Insight

IN-DEPTH DISCUSSION

JULY 31, 2017

Final Regulations Clarifying and Expanding New York City "Ban the Box" Law Take Effect on August 5, 2017

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New York City's Fair Chance Act (FCA), which took effect October 27, 2015, imposes affirmative obligations on covered employers and employment agencies regarding when they may conduct criminal background checks on job applicants, and what process must be followed before making an adverse decision on the basis of an applicant's criminal history. It is one of the nation's most comprehensive "ban the box" laws restricting employers' use of criminal history in the employment process.[1] The New York City Commission on Human Rights ("the Commission") released comprehensive interpretive Enforcement Guidance regarding the FCA on November 5, 2015. In February, 2016, the Commission issued proposed regulations, and a public hearing regarding the proposed regulations was held on March 21, 2016.[2]

Over 15 months after the public hearing, in early July 2017, the Commission quietly and without publicity published the final regulations.[3] The final regulations, which take effect on August 5, 2017, expand on and clarify the already burdensome requirements of the FCA, making it more difficult for New York City employers, and particularly national employers doing business in New York City, to screen applicants whose criminal history may affect their ability to do their job or present an unreasonable risk to their business, customers or employees. Employers with a consolidated hiring process used in multiple jurisdictions in particular should carefully review the final regulations to ensure that their process does not constitute a per se violation of the FCA.

Below is a summary of the key provisions of the final regulations.

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

2 *See* Jennifer Mora and Stephen Fuchs, *Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban the Box" Law*, Littler Insight (Feb. 25, 2015)

3 Amending Title 47 of the Rules of the City of New York, § 2-01, and adding a new §2-04.

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Clarification on *Per Se* Violations

The final regulations clarify conduct that the Commission will find to be a per se violation of the FCA, which will subject the employer to liability and/or fines, regardless of whether any adverse action is taken by the employer. Several per se violations relate to the prohibited conduct arising in the pre-conditional offer recruiting, application and interview phase. The following acts are identified as per se violations of the FCA:

- Recruiting materials of any kind, whether applications, solicitations, advertisements policies, publications or otherwise that express, directly or indirectly, any limitation or specification regarding criminal history. Advertisements and applications may have no reference to criminal history requirements, and may not even reference a background check being part of the hiring process.
- Applications that either require applicants to grant the prospective employer permission to run a background check, or to provide information regarding criminal history, prior to a conditional offer.
- Any statement or inquiry relating to pending arrest or criminal conviction during an interview or at any other point prior to a conditional offer being made.
- Use of a standard boilerplate application form for multiple jurisdictions that requests or refers to criminal history, regardless of disclaimers or other language indicating that New York City applicants should not answer specific questions. In other words, a multijurisdictional application with any references to criminal background checks is a per se violation of the FCA.
- Disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about criminal history.
- Asserting, either orally or in writing, that individuals with a criminal history, or with certain convictions, will not be considered or hired.
- Seeking to discover, obtain, or consider the criminal history of an applicant before a conditional offer of employment is made. This includes investigating an applicant's criminal history, including the use of publicly available records or internet searches to learn about the applicant's criminal history, whether conducted by the employer or by a third party.
- Failing to comply with the review and notice process required by the FCA, including:
    1. providing the applicant of a written copy of any inquiry the employer conducted into the applicant's criminal history (the criminal history report);
    2. sharing with the applicant a copy of the employer's Article 23-A analysis;
    3. holding the position open for at least three business days from the applicant's receipt of the inquiry into the applicant's criminal history; or
    4. Requiring an applicant to disclose a "non-conviction" (see below).

Employers are also prohibited from changing the requirements of the position applied for after learning of an applicant's criminal history, and thereafter disqualifying the applicant based on the conviction because of the revised job requirements.

Employers Cannot Consider Non-Convictions

The final regulations define a "non-conviction," and emphasize that non-convictions may not be considered in the hiring process.

A non-conviction is defined as any criminal accusation, not currently pending, that 1) was terminated in favor of the individual, 2) was adjudicated as a youthful offender offense, even if the adjudication was not sealed; 3) was adjudicated to be a non-criminal offense (such as a traffic infraction or violation) that has been

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sealed; or 4) resulted in a conviction that was sealed. At no time may an employer require an applicant to disclose a non-conviction, nor may an employer seek information regarding a non-conviction, or consider a non-conviction in the hiring process. Inquiries regarding non-convictions or consideration of non-convictions are considered per se violations of the FCA.

Pending Criminal Charges Cannot be Considered Prior to a Conditional Offer

Under both the FCA and Article 23-A of the New York State Correction Law ("Article 23-A"), employers must consider eight specific factors before rejecting an applicant on the basis of their criminal conviction. The Fair Chance Act additionally requires employers to provide the applicant with its individualized, pre-adverse action analysis of the relevance of their convictions to the job applied for, or the risk their criminal history creates upon the employer's property, customers, employees or the public. Applicants must then be provided a reasonable opportunity to respond to the employer's analysis before an adverse action is taken.

Neither the FCA nor Article 23-A restricts an employer's consideration of an applicant or an employee's currently pending criminal charges. Several provisions of the proposed regulations not adopted would have extended the full Article 23-A / Fair Chance Act individualized analysis and pre-adverse action notice requirements to an employer's consideration of pending criminal charges against an applicant or employee. Fortunately, the final regulations do *not* require employers to apply the FCA review process to pending criminal charges. However, the final regulations do extend the restrictions on inquiries regarding an applicant's criminal history prior, and the *per se* violations that can result from such inquiries, to pending criminal charges. As a result, employers may not make inquiries or seek to learn about pending charges before a conditional offer of employment is made. However, nothing in the final regulations restricts an employer from asking a current employee about a pending criminal matter, or prevents an employer from disqualifying an applicant who is unavailable for work because they have been arrested.

Guidance Regarding Inadvertent or Unsolicited Disclosure of Criminal History Prior to Conditional Offer

The final regulations contain a new section providing guidance to employers that inadvertently discover information relating to an applicant's criminal history, or when the applicants volunteers their criminal history without solicitation. In such a circumstance, the employer is required to essentially ignore such information until after a conditional offer is made. An employer will be liable for violation of the FCA if it uses the discovery or disclosure to further explore an applicant's criminal history before making a conditional offer, or uses the information to determine whether to make a conditional offer.

Additional Steps Must be Taken Before Withdrawing a Conditional Offer

Additional steps have been added to the post-conditional offer phase before an employer may complete the Article 23-A/FCA review process and rescind a conditional offer of employment. Specifically, employers conducting an individualized assessment of the direct relation of a conviction to the job applied for or the unreasonable risk employment of the applicant poses are now required to affirmatively solicit from the applicant any available information concerning the applicant's rehabilitation or good conduct. The employer must consider any such evidence of rehabilitation or good conduct. If the applicant produces a certificate of relief from legal disabilities or a certificate of good conduct, a presumption exists that the applicant has been rehabilitated from the crime that is the subject of the certificate.

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Provisions Relating to Temporary Help Firms

The final regulations add detail describing the duties and responsibilities of temporary help firms under the FCA. Temporary help firms are bound by the same prohibitions on inquiries as employers regarding criminal history prior to making a conditional offer. However, a "conditional offer" from a temporary help firm is an offer to place the applicant in the firm's labor pool, from which the applicant may be assigned to the firm's clients. To evaluate job duties relevant to the conviction, the firm may only consider the minimum skill requirements and qualifications necessary for placement in the applicant pool.

Employers using a temporary help firm must follow the FCA process, and may make no statements or inquiries about an applicant's criminal history until the firm assigns the applicant to the employer. A temporary help firm cannot be used to aid and abet violations of the FCA. The temporary help firm may not determine what candidates to refer to an employer based on an employer's preference not to employ persons with specific types of convictions.

Rebuttable Presumption That a Conditional Offer Was Withdrawn Because of Criminal History

If an employer rescinds a conditional offer of employment after receiving information regarding the applicant's criminal history, the final regulations impose a rebuttable presumption that the revocation was motivated by the applicant's criminal history, and the employer will have to carefully follow the FCA individualized assessment and notice process. This presumption can be rebutted by showing that the revocation was based on 1) the results of a medical examination, where such an examination is permitted under the Americans with Disabilities Act, or 2) information based on information the employer could not reasonably have known before the conditional offer, if it can show it would not have made the offer if it had the information prior to the conditional offer and the information is material; or 3) evidence that the employer did not have knowledge of the employee's criminal history before revoking the conditional offer.

Enforcement Initiatives

The Commission has instituted an early resolution program, enabling employers charged with per se violations of the FCA to admit liability, accept a penalty, and enter an agreement to comply with the FCA in lieu of litigating complaints of unlawful conduct. The final regulations set forth a schedule of fines and penalties to be imposed in such early resolution cases based upon the size of the employer and the frequency of the violations. The Commission retains discretion to conduct a full investigation and refer a complaint for hearing when it decides early resolution will not serve the public interest.

Compliance Recommendations for Employers

The foregoing is a summary of the detailed FCA regulations promulgated by the Commission that take effect on August 5, 2017. Employers and employment agencies that employ persons in New York City, particularly those with a recruiting function that covers multiple states and municipalities, should consult with experienced employment counsel to assess how their current hiring practices are affected by the final regulations. Specifically, employers and employment agencies should:

- Exercise significant caution and due diligence when considering the impact of an applicant's criminal history on their fitness to perform the job applied for, or whether their employment creates an undue risk to their workplace, workforce, customers or public;
- Review and revise job applications, interview guidelines, and policies and procedures used in multiple jurisdictions for conducting and evaluating criminal background checks, including "pre-adverse" and "adverse action" notices;

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- Implement guidelines and documentation that comply with the FCA final regulations; and
- Conduct training of their recruiting and human resources personnel to ensure they understand FCA compliance requirements.

In addition, multi-state employers should continue to monitor developments in this and related areas of the law governing use of background checks in the hiring process.

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