

The New York City Commission on Human Rights, the agency responsible for enforcing New York City’s Fair Chance Act, has issued its “Interpretative Enforcement Guide.”

The Guidance is intended to provide legal guidance on the Act, although portions of the Guidance also will be subject to future rulemaking. While the Act applies to employment as well as licensure, the emphasis of the Guidance is on employment.

Highlights of the Guidance include the following:

Definitions – The Guidance clarifies a number of terms referenced in the Act or in the Guidance itself:

- “Applicant” includes prospective and current employees.
- The Act applies to the “hiring process,” which includes not only the process of hiring a prospective or current employee for a position, but also the process for making other employment decisions, including transfers and terminations. This means the Act applies not only to pre-employment convictions, but also to convictions during employment.
- A “conditional offer of employment” is one that is revocable only under three

circumstances: (1) results of a criminal background check; (2) results of a medical examination, provided the examination is permitted under applicable law; or (3) discovery of information that (i) an employer could not have reasonably known before the conditional offer, (ii) an employer can demonstrate is material to job performance, and (iii) if known, would have prevented the applicant from receiving an offer.

- An applicant’s “conviction history” covers New York state felonies and misdemeanors, as well as convictions for crimes as they are defined under applicable state law.
- An applicant’s “criminal history” refers to an applicant’s previous record of criminal convictions and non-criminal convictions, as well as any pending criminal cases.
- A “non-conviction” is any non-pending criminal action that concluded in one of four ways: (i) termination of the action in favor of the individual, (ii) adjudication as a youthful offender (sealed or unsealed), (iii) a sealed non-criminal conviction, or (iv) a sealed conviction.

Identification of Per Se Violations – The Guidance sets forth the four separate, chargeable violations of the Act:

1. Declaring, printing, or circulating of employment-related materials that include a limitation or specification regarding criminal history, regardless of whether any adverse action follows. As noted in the Fact Sheet also published by the Commission, statements such as “background check required” or “must have clean record” are per se violations.
2. Making an inquiry prohibited under the Act before a conditional offer of employment, regardless of whether any adverse action follows.
3. Withdrawing a conditional offer of employment without completing the mandatory “Fair Chance Process”: (i) disclosing to an applicant a written copy of the inquiry conducted into the applicant’s criminal history, (ii) sharing a written copy of the Article 23-A analysis with the applicant, and (iii) holding the position open for at least three business days after the applicant received (i) and (ii) above so that the applicant has an opportunity to respond.

4. Taking an adverse employment action based on a non-conviction.

Guidance on Criminal Background Check and Fair Chance Processes – The Guidance

explains the step-by-step process that employers must follow, and the actions and communications that can and cannot take place, at three discrete points: (1) prior to a conditional offer of employment; (2) following a conditional offer of employment; and (3) during an evaluation of the applicant under Article 23-A. The Commission published a model form (*which has been revised since its initial publication*) for use during this internal evaluation and for distribution to the applicant. The Guidance also clarifies that before revoking a conditional offer, an employer must *first* consider the Article 23-A factors and *then also* undertake the Fair Chance Process.

The Guidance also clarifies that if an applicant misrepresents his or her criminal history or fails to demonstrate that a discrepancy between the information he or she disclosed and information collected by the employer was an error, the Article 23-A analysis is not necessary and the employer can choose whether to hire the individual based on the applicant’s misrepresentation.

While the Commission’s Article 23-A analysis is troubling, the Guidance modifies a prior

direction to employers to provide ambiguous responses if candidates inquire into whether they will be subject to a background check. Now, employers asked such question during an interview are advised to tell applicants that a criminal background check will be conducted only after a conditional offer of employment and then they should move on to a different topic. In cases when an employer makes a “good faith effort” to exclude criminal history information prior to extending a conditional offer of employment, there will be no liability under the Act.

Exempt Positions – The Guidance clarifies the four categories of positions exempt under the Act (but not exempt from Article 23-A requirements) and notes that employers have the burden of proving, by a preponderance of the evidence, that the exemption applies. The Guidance also explains that for employers other than city agencies and departments, the Commission will not assume other employers or industries are exempt and, therefore, will investigate applicability of the other exemptions.

Best Practices – The Guidance provides “best practice” suggestions for employers, including:

- Collecting and maintaining inquiry-related documentation separately and confidentially.

- Limiting use, distribution, and dissemination of any information collected only to those individuals involved in the employment decision.
- For employers intending to avail themselves of any of the exemptions, maintaining a detailed “exemption log” for five years.

Enforcement – The Guidance sets forth factors that the Commission will consider when determining civil penalties to assess against employers who violate the Act, including: severity of the violation, whether the employer has any previous or contemporaneous violations of the Act, the size of the employer (based on number of employees and revenue), and whether the employer knew or should have known about the Act.

Additionally, for purposes of enforcement, the Guidance indicates that there is a rebuttable presumption an employer who revokes a conditional offer of employment was motivated by the applicant’s criminal record.

Interplay with State Human Rights Law – The Guidance highlights the fact that although the City and State Human Rights Laws prohibit non-conviction discrimination, the Act must be interpreted independently from the State Human Rights Law and from any applicable federal anti-discrimination laws.

While language elsewhere in the Guidance regarding consideration of pending criminal actions is inconsistent, and the Commission’s model Fair Chance Act Notice makes no direct reference to pending criminal actions, the Guidance states the Act does not prevent an employer from “basing an employment decision on a pending criminal proceeding.” Accordingly, it appears that, to the extent employers wish to consider pending criminal actions, such pending criminal actions should be analyzed in the same manner as convictions under the NYCHRL.

Dissemination of Notices and Disclosures –

In what appears to be an attempt to ease the administrative burden on employers, the Guidance indicates that notices and disclosures can be distributed to applicants in hard copy or communicated via email. However, it also states that email can be utilized only if it “is mutually agreed on in advance by [the] employer and the applicant,” without providing any further guidance as to how this “mutual agreement” can reasonably be reached.

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