

Testimony of Dana Sussman
Deputy Commissioner for Policy and Intergovernmental Affairs
New York City Commission on Human Rights
Before the Committee on Civil and Human Rights
January 22, 2020

Good morning Chair Eugene and Members of the Committee on Civil and Human Rights. Thank you for convening today's hearing on Intro. 1314-A. I am Dana Sussman, Deputy Commissioner for Policy and Intergovernmental Affairs at the New York City Commission on Human Rights. The Commission is proud to enforce one of the broadest and most protective laws prohibiting discrimination on the basis of one's involvement in the criminal legal system, the Fair Chance Act, and we are excited to be here today to discuss Intro. 1314-A which would expand protections in meaningful and important ways for people currently employed or seeking employment and who have prior or current engagement with the criminal legal system. We think Intro. 1314-A is vital to continuing this important work and we strongly support the bill.

The Fair Chance Act was signed into law in June 2015 and went into effect in October 2015. It was the first substantive change to the NYC Human Rights Law under Commissioner Carmelyn P. Malalis's tenure, and a groundbreaking shift in how employers must advertise, interview, and consider candidates for employment. By "banning the box," which refers to removing the box an applicant is required to check on a job application indicating whether they have a criminal record, prohibiting the use of criminal background checks until a conditional offer is made, and then providing a standard, notice, and process for withdrawing the conditional offer under limited circumstances, it gives people with criminal history access to employment in ways that had long been out of reach. And the implementation of New York City's Fair Chance Act ("FCA") provides a case study in how the Commission, under Commissioner Malalis's leadership, undertook a comprehensive and multi-pronged approach that involved policy development and rulemaking, education and outreach, a public awareness campaign, and aggressive enforcement, including case resolutions that incorporate restorative justice principles.

Leading up to the Fair Chance Act's effective date, the Commission published its second legal enforcement guidance, which provides clear and transparent information and examples as to how the Commission will enforce the Fair Chance Act's protections, enumerating specific *per se* violations of the FCA, and publishing a template notice form for employers to use to share with applicants when undertaking the Fair Chance analysis. In addition, the Commission published fact sheets, a multi-lingual pamphlet, and frequently asked questions on its website that are responsive to questions the Commission received from members of the public and employers. In 2017, the Commission, after notice and comment, promulgated rules codifying most of the legal enforcement guidance. The Fair Chance Act rules also established a new Early Resolution process, in which the Commission's Law Enforcement Bureau, in its discretion, can issue fines pursuant to a prescribed penalty schedule, in an expedited manner, where *per se* violations of the FCA are identified. This has allowed the Commission to manage its resources and build in efficiencies so that the Commission can focus its efforts on high impact cases. The rules went into effect August 5, 2017.

To educate the public on this major expansion of legal protections, the Commission developed two FCA-focused workshops (which also cover prohibitions on obtaining and using applicants' credit history during the hiring process) for two different audiences: employers, to understand their obligations, learn where to find resources, and obtain clear information on how to properly engage in the Fair Chance process; and one workshop for job applicants, workers, and service providers who work with people with criminal legal involvement, to understand their rights, how to report to the Commission, and what remedies are available to them. The Commission offered these workshops to community-based organizations, business associations, houses of worship, and to sister agencies. The Commission also hosted these free workshops at its five borough-based offices monthly or quarterly during the first three years after the law went into effect and continue to offer them.

Since 2015, the Commission has provided 1,148 trainings on the Fair Chance Act across all five boroughs, including 510 trainings on Rikers, over 50 additional trainings in partnership with the Department of Corrections, Probation, and NYCHA, and over 100 trainings to NYS Department of Correction and NYS Division of Parole. In total, the Commission has provided in-person live training to over 44,000 New Yorkers on the Fair Chance Act since its passage in 2015. The Commission has also prioritized outreach and education to business entities to ensure they have the information and tools they need to comply with the Fair Chance Act and other requirements under the City Human Rights Law. For example, the Commission has presented on the Fair Chance Act to the Brooklyn Chamber of Commerce, the Richmond County Black & Minority Chamber of Commerce, the United Neighborhoods Civic Association, and the Bucks Business Network on Staten Island. The Commission has also presented regularly to the management bar, law firms that counsel large employers on compliance, and to various bar associations on this law and others. In addition, the Commission has educated millions of New Yorkers on their rights and obligations under the Fair Chance Act through a robust public outreach campaign that launched in late 2015 and included multilingual ads in subways, online, in newspapers, and on ethnic and community radio stations.

The Commission's Law Enforcement Bureau has aggressively enforced the Fair Chance Act using a variety of investigatory tools and methods for maximum impact. Since 2015, the Commission has filed 456 complaints of criminal history discrimination, and as of earlier this month, currently has 174 open matters related to the Fair Chance Act. The Commission has conducted a total of 832 tests related to the Fair Chance Act and filed a total of 69 Commission-initiated complaints that were a result from testing.

The Commission's Law Enforcement Bureau has resolved cases with large employers, including, for example, CityMD, Yelp, Mount Sinai Medical Systems, and CVS, ensuring maximum impact for New Yorkers, and in some instances, has even negotiated resolutions that include a commitment to "ban the box" nationwide, beyond what employers are legally obligated to do. In addition to major policy changes, trainings, and other affirmative relief, the Commission has ordered a total of \$1,055,610.00 in damages and penalties since 2015, representing \$698,610 in damages to complainants that have been harmed by violations of the FCA and \$357,000 in civil penalties to the general fund of the City of New York. In other cases, the Commission, in its discretion, has not levied any penalties at all, where an employer agrees to take immediate action to correct a violation, undergo training, and come into compliance. A few

case summaries highlight the Law Enforcement Bureau's dedicated efforts to ensure widespread change, relief for victims of discrimination, and restoration for communities impacted by these practices.

In a case in which an individual sought a job as a custodian, he identified that the application contained illegal questions about criminal history, and he was unlawfully interrogated about his criminal history during his interview. Afterwards, the complainant did not receive an offer for the position, and he filed a complaint with the Commission alleging criminal history discrimination and violations of the Fair Chance Act. To resolve the case, Respondent agreed to bring its employment policies in line with the New York City Human Rights Law, train the company's managers; partner with certain reentry organizations to include their clients who have criminal histories in the job applicant pool; pay the complainant \$35,000 in emotional distress damages and \$7,000 in back pay, and pay a \$20,000 civil penalty to the general fund of the City of New York.

In another case, an applicant for employment with Yelp, Inc. filed a complaint, alleging that the company made an unlawful pre-employment inquiry about his criminal conviction history in violation of the Fair Chance Act and denied him employment based on his criminal conviction record. The Commission's Law Enforcement Bureau conducted an investigation and audited Yelp, Inc.'s employment policies. They also found that Yelp, Inc. had unlawfully run a background check on the complainant prior to making him a conditional offer of employment and had unlawfully denied him employment because of a two-year-old misdemeanor conviction. Yelp, Inc., the complainant, and the Commission entered into a conciliation agreement requiring the company to pay \$20,000 in emotional distress damages to the complainant, a \$10,000 civil penalty to the general fund of the City of New York, and engage in extensive affirmative relief, including: training 800+ New York City-based employees on the New York City Human Rights Law, including the Fair Chance Act; formally committing to ban the box at all of its offices nationwide; displaying the Commission's Notice of Rights and Fair Chance Act posters at conspicuous locations accessible to all New York City-based employees; and revising and updating its internal policies regarding applicants with criminal conviction records. In particular, in an unprecedented move beyond the protections of the existing law, Yelp agreed to disregard entire classes of convictions and convictions over a certain number of years old.

I will turn it over to my colleague, Zoey Chenitz, Senior Policy Counsel, to discuss the key changes to the Fair Chance Act that Intro. 1314-A would codify. Thank you for convening today's hearing to discuss this incredibly important bill. The Commission is dedicated to using all of the tools at our disposal to ensure that the Fair Chance Act fulfills its promise to reduce barriers to employment for people with involvement in the criminal legal system, and we hope to soon incorporate the additional protections afforded by Intro. 1314-A into the agency's work and mandate.

Testimony of Zoey Chenitz
Senior Policy Counsel
New York City Commission on Human Rights
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Good morning Chair Eugene and Members of the Committee on Civil and Human Rights. Thank you for convening today's hearing on Intro. 1314-A. I am Zoey Chenitz, Senior Policy Counsel at the New York City Commission on Human Rights. As my colleague Dana Sussman highlighted in her testimony, New York City's Fair Chance Act has been a leading model across the nation in terms of promoting fair employment opportunities for people impacted by the criminal legal system, ensuring they have an opportunity to obtain employment based on their merit and qualifications, support themselves and their families, and contribute meaningfully to their communities.

The Commission strongly supports Intro. 1314-A, which will strengthen the Fair Chance Act in several important ways. I would like to focus on four key changes that the bill will make to the New York City Human Rights Law. First, the bill provides new procedural protections for job applicants and current employees with pending criminal cases, meaning that employers may not arbitrarily take adverse action, such as denying or terminating employment, because of an arrest or open criminal case, without first considering several factors related to whether the alleged wrongdoing is related to the job or would pose an unreasonable risk to people or property. This important change ensures that people who have not been convicted of a crime, and are presumed innocent under the law, will receive similar employment protections to those already available for someone convicted of a crime.

Specifically, the bill requires that before an employer takes an adverse action against an applicant or employee based on a pending case they must first request information from the person and consider six "relevant fair chance factors," similar to those outlined in Article 23-A, Section 753 of the Correction Law. The differences from Article 23-A reflect the fact that, unlike old convictions which may have occurred in the distant past, pending cases concern current interactions with the criminal system. With respect to pending cases, the relevant fair chance factors would include: (1) the City's policy objective of overcoming stigma toward and unnecessary exclusion of people with criminal justice involvement from licensing and employment; (2) the specific duties and responsibilities related to the person's employment; (3) the bearing of the alleged criminal offense on the person's fitness or ability to perform the duties and responsibilities of the job; (4) the seriousness of the alleged offense; (5) the legitimate interest of the employer in protecting property and the safety and welfare of specific people or the general public; and (6) if the person is a current employee, any additional information they can provide of rehabilitation or good conduct, including their history of positive job performance.

Taking into account all of the relevant fair chance factors that I have just listed, the employer could take an adverse action only if they determine that there is a direct relationship between the job and the wrongdoing alleged in the pending case, or that granting or continuing the person's employment would involve an unreasonable risk to property or to the safety or welfare of specific people or the general public. As with the fair chance process that is already applicable to convictions, the employer will have to provide the applicant or employee with a copy of the criminal history information relied on by the employer and a written copy of the employer's analysis of the relevant fair chance factors and then give the person time to respond, for example with information about errors in the criminal history, faults in the employer's analysis, or with mitigating information.

As with the existing protections for criminal history under the Fair Chance Act, these new protections based on pending cases would not apply to police officers, peace officers or other positions at law enforcement agencies, or where the law imposes a mandatory forfeiture, disability, or bar to employment. In addition, the new protections for pending cases would not apply to public employees who are already eligible for procedural protections against arbitrary dismissals pursuant to Section 75 of the Civil Service Law or pursuant to agency rules or other law. The minority of public employees who are not eligible for such alternative protections, and the majority of employees working in the private sector, will gain protection under this proposed amendment to the Fair Chance Act.

In the absence of employment protections for pending criminal cases, legally innocent people with pending criminal cases enjoy, paradoxically, less robust employment protections than people who have been convicted. As a result, people who wish to fight the criminal charges against them may risk greater job uncertainty while their case is open than they would if they plead guilty to quickly resolve their case. This bill would protect the rights of the accused and would help to mitigate collateral employment consequences, particularly for people of color and lesbian, gay, bisexual, transgender, and queer ("LGBTQ") people who are disproportionately impacted by the criminal legal system.

Second, the bill would add protections for employees impacted by the criminal system during their employment. Currently, the Fair Chance Act only protects current employees from adverse action based on convictions that occurred prior to the start of their employment. Under the proposed amendment, current employees would also have protections against adverse actions based on a pending case, as I described earlier, or a conviction that occurs during employment. As with convictions pre-dating employment, employers would have to engage in an analysis similar to that which I described earlier. In short, an employer could take an adverse action only after considering the relevant fair chance factors and determining either that there is a direct relationship between the alleged or convicted conduct and the job, or that continued employment would involve an unreasonable risk to the safety or welfare of people or property. The employer would also be required to provide the employee with a written copy of its fair chance analysis, along with the criminal history information on which the analysis was based and give the employee a reasonable time to respond. The employer would be permitted to place the employee on unpaid leave while it conducts the fair chance process.

Consistent with existing exceptions to the Fair Chance Act, the bill's protections for current employees would not apply for police officers, peace officers, or other employees of law enforcement agencies, or to positions designated as exempt from the fair chance process by the Department for Citywide Administrative Services (DCAS). In addition, as I noted earlier, protections for pending cases would not apply where the employee is otherwise protected under Civil Service Law Section 75, agency rules, or another law. These procedural protections are important because they will prevent an arrest from automatically causing job loss, while still protecting the legitimate business interests of employers.

Third, the bill would prohibit employers from considering violations and non-criminal convictions that are unsealed. Currently, employers are prohibited from asking about or taking any adverse action based on violations or non-criminal convictions that have been sealed, a process that happens automatically after a period of time for most violations. However, there is no protection for workers with such adjudications during the period prior to sealing, which typically lasts between six months and one year, or if the violation is not subject to sealing, as is the case for the violation of loitering for purposes of prostitution. In short, a loophole in the current law means that people whose criminal outcomes are deemed so inconsequential that they may not be considered at all once they are sealed have no employment protections before they seal. Intro. 1314-A would close the existing loophole, ensuring minor contact with the criminal legal system does not hinder the ability to seek and keep employment. This amendment will be particularly impactful for people convicted of loitering for purposes of prostitution – a violation that critics have referred to as “walking while transgender”¹ because of the frequency with which it is used to disproportionately police transgender women of color, often criminalizing ordinary conduct such as standing on a street corner with one's friends. By adding employment protections for unsealed violations, which includes all convictions for loitering for purposes of prostitution, this bill will help to reduce the collateral consequences of this outdated offense. The bill will provide similar new protections in the area of licensing, with respect to unsealed violations, non-criminal offenses, and the underlying arrests that result in such outcomes.

Fourth, the bill will provide procedural protections if an employer seeks to take adverse action based on perceived misrepresentations about a person's criminal history. Currently, if there is any perceived conflict between a person's self-report of their criminal history and a background check, the employer can take adverse action without any further input or clarification from the person. That is troubling because background checks often include inaccurate or outdated information.² In addition, employers may use insignificant conflicts between what a person has represented and what appears on their record as a pretextual basis to reject them from a job. This bill would require that before an employer takes adverse action based on a perceived misrepresentation, they first provide the person with the information that they believe demonstrates the misrepresentation and provide the person a reasonable time to respond. In other words, the bill will enable people to explain their situation before an employer

¹ See, e.g., Emma Whitford, *NYPD amends patrol guide to curb 'walking while trans' arrests*, QUEENS DAILY EAGLE (June 6, 2019), <https://queenseagle.com/all/loitering-law-transwomen-nypd-amended-profiling>; German Lopez, “Walking while trans”: How transgender women of color are profiled, VOX (Jul. 21, 2015), <https://www.vox.com/2015/7/21/9010093/walking-while-transgender>.

² See generally Nat'l Consumer Law Center, *Broken Records Redux: How Errors By Criminal Background Check Companies Continue To Harm Consumers Seeking Jobs And Housing* (Dec. 2019), <https://www.nclc.org/images/pdf/criminal-justice/report-broken-records-redux.pdf>.

unilaterally takes an adverse action based on their belief that an applicant has lied about their criminal history. This change will be particularly helpful to people with old and minor convictions, who may be less likely to remember them.

For all the reasons I have discussed, the Commission strongly supports Intro. 1314-A and we encourage the Council to move forward with its passage. We are grateful to the Public Advocate for sponsoring this legislation and to the Council for taking up the issue. I look forward to your questions.