Insight

IN-DEPTH DISCUSSION

NOVEMBER 9, 2015

New York City Commission on Human Rights Issues Guidance on Citywide "Ban-the-Box" Law

BY JENNIFER MORA, DAVID WARNER AND ROD FLIEGEL

On November 5, 2015, the New York City Commission on Human Rights (NYCCHR) released its 13-page Interpretative Enforcement Guidance regarding the City's Fair Chance Act (FCA). The FCA, which became effective on October 27, 2015, imposes obligations on covered employers well beyond all other "ban-the-box" laws.[1] The ambitious scope of the Guidance makes this even more apparent, with the Commission expounding at length on protections that ex-offenders enjoy in New York City throughout the hiring process (and even during employment, since the Guidance defines the term "applicant" to include both prospective and existing employees). Covered employers, particularly those with one hiring process used in multiple jurisdictions, including an on-line applicant tracking system or ATS, will want to ensure they closely review the Guidance to identify measures needed to fortify compliance with the FCA.

Although not summarized in this Insight, the Guidance can be found at the NYCCHR's website.[2] This Insight provides a brief overview of the FCA.

The FCA Covers Most NYC Employers

The prohibitions in the FCA were added to the New York City Human Rights Law (NYCHRL), which applies to virtually any employer of four or more persons in New York City.

The FCA also includes several exceptions. Specifically, it does not apply to any criminal history inquiries or adverse actions taken by an employer pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. It also does not apply to any actions taken by an employer against applicants for employment as a police officer or peace officer, including those applying for positions with the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of youth and family services, the business integrity commission, the district attorneys' offices, and other sensitive citywide administrative positions.

---

1 *See* Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Bans the Box*, Insight, (June 12, 2015).

2 Available at http://www.nyc.gov/html/cchr/html/coverage/fair-chance.shtml.

NYC Employers are Restricted in Using and Obtaining Criminal History Information

The FCA now makes it unlawful for an employer or employment agency to issue any solicitation, advertisement or publication that states, either directly or indirectly, any employment limitations or requirements based on a person's history of arrests or criminal convictions.

The FCA also makes it generally unlawful for an employer or employment agency to "[m]ake any *inquiry* or statement related to the pending arrest or criminal conviction record of" most applicants unless and until the applicant has received a conditional offer of employment (emphasis added). For employees of temporary help firms, a conditional offer of employment means an offer to put the applicant in the temporary help firm's general candidate pool.

Prohibited, pre-conditional offer inquiries include "any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information." Thus, employers have to wait until after they have made a conditional offer of employment before (i) asking an applicant about his/her criminal history, and (ii) searching public records to find or otherwise procuring any criminal background information about the applicant.

The statements prohibited by the FCA include verbal or written statements to the applicant for the purposes of obtaining his/her "criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check."

Job applicants need not respond to impermissible inquiries and cannot be disqualified from employment for not responding to them.

Permissible Inquiries

The FCA allows employers to inquire about an applicant's record of arrests, criminal accusations and/or convictions, either directly or through a background check, only *after* making a conditional offer of employment and, in the event the employer ultimately decides to take an adverse action based on the results of such inquiry, it does the following *before* taking that action:

- provides the applicant with a written copy of the inquiry (e.g., using the Commission's Fair Chance Act Notice);
- performs an analysis that considers the eight-factor test in Article 23-A of the New York Correction Law and provides the applicant with a copy of the analysis (using the FCA Notice), the documents the employer relied upon, and a statement as to the reason(s) for the adverse action; and
- allows the applicant at least three business days to respond, *while holding the position open for the applicant to do so.*

Unlawful Employment Practices

The FCA also aims to add to the NYCHRL a new prohibition against denying employment to any applicant or taking an adverse action against any employee "by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of" the New York State Human Rights Law, which prohibits employers from inquiring about or taking adverse actions against persons based on arrests or criminal accusations that are not still pending at the time.

The FCA further expands the NYCHRL's existing prohibition against denying employment to any person in violation of Article 23-A of the New York Correction Law to also bar taking an adverse action against an employee if it would violate that law.

Enforcement

As the FCA is designed to amend the NYCHRL, aggrieved applicants and employees will essentially have all the enforcement mechanisms and remedies available under that law. This includes, for example, a right to file a complaint with the NYCCHR or pursue a claim in court.

Recommendations

Most immediately, employers and employment agencies that employ persons in New York City should consult with experienced employment law counsel to determine whether they are covered by these anticipated amendments to the NYCHRL, and, if so, whether they need to do any the following:

- Revise job applications, interviewing guidelines, and policies and procedures for conducting and evaluating criminal background checks;
- Revise notice letters and the corresponding enclosures, including the notices required by the fair credit reporting laws ("pre-adverse action" and "adverse action" notices);
- Revamp the sequencing and timing of events in the hiring process; and
- Implement guidelines and documentation that comply with the ordinance.

Employers that also operate in Rochester and Buffalo, New York, should assess their hiring and background screening practices given the differences among the various New York ban-the-box laws.

In addition, employers throughout the United States, and particularly multi-state employers, should continue to monitor developments in this and related areas of the law, including laws restricting the use of criminal and credit history information and the fair credit reporting laws.[3]

3 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers,* Littler Report (Aug. 1, 2014).