. The effects of both of these developments are addressed below.

The Fair Chance Act

As we described in a previous [client advisory](#), the Fair Chance Act (FCA) prohibits employers from asking about a job applicant's criminal history until after they make a conditional offer of employment. If an employer wishes to rescind a conditional offer of employment, it must first conduct the Article 23-A Analysis to determine if an applicant's criminal history is relevant to the job for which he or she is applying. The Article 23-A Analysis requires employers to consider eight factors, such as the applicant's age at the time of conviction, to determine if (1) there is a "direct relationship" between the applicant's criminal conviction and the employment sought or (2) hiring the applicant would involve an "unreasonable risk" to property or the safety and welfare of specific individuals or the general public. An employer may only rescind a conditional offer if a direct relationship or unreasonable risk is present. If the employer wishes to rescind the conditional offer of employment due to

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the 23-A Analysis, it must then follow the “Fair Chance Process”, which consists of (1) providing the applicant with a written copy of all inquiries made to collect information about his or her criminal history; (2) providing the applicant with a written copy of the 23-A Analysis; (3) giving the applicant a reasonable time to respond to the employer’s concerns; and (4) considering any additional information provided by the applicant.

While the final rules largely track the [legal enforcement guidance](#) the Commission published in 2015, there are some critical difference for employers. The rules (1) establish *per se* violations of the FCA; (2) clarify how the FCA applies to current employees, as opposed to applicants; and (3) potentially narrow the effect of the exemptions to the FCA.

Per Se Violations of the Fair Chance Act

The rules establish six “*per se* violations” of the FCA. A *per se* violation is an action or inaction that, standing alone and without reference to additional facts, constitutes a violation of the FCA. In other words, the *per se* violations create liability regardless of whether any adverse employment action was taken or any actual injury occurred. The following are *per se* violations of the FCA:

- Declaring, printing, or circulating any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history. This includes advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”
- Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding any criminal history prior to a conditional offer.
- Making any statement or inquiry relating to the applicant’s pending arrest or criminal conviction before a conditional offer of employment is extended. An “inquiry” is any oral or written question asked for the purpose of obtaining a person’s criminal history,

including questions in a job interview about an applicant's criminal history, internet searches for a person's criminal history, and requests for background checks from a consumer reporting agency. A "statement" is any communication made, orally or in writing, to a person for the purpose of obtaining criminal history, including stating that a background check is required for a position.

- Using a standard form within New York City, such as a boilerplate job application intended to be used across multiple jurisdictions, that requests or refers to criminal history. Using such a form is a *per se* violation even if it contains disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the New York City Human Rights Law.
- Failing to engage in the Fair Chance Process, or any of the steps of the process, prior to rescinding a conditional offer of employment.
- Requiring applicants or employees to disclose an arrest that, at the time disclosure is required, has resulted in a "non-conviction". A non-conviction means any arrest or criminal accusation, not currently pending, that was concluded by (a) termination in favor of the individual, as defined by the New York Criminal Procedure Law, even if not sealed; (b) adjudication as a youthful offender, even if not sealed; or (c) certain types of convictions that have been sealed under the New York Criminal Procedure Law.

Application of the Fair Chance Act to Current Employees

Until the publication of the final rules, it was unclear how the FCA applied to current employees, as opposed to applicants for initial employment. The final rules make clear that certain portions of the FCA apply only to applicants and employees actively seeking promotion or transfer, while other requirements of the FCA apply to all applicants and all current employees.

- Conditional Offer Requirements: The prohibition on requesting criminal history information until after a conditional offer is made

applies only to applicants for initial employment and current employees who are seeking or being considered for promotions or transfers. Thus, if an employer wishes to conduct a criminal background check on a current employee that is not actively seeking or being considered for a promotion or transfer, the employer may request a criminal background check without conditionally offering to retain the employee. For example, an employer may request a criminal background check for an employee during an internal investigation or where the employer learns of recent employee criminal activity without conditionally offering to retain the employee.

- **Fair Chance Process**: The requirement that employers engage in the Fair Chance Process before taking adverse action due to an individual's conviction history applies to both applicants and current employees, regardless of whether a current employee is seeking or being considered for a promotion or transfer. Thus, employers must engage in the Fair Chance Process before rescinding a conditional offer of employment due to an applicant's criminal history *and* prior to taking any adverse action against a current employee due to his or her criminal history.

Exemptions to the Fair Chance Act

Certain positions are exempt from the FCA. However, the rules create some uncertainty regarding the actual effect of these exemptions.

The FCA states that its substantive provisions – including the requirements that a conditional offer is made prior to a criminal history inquiry and that employers follow the Fair Chance Process prior to rescinding a conditional offer – do not apply to “any actions taken by an employer or agent thereof pursuant to any state, federal, or local law that requires criminal background checks for employment purposes or bars employment based on criminal history.” Federal law is defined to include rules or regulations promulgated by a self-regulatory organization as defined by the Securities and Exchange Act, such as FINRA. In other words, the text of the FCA suggests that when an exemption applies, an employer does not need to make a conditional offer prior to inquiring

about criminal history or follow the Fair Chance Process before rescinding an employment offer.

However, the rules seem to limit the actions an employer may take when this exemption applies: According to the rules, if a federal, state, or local law bars employment with respect to a particular type of conviction, an employer may (1) notify applicants of the specific mandatory bar to employment prior to a conditional offer, (2) inquire at any time during the application process whether an applicant has been convicted of *the specific crime* that is subject to the mandatory bar to employment, and (3) disqualify any applicant or employee *with such criminal history* without following the Fair Chance Process.

Thus, even if the exemption applies, the rules suggest that the exemption is not a total one. Rather, the employer is still restricted in the type of criminal history it may ask about before a conditional offer and is only exempt from the Fair Chance Process if the applicant has the specific type of criminal history prohibited by state, federal, or local law. Given that the rules seem to limit the exemptions further than the text of FCA, it is unclear whether the Commission could enforce its interpretation of the exemptions.

The rules do expand the reach of the exemption for positions regulated by a self-regulatory organization, such as FINRA: The Fair Chance Process does not apply where the rules or regulations of a self-regulatory organization require criminal background checks or bar employment based on criminal history. This exemption now includes positions for which applicants are not required to be registered with a self-regulatory organization, if the applicant nevertheless either chooses to become registered while in the position or elects to maintain prior registration. However, as noted above, this exemption may still be limited. The rules seem to suggest that even in this situation, the employer is restricted in the type of criminal history it may ask about before a conditional offer and is only exempt from the Fair Chance Process if the applicant has the specific type of criminal history prohibited by the self-regulatory organization.

The Stop Credit Discrimination in Employment Act

The Commission also recently proposed rules to implement the Stop Credit Discrimination in Employment Act (SCDEA). As described in a previous [client advisory](#), SCDEA prohibits employers from requesting or considering employees' or job applicants' consumer credit history (such as by requesting a credit check) when making decisions regarding hiring, compensation, or other terms and conditions of employment, with limited exceptions for particular positions.

The proposed SCDEA rules largely track the [legal enforcement guidance](#) published by the Commission in 2015. Most notably, the proposed rules:

- Explicitly state that an employer may not ask applicants to sign a waiver authorizing a credit check, unless an exception to the law applies.
- Create an exemption from SCDEA for positions in which applicants or employees are not required to be registered with a self-regulatory organization, such as FINRA, but where the applicant or employee nevertheless either chooses to become registered while in the position or elects to maintain their prior registration. This exemption only applies where the regulations of the self-regulatory organization require a consumer credit check for purposes of registration.
- Clarify the exemption from SCDEA for positions in which the individual has signatory authority over funds valued at \$10,000 or more. This exemption applies only where the individual has (1) signatory authority over third party funds or assets that are valued at \$10,000 or more or (2) fiduciary responsibility to an employer who has granted the employee *unrestricted or final authority* to enter into financial agreements valued at \$10,000 or more on behalf of the employer. The proposed rules further clarify that this exemption does not apply to positions for which the \$10,000 threshold can be met only by aggregating the value of multiple assets or agreements over which the position holds signatory authority or fiduciary responsibility. For example, the fact that an

employee will have a company credit card with a \$10,000 credit limit is unlikely to exempt the employee from SCDEA.

The Fair Chance Act rules became effective on August 5, 2017. Public comments on the proposed rules implementing the Stop Credit Discrimination in Employment Act must be submitted by August 17, 2017. If you have any questions about how the new and proposed rules impact your current application and background check procedures, please contact Amanda M. Baker at (212) 758-7724, or any other attorney at the Firm.