

CRIMINAL RECORD? YOU CAN WORK WITH THAT.

When employers consider qualifications first, more New Yorkers go to work. That makes businesses strong and powers our economy.

■ INFORMATION FOR EMPLOYERS

The New York City Commission on Human Rights is a resource to help you strengthen your business, become a more inclusive employer, and conform your employment practices to comply with the NYC Human Rights Law (“NYCHRL”). This document provides information regarding the Fair Chance Act, an important change in the law affecting your employment application and decision-making processes.

For nearly 40 years, New York Correction Law Article 23-A (“Article 23-A”) has prohibited New Yorkers from being denied a job simply because of their arrest or criminal records. Starting on October 27, 2015, a new city law called the Fair Chance Act (“FCA”) requires most employers in New York City to wait until after a conditional offer of employment before asking about or considering a job candidate’s criminal record. At that point, employers may only revoke the job offer consistent with Article 23-A. If you decide to revoke a conditional offer after considering an applicant’s criminal history, the FCA requires that you notify the applicant and allow him/her at least three days to respond before you make a final decision on his/her application. This time period takes into account the fact that up to 50% of criminal background checks contain outdated or incorrect information, and gives applicants an opportunity to provide updated information.¹ Employers that fail to follow the Article 23-A process or fail to follow the process for revoking offers after considering criminal history may be liable for damages and/or penalties under the NYCHRL. An employer will be liable for any FCA violations committed by third party entities hired by the employer to manage any aspect of its recruitment, interviewing, or hiring processes.

While the FCA applies to all employment decisions – whether you are hiring, firing, or promoting an individual – this guide refers to all individuals as “applicants” because the law will most frequently apply during hiring.

■ BEFORE A CONDITIONAL OFFER OF EMPLOYMENT

Job applicants’ criminal history cannot be part of your hiring process until **after** a conditional offer of employment is extended. In order to comply with the FCA, you must:

- Eliminate any reference to arrest or conviction history when advertising for positions. Phrases such as, “no felonies,” “background check required,” and “must have clean record” on job advertisements cannot be used.
- Ensure that your application forms and agents acting on your behalf do not ask whether an applicant has a criminal record or ask an applicant to authorize a background check.
- Instruct your human resources and hiring staff to not ask applicants any questions about criminal records, run a background check, or attempt to discover whether or not an applicant has a conviction history before the conditional offer.

During the hiring process, you may accidentally discover an applicant’s criminal history. If that happens, inform the applicant that any consideration of his/her criminal record will happen only after you decide to offer him/her a job, let him/her know that you are moving on to another topic, and that it is not

¹ U.S. Dept. of Justice Office of the Attorney General, *The Attorney General’s Report on Criminal History Background Checks* (June 2006) at 3; National Employment Law Project, *65 Million “Need Not Apply:” The Case for Reforming Criminal Background Checks for Employment* (March 2011) at 7, available at http://www.nelp.org/content/uploads/2015/03/65_Million_Need_Not_Apply.pdf.

proper to discuss that issue until later, if at all. You may want to make a note in the applicant's file about what happened, in case the disclosure becomes an issue.

■ AFTER A CONDITIONAL OFFER OF EMPLOYMENT IS MADE TO THE APPLICANT

After you extend a conditional offer of employment, you have the same rights and obligations as before the effective date of the FCA. You may ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case; check the applicant's criminal record; and ask the applicant about the circumstances that led to any criminal conviction. As you ask these questions, you should gather information necessary to analyze the person's conviction history under Article 23-A, which is explained below.

Employers should note that there is certain arrest and conviction information that is always off-limits. You may never ask about or consider arrests that did not result in a criminal conviction. These include cases where a person was not found guilty or her or his case was later sealed. Convictions for petty offenses like disorderly conduct are usually sealed, as are cases where a person was adjudicated as a youthful offender or juvenile delinquent. This information should never appear on a background check and cannot be asked about or considered at any point in the hiring process. If you find out about it anyway, you cannot use it in an employment decision.

The following is a sample question you can use, after a conditional offer of employment, that only asks about information you are legally allowed to consider:

Have you ever been convicted of a misdemeanor or felony? Answer "NO" if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as "disorderly conduct;" (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

If you **decide that the applicant's record does not outweigh the reasons you selected him/her for hire, and wish to hire the applicant, you do not have to do anything more.** If you want to withdraw the offer of employment, however, you must first complete three steps:

1. Give the applicant a copy of any background check or other documents you used to determine that s/he had a criminal record;
2. Evaluate the applicant under Article 23-A, and share that written evaluation with him/her; and
3. Hold the job open for at least three business days so the applicant can respond.

■ DISCLOSING THE BACKGROUND CHECK

You must give the applicant exactly the same information you used to determine s/he had a criminal record. The information should contain date and time it was accessed and the name of the employee who accessed it. Complying is straightforward:

- If you hired another company to do a background check report, turn over a copy of that report.
- If you searched the Internet, print out the pages you relied upon.
- If you checked public records, provide copies of those records.
- If you relied upon oral information, summarize your conversation and the information obtained in writing. This includes information from the applicant him/herself.

■ EVALUATING THE APPLICANT UNDER ARTICLE 23-A

Under Article 23-A, New Yorkers cannot be denied work simply because of a criminal record. You may only decline to hire someone if there is a direct relationship between the applicant's criminal record and the prospective job or you can show that employing the person creates an unreasonable risk to your property or to the safety of specific individuals or the general public. You must consider the following

eight factors in making your determination. If you determine that a direct relationship exists, evaluate the factors to determine whether the risk is decreased. If there is no direct relationship, all of the factors may be considered in determining whether an unreasonable risk exists. The factors are:

- That New York public policy encourages the licensure and employment of people with criminal records.
- The specific duties and responsibilities of the prospective job.
- The bearing, if any, of the person's criminal record on her or his fitness or ability to perform one or more of the job's duties or responsibilities.
- The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the arrest or conviction itself.
- The age of the applicant when the events that led to her or his conviction occurred.
- The seriousness of the applicant's conviction record, judged by the applicant's conduct. Note that the Commission does not consider convictions for possession or sale of a controlled substance to be particularly serious.
- Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct. Because you are required to consider this information, you must affirmatively request it from applicants.
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
- If an applicant has a certificate of relief from disabilities or a certificate of good conduct, you **must** presume s/he is rehabilitated.

The Commission's website contains additional information about how to conduct the Article 23-A analysis, along with a form you may use to comply with this requirement. The form may be adapted to your preferred format or distributed electronically but the substantive material language must remain the same.

■ ALLOWING TIME FOR THE APPLICANT TO RESPOND

You must give applicants a reasonable time to respond to the background check and Article 23-A analysis. The law requires at least three business days, from when an applicant receives this information, but you may provide the applicant even more time to gather any information necessary to respond. You must hold the job open for the applicant during this three-day period.

If an applicant contacts you during this time, you may be able to resolve the issue by explaining your concerns and having the applicant address them. You may also decide to offer the applicant a different position that you believe is more appropriate for the applicant. If you are not able to reach a resolution after three-day, you must inform the applicant that s/he will not be hired before you can move on to the next candidate.

Does this new law cover my business?

Probably. Employers must have four or more employees in New York City to be covered by the law. For small businesses, the owner her/himself counts. The four employees need not work in the same location, as long as one of them works in New York City.

The FCA does not apply to your business if another law or government agency either requires you to check applicants' criminal backgrounds or prohibits you from hiring people with certain criminal convictions. If you have discretion to hire an applicant with a record, however, you must follow the FCA.