

New York City Commission on Human Rights

Notice of Public Hearing and Opportunity to Comment on Proposed Rules

What are we proposing? The New York City Commission on Human Rights (“the Commission”) is proposing to amend its rules to establish certain definitions and criteria around procedure and application of the Human Rights Law provisions regarding unlawful discrimination on the basis of criminal history against job applicants and employees, and applicants for licenses, registrations and permits, enacted by Local Law No. 63 of 2015, the Fair Chance Act (“the FCA”). These proposed rules will amend title 47 of the Rules of the City of New York.

When and where is the Hearing? The Commission will hold a public hearing on the proposed rule. The public hearing will take place at 1:00 pm on March 21, 2016. The hearing will be in 125 Worth Street, 2nd Floor Auditorium.

How do I comment on the proposed rules? Anyone can comment on the proposed rules by:

- **Website.** You can submit comments to the Commission through the NYC rules Web site at <http://rules.cityofnewyork.us>.
- **Email.** You can email comments to policy@cchr.nyc.gov
- **Mail.** You can mail comments to:

Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights
P.O. Box 2023
New York, NY 10272

- **Fax.** You can fax comments to Dana Sussman, Special Counsel to the Office of the Chairperson at 646-500-6734.
- **By Speaking at the Hearing.** Anyone who wants to comment on the proposed rule at the public hearing must sign up to speak. You can sign up before the hearing by emailing policy@cchr.nyc.gov. You can also sign up in the hearing room before the hearing begins on March 21, 2016 at 1:00 pm. You can speak for up to three minutes.

Is there a deadline to submit written comments? You must submit written comments by March 21, 2016.

What if I need assistance participating in the Hearing? You must notify the Commission if you need a reasonable accommodation of a disability at the Hearing. You must tell us if you need a sign language

interpreter. You can tell us by mail or email at the addresses given above. You must tell us by 10 days prior to the hearing date.

Can I review the comments made on the proposed rules? You can review the comments made online on the proposed rules by going to the website at <http://rules.cityofnewyork.us/>. A few days after the hearing, a recording of the hearing and copies of the written comments will be available to the public on the Commission's website.

What authorizes the Commission to adopt this rule? Sections 905 and 1043 of the New York City Charter authorize the Commission to adopt this proposed rule. This proposed rule was not included in the Commission's regulatory agenda for this Fiscal Year because it was not contemplated at the time agencies needed to submit the agenda.

Where can I find the Commission's rules? The Commission's rules are in title 47 of the Rules of the City of New York.

What laws govern the rulemaking process? The Commission must meet the requirements of § 1043 of the New York City Charter when creating or changing rules. This notice is made according to the requirements of §1043 of the Charter.

Statement of Basis and Purpose of Proposed Rule

The New York City Commission on Human Rights (“the Commission”) is proposing to amend its rules to establish certain definitions and criteria around procedure and application of the Human Rights Law provisions regarding unlawful discrimination on the basis of criminal history against job applicants and employees, and applicants for licenses, registrations and permits, enacted by Local Law No. 63 of 2015, the Fair Chance Act (“the FCA”). These proposed rules will amend title 47 of the Rules of the City of New York by amending section 2-01 to define terms used in the Human Rights Law and update the definition of “domestic partners” to reflect the definition contained in the Administrative Code. The rules will also add a new section, section 2-04, to specify chargeable violations under the Human Rights Law as that law has been amended by the FCA, further define and clarify terms and requirements in furtherance of the intent of the FCA, establish specific guidelines and procedures around enforcement and obligations of employers and those evaluating individuals for licenses, registrations, permits and credit, and clarify when and under what circumstances an employer can withdraw a conditional offer or take an adverse employment action against an applicant or employee based on their criminal history. The proposed rules will also create a discretionary mechanism for the Commission to resolve commission-initiated charges of certain *per se* violations under the FCA by offering eligible respondents an option for expedited resolution. This process, called Early Resolution will allow a respondent to bypass a full investigation and a hearing at OATH, by admitting liability, and complying with a penalty. The monetary fine associated with the penalty is based on the penalty schedule set forth in the rules. By assessing penalties based upon employer size, the penalty schedule recognizes the impact of the discriminatory action on the public and is designed to ensure that the penalty will incentivize compliance with this program, deter future violations, and educate employers about their obligations under the law. The monetary fines are proportional to the civil penalties awarded in cases of *per se* violations that come before the Commission.

The proposed rules will:

- Amend title 47 of the Rules to establish definitions for “Applicant,” “Adverse Employment Action,” “Article 23-A Analysis,” “Article 23-A Factors,” “Business Day,” “Conditional Offer of Employment,” “Conviction History,” “Criminal Background Check,” “Criminal History,” “Direct Relationship,” “Domestic Partners,” “Fair Chance Process,” “Human Rights Law,” “Inquiry,” “Licensing Agency,” “Non-Convictions,” “Per Se,” “Statement,” “Temporary Help Firms,” and “Terms and Conditions.”
- Establish *per se* violations, as defined by these rules, of the new provisions added by the FCA.
- Clarify the types of questions and statements relating to criminal history that are prohibited under the FCA.
- Explain the meaning of a conditional offer and establish the limited circumstances under which an employer can revoke a conditional offer.

- Explain what an employer should do if they inadvertently come to learn about an applicant’s criminal history prior to making a conditional offer.
- Clarify the procedure that must be followed by an employer upon learning of an applicant or employee’s criminal history and what steps must be taken before revoking a conditional offer or taking an adverse employment action.
- Establish clear guidelines that employers must follow when considering whether and how applicants and employee’s criminal convictions or pending cases relate to the duties of a prospective or current job or would pose an unreasonable risk to the property or the safety or welfare of specific individuals or the general public.
- Establish what information an employer must provide to an applicant or employee if a determination is made to revoke a conditional offer based on their conviction history or pending case and clarify how an employer must evaluate an applicant or employee’s request for more time.
- Require an employer to consider any documentation that the applicant or employee presents to support their assertion that the information on the background check contains an error.
- Clarify the exemptions under the FCA.
- Create a discretionary mechanism for the Commission to respond to charges of *per se* violations under the FCA by allowing the Commission’s Law Enforcement Bureau to send employers or licensing agencies an Early Resolution Notice.
- Clarify that employers may not request information or inquire about the non-convictions of applicants or employees and may not deny or take any adverse actions against applicants or employees based on non-convictions.
- Clarify that individuals with pending criminal cases are protected by the FCA.
- Update the rule’s definition of “domestic partners” to reflect the definition contained in the Administrative Code.

The Commission’s authority for these rules is found in sections 905 and 1043 of the New York City Charter.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 2-01 of Title 47 of the Official Compilation of the Rules of the City of New York is amended to read as follows:

Section 2-01. **Definitions.**

[(a) The definitions in this section shall be used by the New York City Commission on Human Rights in determining whether an institution, club, or place of accommodation is "distinctly private" as that term is used in the New York City Human Rights Law, Administrative Code §8-101 *et seq.*

Domestic partner. The term "domestic partner" means a person who has registered a domestic partnership in accordance with applicable law with the City Clerk, or has registered such a partnership with the former City Department of Personnel pursuant to Executive Order 123 (dated August 7, 1989) during the period August 7, 1989 through January 7, 1993. (The records of domestic partnerships registered at the Department of Personnel are to be transferred to the City Clerk.)

Members. "Members" shall mean individuals belonging to any class of membership offered by the institution, club, or place of accommodation including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses or domestic partners.

Payment directly from a nonmember. "Payment directly from a nonmember" shall mean payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.

Payment for the furtherance of trade or business. "Payment for the furtherance of trade or business" shall mean payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business-related events.

Payment indirectly from a nonmember. "Payment indirectly from a nonmember" shall mean payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.

Payment on behalf of a nonmember. "Payment on behalf of a nonmember" shall mean payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

Regular meal service. "Regular meal service" shall mean the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.

Regularly receives payment. An institution, club or place of "accommodation "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business" if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.]

Applicant "Applicant" refers to potential employees, and current employees who are seeking or being considered for positive changes to the terms and conditions of their employment, including, without limitation, promotions.

Adverse employment action "Adverse employment action" refers to any action that negatively affects the terms and conditions of employment.

Article 23-A analysis "Article 23-A analysis" refers to the process required under subdivisions 9, 10, 11 and 11-a of section 8-107 of the Administrative Code, when those provisions mandate compliance with Article 23-A of the New York Correction Law.

Article 23-A factors "Article 23-A factors" refers to the factors that employers must consider concerning applicants' and employees' conviction histories or pending cases under section 753 of Article 23-A of the New York Correction Law.

Business day "Business day" means any day except for Saturdays, Sundays, and all legal holidays of the City of New York.

Commission "Commission" means the New York City Commission on Human Rights.

Conditional offer of employment "Conditional offer of employment" as used in section 8-107(11-a) of the Administrative Code and section 2-04 of this title for purposes of establishing when an applicant's or employee's criminal history can be considered by an employer, refers to an offer of employment or an offer to positively change the terms and conditions of employment, that can only be revoked based on one of the following:

1. The results of a criminal background check, and only after the "Fair Chance Process," as defined later in this section, has been followed.
2. The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act.
3. Other information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material.

For temporary help firms, a conditional offer is the offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients.

Conviction history “Conviction history” refers to an individual’s actual conviction of either a felony or a misdemeanor or an unsealed violation under New York law or federal law, or a conviction of a crime committed in another state and defined as a felony or a misdemeanor by the law of that state.

Criminal background check “Criminal background check” refers to when an employer, orally or in writing, either:

1. Asks an applicant or employee whether or not they have a criminal record; or
2. Searches public records, including through a third party, such as a consumer reporting agency, for an applicant’s criminal history.

Criminal history “Criminal history” refers to records of criminal convictions or non-convictions and/or a currently pending criminal case.

Direct relationship “Direct relationship” refers to a finding that the nature of the criminal conduct underlying a conviction or pending case has a direct bearing on the fitness or ability of an applicant or employee to perform one or more of the duties or responsibilities necessarily related to the license, registration, permit, employment opportunity or terms and conditions of employment in question.

Domestic partners. The term “domestic partners” means persons who have a registered domestic partnership, which shall include any partnership registered pursuant to this chapter, any partnership registered in accordance with executive order number 123, dated August 7, 1989, and any partnership registered in accordance with executive order number 48, dated January 7, 1993, and persons who are members of a marriage that is not recognized by the state of New York, domestic partnership, or civil union, lawfully entered into in another jurisdiction

Employer “Employer” includes any employer with four or more persons in their employ.

Fair Chance Process “Fair Chance Process” refers to the post-conditional offer process mandated by section 8-107(11-a) of the Administrative Code when employers elect to withdraw a conditional offer of employment or change the terms and conditions of employment based on an applicant’s conviction history or pending criminal case.

Human Rights Law “Human Rights Law” refers to Title 8 of the Administrative Code.

Inquiry “Inquiry” refers to any oral or written question asked for the purpose of obtaining an applicant’s or employee’s criminal history, including without limitation, questions in a job interview about an applicant’s criminal history; and any search for an applicant’s or employee’s

criminal history, including through the services of a third party, such as a consumer reporting agency.

Licensing agency “Licensing agency” refers to any agency or employee thereof that is authorized to issue a license, registration or permit

Members. “Members” means individuals belonging to any class of membership offered by the institution, club, or place of accommodation, including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses or domestic partners.

Non-conviction “Non-conviction” means any arrest or criminal accusation not currently pending, that was concluded in one of the following ways:

- (1) Termination in favor of the individual, as defined by New York Criminal Procedure Law (“CPL”) § 160.50, even if not sealed;
- (2) Adjudication as a youthful offender, as defined by CPL § 720.35, even if not sealed;
- (3) Conviction of a non-criminal offense that has been sealed under CPL § 160.55; or
- (4) Convictions that have been sealed under CPL § 160.58.

“Non-conviction” includes a disposition of a criminal matter under federal law or the law of another state that results in a status comparable to a “non-conviction” under New York law as defined in this section.

Payment directly from a nonmember. “Payment directly from a nonmember” shall mean payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.

Payment for the furtherance of trade or business. “Payment for the furtherance of trade or business” means payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business- related events.

Payment indirectly from a nonmember. “Payment indirectly from a nonmember” means payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.

Payment on behalf of a nonmember. "Payment on behalf of a nonmember" means payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

Per se violation. "Per se violation" means an action or inaction that, standing alone, without reference to additional facts, constitutes a violation of the human rights law, regardless of whether any adverse action was taken or any actual injury incurred.

Regular meal service. "Regular meal service" means the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.

Regularly receives payment. An institution, club or place of "accommodation "regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business" if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

Statement "Statements" are any communications made, orally or in writing, to the applicant or employee for the purpose of obtaining criminal history, including, without limitation, stating that a background check is required for a position.

Terms and conditions "Terms and conditions" refers to conditions of employment, including but not limited to hiring, termination, transfers, promotions, privileges, compensation, benefits, professional development and training opportunities, and job duties.

Temporary help firms "Temporary help firms" are businesses that recruit, hire, and assign their own employees to perform work at or services for other organizations, to support or supplement the other organization's workforce, or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.

§ 2. Chapter 2 of title 47 of the rules of the city of New York are amended by adding a new section 2-04 to read as follows:

Section 2-04 Prohibitions on discrimination based on criminal history. Sections 2-04(1) through 2-04(7) relate to prohibitions on discrimination in employment only. Section 2-04(8) relates to prohibitions on discrimination in licensing only. Section 2-04(9) relates to enforcement and procedures regarding violations of the HRL under this section in employment and licensing.

- 1) **Per Se Violations:** The Commission has determined that the following are *per se* violations of sections 8-107(11-a) or (11-b) of the Administrative Code Human Rights Law (regardless of whether any adverse employment action is taken against an individual applicant or employee):

- a) Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, or publication that expresses, directly or indirectly, any limitation or specification in employment regarding criminal history. This includes, without limitation, advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”
 - b) Using applications for employment that require applicants to either grant employers permission to run a background check, or to provide information regarding criminal history.
 - c) Making any statement or inquiry relating to the applicant’s pending arrest or criminal conviction before a conditional offer of employment is extended.
 - d) Using a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability.
 - e) Failing to comply with requirements of section 8-107(11-a) of the Administrative Code, when they are applicable: (1) to provide the applicant or employee a written copy of any inquiry an employer conducted into the applicant’s or employee’s criminal history; (2) to share with the applicant or employee a written copy of the employer’s Article 23-A analysis; or (3) to hold the prospective position open for at least three business days from the date of an applicant’s or employee’s receipt of both the inquiry and analysis to allow them time to respond.
- 2) **Criminal Background Check Process:** An employer may not inquire about an applicant’s criminal history or request permission to run a criminal background check of an applicant until after the employer makes the applicant a conditional offer. At no point may an employer seek or consider information pertaining to a non-conviction.
- a) Employers may not engage in any of the following actions prior to making a conditional offer to an applicant:
 - i) Seeking to discover, obtain, or consider the criminal history of an applicant before a conditional offer of employment is made.
 - ii) Expressing any limitation or specifications based on criminal history in job advertisements. This includes, but is not limited to, any language that states or implies “no felonies,” “background check required,” or “clean records only.” Solicitations, advertisements, and publications encompass a broad variety of items, including, without limitation, employment applications, fliers, hand-outs, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness programs.
 - iii) Using an application that contains a question about an applicant’s criminal history or pending criminal case or requests authorization to perform a background check.
 - iv) Making any inquiry or statement related to an applicant’s criminal history, whether written or oral, during a job interview.
 - v) Asserting, whether orally or in writing, that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered.
 - vi) Conducting investigations into an applicant’s criminal history, including using public records or the Internet for the purpose of learning about the applicant’s criminal

- history, whether such investigations are conducted by an employer or for an employer by a third party
- vii) Disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about criminal history.
- viii) In connection with an applicant, searching for terms such as, “arrest,” “mugshot,” “warrant,” “criminal,” “conviction,” “jail,” or “prison” or searching websites that purport to provide information regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history.
- 3) **Inadvertent Discovery or Unsolicited Disclosure of Criminal History Prior to Conditional Offer:** Inadvertent discovery by employer or unsolicited disclosure by applicant of criminal history prior to a conditional offer of employment does not automatically create employer liability. Employer liability is created when an employer uses the discovery or disclosure to further explore an applicant’s criminal history before having made a conditional offer.
- 4) **Information Regarding Conviction History or Pending Criminal Cases Obtained After a Conditional Offer:** After an employer extends a conditional offer to an applicant, an employer may make inquiries into or statements about the applicant’s conviction history or any pending criminal cases. An employer may:
- a) Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case;
 - b) Run a background check or, after receiving the applicant’s permission and providing notice, use a consumer reporting agency to do so; and
 - c) Once an employer knows about an applicant’s conviction or pending criminal case, ask them about the circumstances that led to the conviction or pending criminal case and gather information relevant to the Article 23-A factors.
 - d) Upon receipt of an applicant’s conviction history or information regarding a pending criminal case, an employer may elect to hire the individual. If the employer does not wish to withdraw the conditional offer, the employer does not need to engage in the Article 23-A analysis.
- 5) **Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action:** Should an employer wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant’s or employee’s conviction history or pending criminal case, the employer must (1) engage in an Article 23-A analysis and (2) follow the Fair Chance Process.
- a) Article 23-A analysis
 - i) An employer must consider the following factors in evaluating an applicant or employee under the Article 23-A analysis:
 - (1) That New York public policy encourages the licensure and employment of people with criminal records;
 - (2) The specific duties and responsibilities necessarily related to the prospective job;
 - (3) The bearing, if any, of the conviction history or pending criminal case on their fitness or ability to perform one or more of the job’s duties or responsibilities;

- (4) The time that has elapsed since the occurrence of the events that led to the applicant or employee's criminal conviction or pending case, not the time since arrest or conviction;
- (5) The age of the applicant or employee when the events that led to their conviction or pending case occurred;
- (6) The seriousness of the applicant's or employee's conviction history or pending criminal case;
- (7) Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
- (8) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.
- ii) When considering the factors outlined above, a presumption of rehabilitation exists when an applicant or employee produces a certificate of relief from disabilities or a certificate of good conduct.
- iii) An employer may not change the duties and responsibilities of a position upon learning of an applicant's or employee's criminal history.
- iv) After evaluating the factors in section 2-04(5)(a)(i) an employer must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job, or (2) employing or continuing to employ the person would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
 - (1) To claim the "direct relationship exception", an employer must first draw some connection between the nature of the conduct that led to the conviction(s) or pending case and the potential position. If a direct relationship exists, an employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated.
 - (2) To claim the "unreasonable risk exception" an employer must consider and apply the Article 23-A factors to determine if in fact an unreasonable risk exists.
- v) If an employer, after weighing the required factors, cannot determine that either the direct relationship exemption or the unreasonable risk exemption applies, then the employer may not revoke the conditional offer or take any adverse employment action.
- b) The Fair Chance Process: If, after an employer determines that either the direct relationship or unreasonable risk exemption applies, the employer wishes to revoke the conditional offer or take an adverse employment action, the employer must first (1) provide a written copy of any inquiry made to collect information about criminal history or pending criminal cases to the applicant or employee, (2) provide a written copy of the Article 23-A analysis to the applicant or employee, (3) inform the applicant or employee that they will be given a reasonable time to respond to the employer's concerns, and (4) consider any additional information provided by the applicant or employee during this period.
 - i) Providing a written copy of the inquiry.
 - (1) The employer must provide a complete and accurate copy of each and every piece of information relied on to determine that an applicant or employee has a conviction history or pending criminal case. This includes, but is not limited to, copies of consumer reporting agency reports, print outs from the internet, public

records, and written summaries of any oral conversations, specifying if the oral information relied upon came from the applicant.

- ii) Providing a written copy of the Article 23-A analysis performed by the employer.
 - (1) Employers who choose to revoke an applicant’s conditional offer or take an adverse employment action on the basis of an applicant’s or employee’s criminal history must provide the applicant with the Fair Chance Notice created by the Commission, or a comparable notice.

Article 23-A Evaluation Form



BILL DE BLASIO
Mayor

CARMELYN P. MALALIS
Commissioner/Chair

100 Gold Street, Suite 4600
New York, NY 10038

nyc.gov/humanrights
@NYCCHR

Applicant Name _____

FAIR CHANCE ACT NOTICE

After extending a conditional offer of employment, we checked your criminal record. Based on the enclosed check, we have reservations about hiring you for the position of _____, and may decide to retract our job offer. Below explains why. We invite you to provide us with any information that could help us decide to offer you the job. If you choose to provide us with additional information you have _____ days (must be at least three business days) from the date you receive this to do so.

If you wish to respond, please contact _____.

In your response, you may:

- Tell us about any errors on your criminal record;
- Give us any additional information you'd like us to consider after reviewing this notice.

The following factors were considered, as required by Article 23-A of the New York State Correction Law, before making our determination:

A. The government encourages employers to hire people with criminal records.

B. The specific duties and responsibilities of the job, which are:

1. _____
2. _____
3. _____
4. _____

C. We believe your record impacts your fitness or ability to perform these duties and responsibilities because:

D. How long ago your criminal activity, not your conviction, occurred: _____ years _____ months

E. Your age when your criminal activity, not your conviction, occurred: _____ years old

F. The seriousness of the conduct that led to your criminal record, which is:

G. Your evidence of rehabilitation and good conduct, which is listed below.

1. _____
2. _____
3. _____

If you have additional documents we should consider, please send them, including evidence that you attended school, job training, or counseling; or are involved with your community. They can include letters from people who know you, like teachers, counselors, supervisors, clergy, and parole or probation officers.

H. Our legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public, which is:

I. Your certificate(s) of relief or certificate of good conduct shows that you are rehabilitated. If you did not have a certificate, we did not hold that against you.

Based on these factors, we may deny you the job because (choose one or both below):

We believe there is a direct relationship between your criminal record and the job we offered to you, and the factors listed above do not lessen that relationship because:

Your criminal record creates an unreasonable risk to specific persons, the general public, or our property because:

For more information about the law, visit:
nyc.gov/FairChanceNYC

- (2) So long as the material substance does not change, the notice may be adapted to an employer's preferred format or to account for the specific circumstances involving the applicant and the adverse action or denial of employment. A Fair Chance Notice must (1) include specific facts that were considered pursuant to the Article 23-A analysis and the outcome, (2) articulate the employer's concerns and basis for the determination that there is a direct relationship or an unreasonable risk, and (3) inform the applicant or employee of their rights upon receipt of the notice, including how they can respond to the decision, the time frame within which they must respond.
- iii) The employer must allow the applicant or employee a reasonable time to respond to the employer's concerns.
 - (1) An employer must consider the following information when determining how much time is reasonable: (1) what additional information the applicant or employee is purporting to gather and whether that additional information would change the outcome of the Article 23-A analysis; (2) why the applicant or employee needs more time to gather the information, (3) how quickly the employer needs to fill the position; and (4) any other relevant information. A reasonable time shall be no less than 3 business days.
 - (2) During this time, an employer may not permanently place another person in the applicant's prospective position.
 - (3) The time period begins when the applicant or employee receives both the Fair Chance Notice and the inquiry.
- iv) Response of employer to additional information.
 - (1) If the applicant or employee provides additional information related to the concerns identified by the employer, the employer must consider whether the additional information changes the Article 23-A analysis.
 - (2) If the employer reviews the additional information and makes a determination not to hire the individual or take an adverse employment action, the employer must relay that decision to the applicant or employee.
- c) Errors, Discrepancies, and Misrepresentations
 - i) If an applicant or employee realizes that there is an error on a background check, they must inform the employer of such error and request the necessary time needed to provide supporting documentation.
 - (1) If the applicant or employee can demonstrate that the information is incorrect and the applicant or employee has no criminal history, the employer may not withdraw the conditional offer or take any adverse employment action on the basis of the applicant's or employee's criminal history.
 - (2) If the applicant or employee can demonstrate that the conviction history resulted in a non-conviction, the employer may not withdraw the conditional offer or take any adverse employment action on the basis of the applicant's or employee's criminal history.
 - (3) If the applicant or employee can demonstrate that the conviction history or pending criminal case is different than what is reflected in the background check, the employer must conduct the Article 23-A analysis based on the correct and current conviction history or pending case information to ensure its decision is not tainted by the previous error.

- ii) If a background check reveals that an applicant or employee has intentionally failed to answer a legitimate question about their conviction history or a pending criminal case, the employer may revoke the conditional offer or take an adverse employment action.

6) **Temporary Help Firms**

- a) Temporary help firms are covered by this section of the Commission's rules. A "conditional offer" from a temporary help firm is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients. A temporary help firm is bound by the same pre-conditional offer requirements as other employers and must follow the Fair Chance Process if it wishes to withdraw a conditional offer based on the conviction history of an applicant.
- b) In order to evaluate job duties relevant to the conviction history under Article 23-A, a temporary help firm may only consider the minimum skill requirements and basic qualifications necessary to be placed in its applicant pool.
- c) Any employer who utilizes a temporary help firm to find applicants for employment must follow the Fair Chance Process and may not make any statements or inquiries about an applicant's criminal history until after the applicant has been assigned to the employer by the temporary help firm.
- d) A temporary help firm may not aid or abet an employer's discriminatory hiring practices. A temporary help firm may not determine which candidates to refer to an employer based on an employer's preference not to employ persons with a particular criminal history or criminal history. A temporary help firm may not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

7) **Exemptions under the Fair Chance Act:**

- a) The prohibitions on discrimination based on criminal history in section 8-107(11)(a) of the Administrative Code shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment or employee:
 - i) In a position where federal, state, or local law requires criminal background checks or bars employment based on criminal history.
 - (1) This exemption does not apply to an employer authorized, but not required, to check for criminal backgrounds..
 - (2) A position is not covered by this exemption simply because it requires licensure or approval by a government agency other than the hiring employer for which criminal history could be a mandatory barrier. When hiring for such a position, before making a conditional offer the employer may only ask whether the applicant has the necessary license or approval or whether they can obtain it within a reasonable period of time.
 - ii) In positions regulated by self-regulatory organizations as defined in section 3(a)(26) of the securities exchange act of 1934, as amended, where the rules or regulations promulgated by such organizations require criminal background checks or bar employment based on criminal history.
 - (1) This exemption includes positions in which applicants or employees are not required to be registered with a self-regulatory organization ("SRO"), when the

applicant or employee nevertheless either chooses to become registered while in the position or elects to maintain their prior registration.

iii) Police and Peace Officers, Law Enforcement Agencies, and Other Exempted City Agencies

- (1) As a police officer or peace officer, as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law.
 - (2) At a New York City law enforcement agency, including but not limited to the City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Youth and Community Development, the Business Integrity Commission, and the District Attorneys' offices in each borough.
 - (3) In a position listed in the determinations of personnel published as a Commissioner's calendar item and listed on the website of the Department of Citywide Administrative Services ("DCAS") as exempt because the Commissioner of Citywide Administrative Services has determined that the position involves law enforcement; is susceptible to bribery, or corruption; or entails the provision of services to or the safeguarding of people who, because of age, disability, infirmity or other condition, are vulnerable to abuse.
 - (4) Once DCAS exempts a position, an applicant or employee may be asked about their conviction history at any time; however, applicants who are denied employment because of their conviction history must receive a written copy of the Article 23-A analysis.
- b) Standard of Proof: It shall be an affirmative defense that any action taken by an employer or agent thereof is permissible pursuant to subdivision a of this section.

8) **Licenses, Registrations, and Permits**

- a) Licensing agencies may not deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit, based on criminal history in violation of Article 23-A of the New York Corrections Law.
- b) Prior to denying or taking any adverse action against an individual applying for a license, registration or permit based on their conviction history, the licensing agency must evaluate the candidate using the Article 23-A analysis.
- c) A finding that an applicant lacks "good moral character," cannot be based on an individual's criminal history when such an action is in violation of Article 23-A of the Correction Law.
- d) Under no circumstances may an individual applying for a license, registration or permit, be questioned about non-convictions, nor can any adverse actions or a denial be made based on non-convictions.
- e) Exemption:
 - i) The prohibitions of this subdivision relating to inquiries, denials or other adverse action related to a person's record of arrests or convictions do not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons.
 - ii) Any agency authorized to issue a license, registration, or permit may consider age, disability, or criminal history as a criterion for determining eligibility or continuing

fitness for a license, registration or permit, when specifically required to do so pursuant to federal, state, or local law.

9) Enforcement and Penalties

- a) The Commission may include penalties for discrimination in employment on the basis of criminal history as part of a conciliation agreement, in recommendations to OATH, and in decisions and orders. The amount will be guided by the following factors:
 - i) The severity of the particular violation;
 - ii) The existence of additional previous or contemporaneous violations of the Human Rights Law;
 - iii) The employer's size, considering both the total number of employees and its revenue; and
 - iv) Any other relevant mitigating factor.
- b) There will be a rebuttable presumption that an employer was motivated by an applicant's or employee's criminal history if it revokes a conditional offer of employment without following the Fair Chance Process.
 - i) This presumption can be rebutted by demonstrating that the conditional offer was revoked based on: (1) the results of a medical exam in situations in which such exams are permitted by the American with Disabilities Act; (2) information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show that the information is material; or (3) evidence that the employer did not have knowledge of the applicant's or employee's criminal history before revoking the conditional offer.
- c) Early Resolution for Commission-initiated complaints regarding certain *per se* violations.
 - i) Early Resolution is an expedited settlement option that is available to respondents in certain circumstances that allows them to immediately admit liability and comply with a penalty in lieu of litigating the matter.
 - ii) Except as provided in subparagraph (iii) below, the LEB will offer Early Resolution for Commission-initiated complaints of *per se* violations under the following circumstances: (1) A respondent has committed a *per se* violation as defined in subdivisions a, b, and d of section 2-04; (2) there are no other pending or current allegations concerning violations of the HRL; (3) the respondent has 50 or less employees at the time of the alleged violation; and (4) the respondent has one or fewer previous violations of the HRL in the past 3 years.
 - iii) Notwithstanding any other provision of this section, the Commission retains discretion to proceed with a full investigation and a referral to OATH when the offer of Early Resolution will not serve the public interest. Factors that indicate that an Early Resolution is not in the public interest include without limitation: (1) the respondent has had prior contact with the Commission from which an inference of willfulness regarding the violation may be inferred, (2) the respondent works with vulnerable communities, or (3) the Commission has reason to believe discrimination is rampant in respondent's industry.
 - (1) For purposes of this section, a violation of any provision of the HRL that resulted in an admission pursuant to early resolution, conciliation or other settlement

agreement; or a finding of liability issued after a hearing or trial pursuant to a complaint filed with the Commission shall be considered a past violation.

iv) Early Resolution: notice, penalties and procedure

- (1) A respondent shall be served with a copy of the Early Resolution Notice with service of the initial complaint.
- (2) The Notice shall state that the respondent has 90 days to answer a complaint in which the respondent has been offered the option of Early Resolution, and that there will be no extensions of time granted.
- (3) The Notice shall inform the respondent of their right to either: (1) admit liability and agree to the affirmative relief and penalty, or (2) file an answer to the complaint in compliance with section 1-14 of this title, except that the time to respond shall be 90 days instead of 30.
- (4) An Early Resolution penalty shall include: (A) a mandatory and free training provided by the Commission; (B) a requirement that the respondent post a notice of rights under the HRL; and (C) a monetary fine as determined by the penalty schedule outlined in paragraph 5 of this subdivision. The Notice shall inform the respondent that a private individual aggrieved by the same violation may also file an independent complaint with the Commission or may bring a court action.
- (5) Fines will be assessed according to the following penalty schedule:

<u>Employer Size (at the time of the violation)</u>	<u>1st Violation</u>	<u>2nd Violation (within 3 years of the resolution date of the first violation)</u>
<u>Employer Size 4-9 employees</u>	<u>\$500.00</u>	<u>\$1000.00</u>
<u>Employer Size 10-20 employees</u>	<u>\$1000.00</u>	<u>\$5000.00</u>
<u>Employer Size 21-50 employees</u>	<u>\$3500.00</u>	<u>\$10,000.00</u>

** Distinct and contemporaneous violations will be counted separately for the purpose of calculating a monetary penalty. For example, an employer who has 4-9 employees and is using a discriminatory advertisement in violation of section 2-04(1)(a) and an application that references criminal history in violation of section 2-04(1)(b) will be charged with two separate violations of \$500.00 each. However, multiple violations of one section, for example, posting a discriminatory advertisement on three different websites, will be counted as one violation for the purpose of assessing a penalty under this section.

- (6) If the employer believes that the employer size used to assess the imposed penalty is incorrect, the employer may call the number listed on the Early Resolution Notice.

iii) Admission of liability

- (1) An admission of liability must be returned to the Commission in the manner prescribed in the Early Resolution Notice. Once the admission is received, the LEB shall promptly forward such agreement to the Chair. The signature of the

Chair with the notation “SO ORDERED” shall be construed to be a final order of the Commission. A copy of such order shall be served upon the respondent.

v) Contesting Liability and Filing an Answer

- (1) Notwithstanding any provision of sections 1-61 or 1-62 of this title, if a respondent elects to deny liability and contest the allegations in the complaint, the respondent shall file an answer and upon receipt of the answer, the LEB shall refer the case to the Office of Administrative Trials and Hearings (“OATH”) for a hearing pursuant to section 1-71 of this title.
- (2) For purposes of a hearing, the case will proceed in accordance with subchapter C of Chapter 2 of Title 48 of the Rules of the City of New York.

vi) Failure to Respond

- (1) If a respondent fails to respond to a complaint accompanied by an Early Resolution Notice within 90 days, all allegations in the complaint will be deemed admitted unless good cause to the contrary is shown pursuant to section 8-111(c) of the Administrative Code.
- (2) Upon default, the LEB may refer the case to the OATH pursuant to section 1-71 of this title and make a motion that the respondent be held in default and that a report and recommendation be issued recommending the affirmative relief and penalties requested by the LEB. The LEB shall attach proof of service of the motion.
- (3) The LEB shall include with the motion a copy of the complaint and any additional documentation sent to the respondent, the Early Resolution Notice and proof of service of the motion.

vii) Relief from Defaults

- (1) At any time after the case has been referred to the OATH, but prior to the issuance of a report and recommendation, the respondent may move for relief from default, pursuant to section 2-27 of Title 48 of the Rules of the City of New York.

10) **Criminal Record Discrimination in Obtaining Credit**

- a) No person can ask about or take any adverse action based on the non-conviction history of an individual in connection with an application or evaluation for credit.

11) **Employers seeking the Work Opportunity Tax Credit (“WOTC”)**

- a) Employers who wish to claim the WOTC credit are not exempt from the FCA. Employers may, however, require an applicant to complete IRS form 8850 before a conditional offer is made if: (1) the employer does not ask under which category the applicant qualifies prior to a conditional offer and (2) the employer uses the information gathered for no purpose other than applying for the WOTC.

**NEW YORK CITY LAW DEPARTMENT
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100 CHURCH STREET
NEW YORK, NY 10007
212-356-4028**

**CERTIFICATION PURSUANT TO
CHARTER §1043(d)**

RULE TITLE: Rules Implementing Fair Chance Act

REFERENCE NUMBER: 2015 RG 039

RULEMAKING AGENCY: New York City Commission on Human Rights

I certify that this office has reviewed the above-referenced proposed rule as required by section 1043(d) of the New York City Charter, and that the above-referenced proposed rule:

- (i) is drafted so as to accomplish the purpose of the authorizing provisions of law;
- (ii) is not in conflict with other applicable rules;
- (iii) to the extent practicable and appropriate, is narrowly drawn to achieve its stated purpose; and
- (iv) to the extent practicable and appropriate, contains a statement of basis and purpose that provides a clear explanation of the rule and the requirements imposed by the rule.

/s/ STEVEN GOULDEN
Acting Corporation Counsel

Date: February 12, 2016

**NEW YORK CITY MAYOR'S OFFICE OF OPERATIONS
253 BROADWAY, 10th FLOOR
NEW YORK, NY 10007
212-788-1400**

**CERTIFICATION / ANALYSIS
PURSUANT TO CHARTER SECTION 1043(d)**

RULE TITLE: Rules Implementing Fair Chance Act

REFERENCE NUMBER: CCHR-1

RULEMAKING AGENCY: City Commission on Human Rights

I certify that this office has analyzed the proposed rule referenced above as required by Section 1043(d) of the New York City Charter, and that the proposed rule referenced above:

- (i) Is understandable and written in plain language for the discrete regulated community or communities;
- (ii) Minimizes compliance costs for the discrete regulated community or communities consistent with achieving the stated purpose of the rule; and
- (iii) Does not provide a cure period but allows for warning letters for certain Commission-initiated complaints.

/s/ Francisco X. Navarro
Mayor's Office of Operations

February 12, 2016
Date