

September 14, 2015

New York City Council Limits Employers' Ability to Make Employment Decisions Based on Criminal Backgrounds

We reported in a [previous alert](#) that New York City Mayor Bill de Blasio had signed a bill into law limiting employers' use of credit checks for employment purposes. Further restricting the scope of employee background checks, Mayor de Blasio has signed a new law limiting employers' ability to perform pre-offer criminal background checks and otherwise use criminal records in employment decisions (an expansion of limitations previously applicable only to city government agencies). The law, known as the Fair Chance Act, is scheduled to take effect on October 27, 2015.

Criminal Convictions & Arrest Records: The Fair Chance Act reiterates that, with limited exceptions, it is an unlawful discriminatory practice for an employer to deny employment to an applicant or take an adverse action against an employee who has been:

1. Convicted of one or more criminal offenses (or found to lack "good moral character" based on such conviction(s)) unless (i) there is a direct relationship between one or more of the offenses and the employment sought or held by the individual or (ii) hiring or continuing to employ the individual would involve unreasonable risk to property or to the safety or welfare of specific individuals or the general public; or
2. Arrested or facing criminal accusations which ended without conviction or, in certain circumstances, were sealed.

Employers are also not permitted inquire about any arrest or criminal accusation which ended without conviction or, in certain circumstances, were sealed.

Pre-Offer Criminal Background Checks: The Fair Chance Act also makes it an unlawful discriminatory practice to:

1. Declare or advertise that any limitation to or specification for employment is based on a person's arrest or criminal conviction; or
2. Make any inquiry about an applicant's pending arrest or criminal conviction record before a conditional offer of employment is made.

An "inquiry" includes any question communicated to an applicant in writing or otherwise (i.e., during an interview), as well as searches of publicly available records or consumer reports conducted for the purpose of obtaining criminal background information.

After a conditional offer of employment is made to an applicant, an employer may inquire into their arrest or conviction record; however, if an employer then wishes to take an adverse action based on the arrest or conviction record (i.e., revoke the offer), the employer must follow these steps:

1. Provide a written copy of the inquiry to the applicant;
2. Perform an analysis of whether the conviction has a "direct relationship" to the employment sought, or whether hiring would pose an "unreasonable risk" to property, people, or general safety, taking into account factors including (i) the specific duties and responsibilities related to the employment, (ii) the bearing on the applicant's

fitness or ability to perform the duties and responsibilities, (iii) the time elapsed since the criminal offense(s), (iv) the age of the individual at the time of the offense(s), (v) the seriousness of the offense(s) and (vi) any information provided by the individual with respect to his/her rehabilitation and good conduct—and provide the applicant with a written copy of this analysis; and

3. Allow the applicant at least three business days to respond, while holding the position open for him or her.

Exception: The Fair Chance Act does not apply to any adverse actions taken against applicants or employees pursuant to a federal, state or local law that requires criminal background checks for employment purposes or bars employment based on criminal history (including rules or regulations promulgated by self-regulatory organizations, such as FINRA).

Enforcement: The law amends the New York City Human Rights Law, so applicants and employees will have all the remedies available under that statute, including the right to bring a complaint with the New York City Commission on Human Rights (the “Commission”) or pursue a private claim in court. Additionally, the Commission has the power to impose a civil penalty of up to \$125,000 upon a finding of unlawful discriminatory practice (and up to \$250,000 if the unlawful discriminatory practice was found to be the result of a willful act).

Employers with four or more employees in New York City will be subject to these new restrictions beginning in October, and potentially subject to additional rules and regulations. We encourage you to seek legal advice before instituting new policies or practices designed to conform to the new law. Any attorney in the Ropes & Gray [labor and employment department](#) will be able to assist you in this regard.