

The New York City Commission on Human Rights (NYCCHR) has issued a [Legal Enforcement Guidance](#) and [Frequently Asked Questions About New York City's Employment Protections Based on Criminal History](#). These publications provide additional guidance to employers on the new Fair Chance Act (FCA) requirements that apply to background checks of applicants and employees. Notably, this guidance indicates that as a result of the amendments to the FCA, employers now need to bifurcate their background check process into two steps:

- **Step 1:** Obtain the non-criminal background check report (i.e., checks of references, educational history and employment history – note that this should not include a check on motor vehicle records, since driving records can contain criminal information). This happens before a conditional offer of employment is made. The appropriate FCRA disclosure and authorization forms must be obtained from the candidate before the employer runs the non-criminal background check report, and the appropriate FCRA notice procedures should also be followed if anything concerning comes up in the non-criminal background check report.
- **Step 2:** After all non-criminal information (including the information in the non-criminal background check report) has been evaluated and a conditional offer of employment has been made, the employer may obtain a criminal background check report (which can include driving records). (There is no need to obtain new FCRA disclosure and authorization forms if the forms provided and received in connection with the non-criminal background check report cover both the non-criminal and criminal reports). The appropriate FCRA notice procedures and NYC Fair Chance Process (described below) should be followed if anything concerning comes up in the criminal background check report.

Under the amended FCA, a conditional offer can only be rescinded/withdrawn for the following reasons:

1. The results of a criminal background check, conducted in accordance with the provisions of the FCA;
2. The results of a medical exam as permitted by the Americans with Disabilities Act; and/or
3. Other information the employer could not have reasonably known before making the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.

The NYCCHR has indicated that employers should work with their background check vendors to obtain separate noncriminal and criminal background check reports. If two separate reports are not possible, employers should determine a method of segregating criminal from non-criminal information when reviewing background check results. Employer may also need to review the language in their offer letter to reflect this new two-step process.

# Amendments Expanding NYC'S "Ban-the-Box" Law Take Effect on July 29

## The Bottom Line

- The Amendments to the FCA will expand the reach of New York City's existing ban-the-box law.
- Employers should review and consider revising their hiring and employment practices before the Amendments take effect on July 29, 2021, and be on alert for additional guidance.
- Employers that decide not to hire a candidate, or take adverse action against a current employee, because of the individual's criminal history should first consult with counsel to make sure the FCA's requirements are followed.
- Employers should work with their background check vendor to ensure they are in compliance with the amended law.

The New York City Council enacted several [amendments](#) to the City's Fair Chance Act (the FCA) on January 10, 2021, which take effect on July 29, 2021. The Amendments expand on the protections already provided to job applicants under the FCA as noted in our prior [alert](#), most notably by modifying the FCA's required "Fair Chance Process" and applying the law's coverage to include:

- Current employees in addition to applicants, and
- Pending arrests and criminal accusations in addition to convictions

## The FCA's Current Requirements

Under current law, the FCA prohibits NYC employers from:

1. Referencing a criminal background check or indicating any limitation on employment based on a person's criminal history in a job application or job posting, or
2. Inquiring about an applicant's criminal history or conducting a criminal background check before a conditional offer of employment is made.

Even after a conditional offer, the FCA prohibits an employer withdrawing such an offer based on an applicant's criminal history without first going through the Fair Chance Process.

The Fair Chance Process requires an individualized analysis to determine whether either the criminal history is directly

related to the position, or if hiring the applicant would create an unreasonable risk to property, safety or welfare. This analysis must take into account the eight [“Fair Chance Factors”](#).

The employer must also disclose the results of the criminal background check to the applicant, provide its written analysis of the Article 23-A factors, give the applicant a reasonable time to respond and consider any additional information they provide.

## The FCA Amendments

### Broader Scope

The Amendments broaden the scope and impact of the FCA in several ways.

1. While the current law protects only job applicants, the Amendments will apply the FCA to current employees as well. (As of January 11, 2020, when the New York City Human Rights Law was expanded to cover gig workers, this includes current and prospective freelancers and independent contractors as well.)
2. While the current law prohibits employers from inquiring about and basing employment decisions on criminal convictions, the Amendments extend the law’s coverage to pending arrests and criminal accusations.
3. The Amendments prohibit employers from making inquiries or basing employment actions on “violations” (meaning a criminal offense for which no more than 15 days imprisonment can be imposed), non-criminal offenses or adjournments in contemplation of dismissal.
  - As has long been the case, employers may not inquire about or consider sealed conviction records, youthful offender adjudications or arrests that did not result in a conviction.

### Different Fair Chance Factors

The Amendments slightly modify the Fair Chance Factors an employer must consider before withdrawing a conditional offer based on:

1. Criminal matters pending at the time the person applies for a job, and
2. Arrests and convictions occurring during employment.

For instance, the Amendments replace length of time since the offense occurred as a Fair Chance Factor with whether the person was 25 years of age or younger at the time of the offense. The Amendments also bolster the “information regarding rehabilitation and good

conduct” factor to further specify that an employer must consider information provided regarding the person’s rehabilitation or good conduct, “including history of positive performance and conduct on the job or in the community, or other evidence of good conduct.” For convictions preceding employment, employers should still consider the Fair Chance Factors listed in [Article 23-A](#).

### **Modifications to the Fair Chance Process**

Before withdrawing a conditional offer of employment from an applicant or taking action against a current employee based on the person’s criminal history, an employer must now go through a slightly modified version of the Fair Chance Process.

1. The employer must disclose the results of its criminal background check to the applicant or employee.
2. The employer must affirmatively request information from the applicant or employee that relates to the relevant Fair Chance Factors (this step was not previously required before the Amendments).
3. After requesting relevant information from the applicant or employee, the employer must perform an analysis considering the applicable Fair Chance Factors, and provide the individual with a written copy of its analysis.
4. Finally, the employer must allow the applicant or employee a reasonable time to respond, while holding the position open, and consider any additional information they provide.

For applicants, the Amendments define a “reasonable time to respond” as five business days, whereas current law provides employees only three business days to respond. The Amendments do not define a “reasonable time to respond” for current employees, but pending further guidance, employers should consider providing at least five business days. An employer may place the employee on unpaid leave during this time. The Amendments are also silent as to whether an employer must wait a certain amount of time, after requesting relevant information, for the applicant or employee to provide such information before moving on to the written analysis step. Employers should be on the lookout for additional clarifying guidance from the City.

The Amendments also establish a new definition of a “conditional offer,” after which an employer may inquire about and consider criminal history. A conditional offer will now mean an offer of employment, promotion or transfer which may only be revoked based on:

1. The results of a criminal background check after the FCA-required process;
2. The results of a medical exam as permitted by the Americans with Disabilities Act; or

3. "Other information the employer could not have reasonably known before making the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check."
  - Typical employer screening practices, such as reference checks, may not fall into the third "other information the employer could not have reasonably known" category, so employers should consider utilizing such practices before a conditional offer is made.

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### **For More Information**

Please contact the attorneys listed below or the Davis+Gilbert attorney with whom you have regular contact.

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