

New Rules Expand Protections Under the New York City Fair Chance Act

The New York City Commission on Human Rights has adopted a set of new rules which amend the current Rules of the City of New York that address employer obligations under the New York City's Fair Chance Act (the "FCA"). The FCA prohibits employers from discriminating against job applicants and current employees based on their criminal history and sets forth robust procedural requirements around the use and consideration of criminal history in hiring and employment decisions. The new amendments expand protections for applicants and employees under the FCA, impose new obligations on employers and clarify important definitions and requirements under the FCA. We explain below these new rules, which go into effect on October 30, 2026.

Employees Now Have 5 Business Days to Respond

Under the FCA, when an employer seeks to revoke an unconditional offer of employment or take an adverse employment action based on criminal history, it must provide the applicant or employee with a copy of their FCA analysis – now referred to under the rules as a "Fair Chance Employment Analysis" – and provide them with a reasonable amount of time to respond. Under the amended rules, employers must now provide at least five business days for an applicant or employee to respond to their concerns and provide additional information before the proposed action is taken by the employer.

The FCA Applies to Current Employees and Pending Cases

The amendments clarify that the FCA applies not only to job applicants but also to current employees when an employer is considering taking an adverse employment action against a current employee based on their criminal conviction or pending cases. In addition, the new rules clarify that the Fair Chance Employment Analysis must be used to evaluate an applicant's or employee's pending cases, in addition to prior convictions.

Expansion of "Non-Conviction" Definition

Under the FCA, an employer may not seek or consider information pertaining to an applicant's "non-convictions" unless an exception applies. The new rule amendments have expanded the definition of "non-conviction" to include certain criminal actions that have been adjourned in contemplation of dismissal and unsealed convictions under specific penal codes.

The Direct Relationship and Unreasonable Risk Exceptions

The amendments explain and clarify the proper application of the "direct relationship" and "unreasonable risk" exceptions under the FCA and when such exceptions apply. Under the amended rules, the "direct relationship" exception applies only when there is a direct connection between the nature of the alleged conduct underlying a conviction or pending case and the specific duties and responsibilities of the role. Further, the new rules clarify that the "unreasonable risk" exception, which applies when an employer determines that an unreasonable risk exists to hire or continue the employment of a current employee, cannot generally be established based on the existence of a conviction or a pending case alone, as the seriousness of the offense is only one factor to be considered.

Intentional Misrepresentation of Criminal History

Prior to the amendments, the FCA permitted employers to revoke an unconditional offer of employment or take an adverse employment action based on an applicant's or current employee's intentional misrepresentation about their conviction history or pending case, or their failure to answer a legitimate question about their conviction history or pending case. Under the new rules, prior to taking such action, an employer must first provide the applicant or employee with notice of the information that led the employer to reach the determination that an intentional misrepresentation was made and give the applicant or employee a reasonable period of at least five business days to respond.

The employer must then consider the applicant's or employee's response prior to taking adverse action based on intentional misrepresentation or withholding of information. Of note, however, this amendment and new requirement does not prohibit an employer from ultimately adhering to its original decision after considering the applicant's or employee's explanation of why their conduct should not serve as a basis for the contemplated adverse action, so long as the decision is supported.

Leave Related to the FCA Analysis

The amendments provide that an employer may place an employee on paid or unpaid leave for a reasonable period of time while conducting the "Fair Chance Employment Process." There is a rebuttable presumption that a reasonable time will not exceed five business days. Thus, a leave duration of five business days is presumed reasonable, and an employer must be prepared to demonstrate that a leave that exceeds five business days was reasonable under the circumstances.

Clarification of *Per Se* Violations Under the FCA

The amendments provide significant clarification around what constitutes *per se* violations of the FCA and add several examples of conduct that constitute such *per se* violations, including but not limited to:

- Prior to a conditional offer of employment, using employment application forms that request or refer to criminal history
- Prior to a conditional offer of employment, referencing that background checks will be conducted or requesting permission to run a criminal background check
- Prior to a conditional offer of employment, making statements that express any limitations or specifications regarding criminal history, such as statements that individuals with a criminal history or certain convictions will not be hired or considered (e.g., "need not apply") or other unsolicited statements about criminal background checks
- Prior to a conditional offer of employment, inquiring into an applicant's criminal history

The amendments also add a number of *per se* violations related to failure to comply with the procedural requirements of the FCA, including:

- Failure to comply with the requirement to request from the employee or applicant information relating to the relevant Fair Chance Employment Factors
- Failure to comply with the requirement to give an employee at least five business days from the date of their receipt of the employer's inquiry and analysis before taking an adverse action based on the employee's criminal history

- Failure to comply with the requirement to consider additional information that the employee has timely provided relating to the New York City Fair Chance Factors before taking an adverse action based on the employee's criminal history
- Taking adverse action against an applicant based on their intentional misrepresentation about their conviction history or pending case without first providing the applicant with a copy of the information that the employer is relying on and a reasonable opportunity and time within which to respond
- Failing to conduct a new Fair Chance Employment Analysis when an applicant identifies an error in their criminal history that is material to the Analysis

FCA Exemptions

The amendments expand upon the FCA exemptions that exist for certain employers – for example, employers required by federal, state or local law to perform a criminal background check and employers required by federal, state or local law to exclude applicants or take adverse action based on any legal bar to employment.

Removal of Early Resolution Option

The amendments also remove the “early resolution” mechanism that was formerly provided by the New York City Commission on Human Rights for complaints initiated by the Commission, through which the Commission could elect to offer early resolution, i.e., resolution prior to full scale investigation, of certain complaints of *per se* violations.

It is critical that New York City employers understand their new and existing obligations under the FCA, which imposes strict and procedurally complex requirements on employers. Employers should review and update all of their job advertisements and job application and offer letter forms to ensure compliance with the FCA, in addition to ensuring that their internal processes related to the FCA, as amended by the newly implemented Rules, are up to date. When in doubt, employers should speak to their employment counsel about adherence with these new FCA Rules.

Key Contacts

Our [Labor & Employment Law team](#) is available to assist employers in full compliance with the FCA and its rule amendments, as well as with respect to any other employment-related matter.

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