

## **NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)**

6/24The New York City Human Rights Law (the “NYCHRL”) prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed “independently from similar or identical provisions of New York state or federal statutes,” such that “similarly worded provisions of federal and state civil rights laws [are] a floor below which the City’s Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise.”<sup>1</sup>

The New York City Commission on Human Rights (the “Commission”) is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission’s Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in New York State Supreme Court within three (3) years of the discriminatory act. The NYCHRL covers employers with four or more employees.

The Fair Chance Act (“FCA”), effective October 27, 2015, amends the NYCHRL by making it an unlawful discriminatory practice for most employers, labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants until after extending conditional offers of employment. If an employer wishes to withdraw its offer, it must give the applicant a copy of its inquiry into and analysis of the applicant’s conviction history, along with at least three business days to respond.

### **I Legislative Intent**

The FCA reflects the City’s view that job seekers must be judged on their merits before their mistakes. The FCA is intended to level the playing field so that New Yorkers who are part of the approximately 70 million adults residing in the United States who have been arrested or convicted of a crime<sup>2</sup> “can be considered for a position among other equally qualified candidates,” and “not overlooked during the hiring process simply because they have to check a box.”<sup>3</sup>

Even though New York Correction Law Article 23-A (“Article 23-A”) has long protected people with criminal records from employment discrimination,<sup>4</sup> the City determined that such discrimination still occurred when applicants were asked about their records before completing the hiring process because many employers were

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<sup>1</sup> Local Law No. 85 (2005). “The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably worded to provisions of this title have been so construed.” N.Y.C. Admin. Code § 8-130.

<sup>2</sup> Gov’t Affairs Division of the N.Y. City Council, Committee Report on Int. No. 318-A, S. 2015-5, at 2 (June 9, 2015) (“Civil Rights Committee’s Report”), available at <http://legistar.council.nyc.gov/View.ashx?M=F&ID=3815856&GUID=59D912BA-68B5-429C-BF39-118EB4DFAAF5>.

<sup>3</sup> Testimony of Gale A. Brewer, Manhattan Borough President on Int. No. 318 to Prohibit Employment Discrimination Based on One’s Arrest Record or Criminal Conviction at 2 (Dec. 3, 2014) (emphasis in original), available at <http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410802&GUID=7D143B7E-C532-41EF-9A97-04FD17854ED7>.

<sup>4</sup> Violating Article 23-A is an unlawful discriminatory practice under the NYCHRL. N.Y.C. Admin. Code § 8-107(10).

not weighing the factors laid out in Article 23-A.<sup>5</sup> For that reason, the FCA prohibits any discussion or consideration of an applicant’s criminal history until after a conditional offer of employment. Certain positions are exempt from the FCA, as described in Section VII of this Guidance.

While the FCA does not require employers to hire candidates whose convictions are directly related to a job or pose an unreasonable risk, it ensures that individuals with criminal histories are considered based on their qualifications before their conviction histories. If an employer is interested enough to offer someone a job, it can more carefully consider whether or not that person’s criminal history makes her or him unsuitable for the position. If the employer wishes to nevertheless withdraw its offer, it must first give the applicant a meaningful opportunity to respond before finalizing its decision.

## II Definitions

The FCA applies to both licensure and employment, although this Guidance focuses on employment. The term “**applicant**,” as used in this Guidance, refers to both potential and current employees. The FCA applies to all decisions that affect the terms and conditions of employment, including hiring, termination, transfers, and promotions; where this Guidance describes the “**hiring process**,” it includes the process for making all of these employment decisions. Any time the FCA or this Guidance requires notices and disclosures to be printed or in writing, they may also be communicated by email, if such method of communication is mutually agreed on in advance by the employer and the applicant.

For the purpose of this Guidance, the following key terms are defined as follows:

### Article 23-A Analysis

The evaluation process mandated by New York Correction Law Article 23-A.

### Article 23-A Factors

The factors employers must consider concerning applicants’ criminal conviction history under Section 753 of New York Correction Law Article 23-A.

### Conditional Offer of Employment

An offer of employment that can only be revoked based on:

1. The results of a criminal background check;
2. The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act;<sup>6</sup> or
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 to job performance.

For temporary help firms, a conditional offer is the offer to be placed in a pool of applicants from which the applicant may be sent to temporary positions.

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<sup>5</sup> Transcript of the Minutes of the Committee on Civil Rights at 10 (Dec. 3, 2014) (statement of Council Member Jumaane Williams), *available at* <http://legistar.council.nyc.gov/View.aspx?M=F&ID=3410594&GUID=5FE2433E-1A95-4FAA-AECC-D60D4016F3FB>.

<sup>6</sup> The Americans with Disabilities Act (“ADA”) prohibits employers from conducting medical exams until after a conditional offer of employment. 42 U.S.C. § 12112(d)(3). To comply with the FCA and the ADA, employers may condition an offer of employment on the results of a criminal background check and then, after the criminal background check, a medical examination.

### **Conviction History**

A previous conviction of a crime, either a felony or misdemeanor under New York law,<sup>7</sup> or a crime as defined by the law of another state.

### **Criminal Background Check**

When an employer, orally or in writing, either:

1. Asks an applicant whether or not she or he has a criminal record; or
2. Searches public records, including through a third party, such as a consumer reporting agency (“CRA”), for an applicant’s criminal history.

### **Criminal History**

A previous record of criminal convictions or non-convictions or a currently pending criminal case.

### **Fair Chance Process**

The post-conditional offer process mandated by the FCA, as outlined in Section V of this Guidance.

### **Inquiry**

Any question, whether made in writing or orally, asked for the purpose of obtaining an applicant’s criminal history, including, without limitation, questions in a job interview about an applicant’s criminal history; and any search for an applicant’s criminal history, including through the services of a third party, such as a consumer reporting agency.

### **Non-convictions**

A criminal action, 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 violation that has been sealed under CPL § 160.55; or
4. Convictions that have been sealed under CPL § 160.58.

### **Statement**

Any words, whether made in writing or orally, for the purpose of obtaining an applicant’s criminal history, including, without limitation, stating that a background check is required for a position.

### **Temporary Help Firms**

A business which recruits, hires, and assigns its 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.<sup>8</sup>

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<sup>7</sup> A misdemeanor is an offense, other than a “traffic infraction,” for which a person may be incarcerated for more than 15 days and less than one year. N.Y. Pen. L. § 10.00(4). A felony is an offense for which a person may be incarcerated for more than one year. *Id.* § 10.00(5).

<sup>8</sup> N.Y. Lab. L. § 916(5).

### III *Per Se* Violations of the FCA

As of October 27, 2015, the following acts are separate, chargeable violations of the NYCHRL:

1. Declaring, printing, or circulating – or causing the declaration, printing, or circulation of – any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history, *even if no adverse action follows*. This includes, without limitation, advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”<sup>9</sup>
2. Making any statement or inquiry, as defined in Section II of this Guidance, before a conditional offer of employment, *even if no adverse action follows*.
3. Withdrawing a conditional offer of employment based on an applicant’s criminal history before completing the Fair Chance Process as outlined in Section V of this Guidance. Each of the following is a separate, chargeable violation of the NYCHRL:
  - a) Failing to disclose to the applicant a written copy of any inquiry an employer conducted into the applicant’s criminal history;
  - b) Failing to share with the applicant a written copy of the employer’s Article 23-A analysis;
  - c) Failing to hold the prospective position open for at least three business days, from an applicant’s receipt of both the inquiry and analysis, to allow the applicant to respond.
4. Taking an adverse employment action because of an applicant’s non-conviction.<sup>10</sup>

### IV The Criminal Background Check Process Under the FCA

The FCA does not change what criminal history information employers may consider. Instead, it changes when employers may consider this information. No employer may seek, obtain, or base an adverse employment action on a non-conviction.<sup>11</sup> No employer may seek, obtain, or base an adverse employment action on a criminal conviction until after extending a conditional offer of employment. After a conditional offer of employment, an employer can only withdraw the offer after evaluating the applicant under Article 23-A and finding that the applicant’s conviction history poses a direct relationship or unreasonable risk.

#### A. Before a Conditional Offer

The FCA prohibits the discovery and use of criminal history before a conditional offer of employment. During this time, an employer must not seek or obtain an applicant’s criminal history. Consistent with Article 23-A, an employer’s focus must instead be on an applicant’s qualifications.

The following are examples of common hiring practices that are affected by the FCA.

- i. Solicitations, advertisements, and publications for employment cannot mention criminal history.*

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<sup>9</sup> See discussion regarding language that encourages individuals with criminal history to apply *infra* p. 5.

<sup>10</sup> The FCA updates the NYCHRL’s protections regarding non-conviction discrimination to match the New York State Human Rights Law. See Section XI of this Guidance.

<sup>11</sup> Employers of police and peace officers can consider all non-convictions, except criminal actions terminated in favor of the applicant, as defined by New York Criminal Procedure Law § 160.50. N.Y.C. Admin. Code §§ 8-107(11)(a),(b).

The FCA now explicitly prohibits employers from expressing any limitation or specification based on criminal history in their job advertisements,<sup>12</sup> even though such advertisements are already illegal under the existing NYCHRL.<sup>13</sup> Ads cannot say, for example, “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, handouts, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness organizations. Employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check.

Solicitations, advertisements, and publications may include language that welcomes people with criminal records, however. For example, solicitations, advertisements, or publications that include language such as “People with criminal histories are encouraged to apply,” and “We value diverse experiences, including prior contact with the criminal legal system” are permissible. Stigmatizing language, like “ex-felon” and “former inmate,” may not be used.

***ii. Employers cannot inquire about criminal history during the interview process.***

The FCA prohibits employers from making any inquiry or statement related to an applicant’s criminal history until after a conditional offer of employment. Examples of prohibited statements and inquiries include, without limitation:

- Questions, whether written or oral, during a job interview about criminal history;
- Assertions, whether written or oral, that individuals with convictions, or certain convictions, will not be hired or cannot work at the employer; and
- Investigations into the applicant’s criminal history, including using public records or the Internet, whether conducted by an employer or for an employer by a third party.

The FCA does not prevent employers from otherwise looking into an applicant’s background and experience to verify her or his qualifications for a position, including asking for resumes and references and performing general Internet searches (e.g., Google, LinkedIn, etc.). Searching an applicant’s name is legal, but trying to discover an applicant’s conviction history is not. In connection with an applicant, employers cannot search for terms such as, “arrest,” “mugshot,” “warrant,” “criminal,” “conviction,” “jail,” or “prison.” Nor can employers search websites that contain or purport to contain arrest, warrant, conviction, or incarceration information.

The FCA allows an applicant to refuse to respond to any prohibited inquiry or statement. Such refusal or response to an illegal question shall not disqualify the applicant from the prospective employment.

***iii. Inadvertent disclosures of criminal record information before a conditional offer of employment do not create employer liability.***

The FCA prohibits any inquiry or statement made for the purpose of obtaining an applicant’s criminal history. If a legitimate inquiry not made for that purpose leads an applicant to reveal criminal history, the employer should continue its hiring process. It may not examine the applicant’s conviction history information until after deciding whether or not to make a conditional offer of employment.

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<sup>12</sup> *Id.* § 8-107(11-a)(a)(1).

<sup>13</sup> Advertisements excluding people who have been arrested violate the NYCHRL’s complete ban on employment decisions based on an arrest that did not lead to a criminal conviction. *Id.* § 8-107(11). Employers whose advertisements exclude people with criminal convictions are not engaging in the individual analysis required by Article 23-A. *Id.* § 8-107(10).

If the applicant raises her or his criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant's criminal history further. The employer should state that, by law, it will only consider the applicant's record if it decides to offer her or him a job. Similarly, if an applicant asks an employer during the interview if she or he will be subject to a criminal background check, the employer may state that a criminal background check will be conducted only after a conditional offer of employment. It must then move the conversation to a different topic. Employers who make a good faith effort to exclude information regarding criminal history before extending a conditional offer of employment will not be liable under the FCA.

## **B. After the Conditional Offer of Employment**

After extending a conditional offer of employment, as defined in Section II of this Guidance, an employer may make the same inquiries into, and statements about, an applicant's criminal history as before the FCA became effective. An employer may:

- Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case;
- Run a background check itself or, after giving the applicant notice and getting her or his permission, use a consumer reporting agency to do so;<sup>14</sup> and
- Once an employer knows about an applicant's conviction, ask her or him about the circumstances that led to it and begin to gather information relevant to every Article 23-A factor.

Employers must never inquire about or act on non-conviction information, however. To guard against soliciting or considering non-conviction information, employers may frame inquiries by using the following language after a conditional offer is made:

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 an employer hires an applicant after learning about her or his conviction history, the FCA does not require it to do anything more. An employer that wants to withdraw its conditional offer of employment, however, must first consider the Article 23-A factors. If, after doing so, an employer still wants to withdraw its conditional offer, it must follow the Fair Chance Process.

## **C. Evaluating the Applicant Using Article 23-A**

Under Article 23-A, an employer cannot deny employment unless it can:

1. Draw a direct relationship between the applicant's criminal record and the prospective job; or
2. Show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."<sup>15</sup>

An employer that cannot show the applicant meets at least one of the exceptions to Article 23-A cannot withdraw the conditional offer because of the applicant's criminal record.

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<sup>14</sup> The consumer report cannot contain credit information. Under the Stop Credit Discrimination in Employment Act, employers, labor organizations, and employment agencies cannot request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. *Id.* §§ 8-102(29); 8-107(24).

<sup>15</sup> N.Y. Correct. L. § 752.

An employer cannot simply presume a direct relationship or unreasonable risk exists because the applicant has a conviction record.<sup>16</sup> The employer must evaluate the Article 23-A factors using the applicant's specific information before reaching either conclusion.

- To claim the direct relationship exception, an employer must first draw some connection between the nature of conduct that led to the conviction(s) 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.<sup>17</sup>
- To claim the unreasonable risk exception, an employer must begin by assuming that no risk exists and then show how the Article 23-A factors combine to create an unreasonable risk.<sup>18</sup> Otherwise, this exception would cover all convictions not directly related.

The Article 23-A 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 conviction history 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 time since arrest or conviction;
- The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
- The seriousness of the applicant's conviction history;<sup>19</sup>
- Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his rehabilitation or good conduct;
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.<sup>20</sup>

Employers must carefully conduct the Article 23-A analysis. Before extending a conditional offer of employment, employers must define the job's duties and responsibilities, as required by Article 23-A. Employers cannot alter the job's duties and responsibilities after making a conditional offer of employment. Once an employer extends a conditional offer and learns of an applicant's criminal record, it must solicit the information necessary to properly consider each Article 23-A factor, including the applicant's evidence of rehabilitation.

The Commission will review private employers' adverse employment decisions to ensure that they correctly consider the Article 23-A factors and properly apply the exceptions. The Commission will begin with the

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<sup>16</sup> *Bonacorsa v. Van Lindt*, 71 N.Y.2d 605, 613-14 (N.Y. 1988).

<sup>17</sup> *Id.* at 613-14; see *Soto v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 907 N.Y.S.2d 104, 26 Misc. 3d 1215(A) at \*9 (N.Y. Sup. Ct. 2010) (citing *Marra v. City of White Plains*, 467 N.Y.S.2d 865, 870 (N.Y. App. Div. 1983)).

<sup>18</sup> *Bonacorsa*, 71 N.Y.2d at 613; *Exum v. N.Y. City Health & Hosps. Corp.*, 964 N.Y.S.2d 58, 37 Misc. 3d 1218(A) at \*6 (N.Y. Sup. Ct. 2012)

<sup>19</sup> Employers may judge the seriousness of an applicant's criminal record based on the number of felony and misdemeanor convictions, along with whether the acts underlying those convictions involved violence or theft.

<sup>20</sup> N.Y. Correct. L. § 753(2). An employer may not disfavor an applicant because she or he does not possess a certificate.

purpose of Article 23-A: to create “a fair opportunity for a job is a matter of basic human fairness,” one that should not be “frustrated by senseless discrimination.”<sup>21</sup> The Commission will also consider Article 23-A case law.<sup>22</sup> Employers must evaluate each Article 23-A factor; they cannot ignore evidence favorable to the applicant;<sup>23</sup> and they cannot disproportionately weigh any one factor over another.<sup>24</sup> Employers should consider applicants’ successful performance of their job duties in past employment, along with evidence that they have addressed the causes of their criminal activity.<sup>25</sup>

## V The Fair Chance Process

If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the Fair Chance Process:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant’s criminal history;
2. Share with the applicant a written copy of its Article 23-A analysis; and
3. Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer’s concerns.

### A. Disclosing the Inquiry

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer.

Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA’s report on the applicant.<sup>26</sup> Because CRAs can be held liable for aiding and abetting discrimination under the NYCHRL, they should ensure that their customers only request criminal background reports after a conditional offer of employment. Employers who rely on criminal record information beyond what is contained in a criminal background report must also give that information to the applicant.

Employers who search the Internet to obtain criminal histories must print out the pages they relied on, and such printouts must identify their source so that the applicant can verify them. Employers who check public records must provide copies of those records. Employers who rely on oral information must provide a written summary of their conversation. The summary must contain the same information the employer relied on in reaching its determination, and it should identify whether that information was provided by the applicant.

### B. Sharing the Fair Chance Notice

The FCA directs the Commission to determine the manner in which employers inform applicants under Article 23-A and provide a written copy of that analysis to applicants.<sup>27</sup> The Commission has prepared a Fair

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<sup>21</sup> Governor’s Approval Mem., Bill Jacket, L. 1976, ch. 931.

<sup>22</sup> Nearly all reported cases concern public agencies’ employment decisions, which cannot be reversed unless “arbitrary and capricious.” N.Y. Correct. L. § 755; see C.P.L.R. § 7803(3). The “arbitrary and capricious” standard does not apply to private employers.

<sup>23</sup> *Gallo v. N.Y. State Office of Mental Retardation & Developmental Disabilities*, 830 N.Y.S.2d 796, 798 (N.Y. App. Div. 2007).

<sup>24</sup> *Soto*, 26 Misc. 3d 1215(A) at \*7.

<sup>25</sup> *Odems v. N.Y.C. Dep’t of Educ.*, No. 400637/09 at \*4, 2009 WL 5225201, at \*5, 2009 N.Y. Misc. LEXIS 6480, at \*5 (N.Y. Sup. Ct. Dec. 16, 2009); *El v. N.Y.C. Dep’t of Educ.*, 23 Misc.3d 1121(A), at \*4-5 (N.Y. Sup. Ct. 2009).

<sup>26</sup> 15 U.S.C. § 1681d; N.Y. Gen. Bus. L. § 380-b(b).

<sup>27</sup> N.Y.C. Admin. Code § 8-107(11-a)(b)(ii).

Chance Notice (the “Notice”)<sup>28</sup> that employers may use to comply with this requirement. As long as the material substance – considering specific facts in the Article 23-A analysis – does not change, the Notice may be adapted to an employer’s preferred format.

The Notice requires employers to evaluate each Article 23-A factor and choose which exception – direct relationship or unreasonable risk – the employer relies on. The Notice also contains space for the employer to articulate its conclusion.<sup>29</sup> Boilerplate denials that simply list the Article 23-A factors violate the FCA. For example, an employer cannot simply say it considered the time since conviction; it must identify the years and/or months since the conviction. An employer also cannot list specific facts for each factor but then fail to describe how it concluded that the applicant’s record met either the direct relationship or unreasonable risk exceptions to Article 23-A.

Finally, the Notice informs the applicant of her or his time to respond and requests evidence of rehabilitation and good conduct. The Notice provides examples of such information. Employers may identify specific examples of rehabilitation and good conduct that would be most relevant to the prospective position, but examples must be included.

### **C. Allowing Time to Respond**

Employers must give applicants a reasonable time, which shall be no less than three business days, to respond to the employer’s inquiry and Notice. During this time, the employer may not permanently place another person in the applicant’s prospective position. This time period begins running when an applicant receives both the inquiry and Notice. Employers may therefore wish to confirm receipt, either by disclosing the information in person, electronically, or by registered mail. Such method of communication must be mutually agreed on in advance by the applicant and employer. Otherwise, the Commission will credit an applicant’s recollection as to when she or he received the inquiry and Notice.

By giving an applicant at least three business days to respond, the FCA contemplates a process in which employers discuss their reasons for finding that an applicant’s record poses a direct relationship or unreasonable risk. The process allows an applicant to respond either orally or in writing and provide additional information relevant to any of the Article 23-A factors.<sup>30</sup> After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A analysis. Employers may offer an applicant a similar position that mitigates the employer’s concerns. If, after communicating with an applicant, the employer decides not to hire her or him, it must relay that decision to the applicant.

The three-day time period to respond also provides an opportunity for the applicant to address any errors on the employer’s background report, including any discrepancies between the convictions she or he disclosed and the results of the background check. As detailed below, a discrepancy could be due to an error on the report or an applicant’s intentional misrepresentation.

#### ***i. Handling Errors in the Background Check***

An error on a background check might occur because, for example, it contains information that pertains to another person or is outdated. If an applicant is able to demonstrate an error on the background report, the employer must conduct the Article 23-A analysis based on the corrected conviction history information to ensure its decision is not tainted by the previous error. If the employer then finds a direct relationship or unreasonable risk and intends to take an adverse action on that basis, it must follow the Fair Chance Process: the applicant

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<sup>28</sup> The Notice is available on the Commission’s website, <http://www.nyc.gov/FairChanceNYC>.

<sup>29</sup> N.Y. Correct. L. § 753(1)(h).

<sup>30</sup> N.Y.C. Admin. Code § 8-107(11-a)(b).

must be given a copy of the corrected inquiry, the employer's Article 23-A analysis, at least three business days to respond, with an opportunity to provide any additional information for the employer to review and re-examine its analysis.

**ii. Handling Applicants' Misrepresentations of Their Conviction Histories**

If an applicant cannot or does not demonstrate that any discrepancy between the information she or he disclosed and the employer's background report is due to an error, the employer can choose not to hire the individual based on the applicant's misrepresentation. It need not evaluate the applicant's record under Article 23-A.

## **VI Temporary Help Firms Under the Fair Chance Act**

Temporary help firms employ individuals, either as direct or joint employers, and place them in job assignments at the firms' clients. The FCA applies the same way to temporary help firms as it does to any other employer. The only difference is that, for these firms, a conditional offer of employment 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. Before a temporary help firm withdraws a conditional offer of employment after discovering an applicant's conviction history, it must follow the Fair Chance Process, according to Section V of this Guidance. To evaluate the job duties, a temporary help firm may only consider the basic skills necessary to be placed in its applicant pool.

Employers who accept placements from temporary help firms, and who wish to inquire about temporary workers' criminal histories, must follow the Fair Chance Act. They may not make any statements or inquiries about an applicant's criminal record until after the worker is assigned to the employer, and they must follow the Fair Chance Process if they wish to decline employment because of an applicant's criminal record.

As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences. For example, a temporary help firm cannot, based on an employer's instructions, refer only temporary workers who do not have criminal histories or who have "less serious" criminal histories.

## **VII Positions Exempt from the FCA**

Consistent with the Local Civil Rights Restoration Act of 2005,<sup>31</sup> all exemptions to coverage under the FCA's anti-discrimination provisions are to be construed narrowly. Employers may assert the application of an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence. Other than the employers described in Subsections C and D of this Section, the Commission does not assume that an entire employer or industry is exempt and will investigate how an exemption applies to a particular position or role. Positions that are exempt from the FCA are not necessarily exempt from Article 23-A.

**A. Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions**

The FCA does not apply to the actions of employers or their agents that are taken pursuant to any state, federal, or local law that requires criminal background checks for employment purposes or bars employment

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<sup>31</sup> N.Y.C. Local Law No. 85 (2005); N.Y.C. Admin. Code § 8-130.

based on criminal history.<sup>32</sup> The purpose of this exemption is to not delay a criminal background inquiry when the results of that inquiry might legally prohibit an employer from hiring an applicant.

A network of federal, state, and local laws creates employment barriers for people with criminal records. The Commission characterizes these barriers as either mandatory or discretionary. Mandatory barriers require a licensing authority or employer to deny applicants with certain convictions enumerated in law. Discretionary barriers allow, but do not require, a licensing authority or employer to deny applicants with criminal records, and may or may not enumerate disqualifying convictions. The FCA controls any time an employer's decision is discretionary, meaning it is not explicitly mandated by law.

For example, state law contains mandatory barriers for – and requires background checks of – applicants to employers regulated by the state Department of Health (“DOH”), Office of Mental Health (“OMH”), and Office of People with Developmental Disabilities (“OPWDD”).<sup>33</sup> These agencies require the employers they regulate to conduct background checks because the agencies are charged by state law to ensure that individuals with certain convictions are not hired to work with vulnerable people.<sup>34</sup> Employers regulated by DOH, OMH, and OPWDD are therefore exempt from the FCA when hiring for positions where a criminal history check is required by law. For positions that do not require a criminal history check, however, such employers have to follow the FCA.

The FCA applies when an employer hires people who require licensure, or approval by a government agency, even if the license has mandatory barriers. In that case, an employer can only ask whether an applicant has the required license or can obtain one within an acceptable period of time. Any inquiry into the applicant's criminal record – before a conditional offer of employment – is not allowed. An applicant who has a license has already passed any criminal record barriers and been approved by a government agency. An applicant who cannot, because of her or his conviction record, obtain a required license may have her or his conditional offer withdrawn or employment terminated for such legitimate nondiscriminatory reason.

### **B. Employers Required by a Self-Regulatory Organization to Conduct a Criminal Background Check of Regulated Persons**

Employers in the financial services industry are exempt from the FCA when complying with industry-specific rules and regulations promulgated by a self-regulatory organization (“SRO”).<sup>35</sup> This exemption only applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the FCA.

### **C. Police and Peace Officers, Law Enforcement Agencies, and Other Exempted City Agencies**

Police and peace officers are limited to their definitions in CPL §§ 1.20(34) and 2.10, respectively. Employment decisions about such officers are exempt from the FCA, as are decisions about positions in law enforcement agencies exempted under New York Correction Law Article 23-A.<sup>36</sup>

As of the date of this Guidance, the following City agencies are also exempt from the FCA: the New York 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.

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<sup>32</sup> N.Y.C. Admin. Code § 8-107(11-a)(e).

<sup>33</sup> N.Y. Exec. L. § 845-b.

<sup>34</sup> *Id.* at 845-b(5)(a).

<sup>35</sup> 15 U.S.C. § 78c(a)(26).

<sup>36</sup> N.Y. Correct. L. § 750(5).

#### **D. City Positions Designated by the Department of Citywide Administrative Services (“DCAS”) as Exempt**

This exemption gives the Commissioner of DCAS the discretion to determine that employment decisions about some City positions, not already exempted pursuant to another provision, need not comply with the FCA because the position involves law enforcement; is susceptible to bribery or other corruption; or entails the provision of services to, or the safeguarding of, people vulnerable to abuse.

Once DCAS exempts a position, applicants may be asked about their conviction history at any time during the hiring process. Under this exemption, however, applicants who are denied employment because of their conviction history must receive a written copy of the DCAS’s Article 23-A analysis.<sup>37</sup>

### **VIII Best Practices for Employers**

An employer claiming an exemption must be able to show that the position falls under one of the categories in Section VII of this Guidance. Employers availing themselves of exemptions to the FCA should inform applicants of the exemption they believe applies and keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

- Which exemption(s) is claimed;
- How the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption under Sections VII(A) or (B) of this Guidance;
- A copy of any inquiry, as defined by Section V(A) of this Guidance, along with the name of the employee who made it;
- A copy of the employer’s Article 23-A analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant’s criminal history.

Employers may be required to share their exemption log with the Commission. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.

The Commission recommends that the results of any inquiry into an applicant’s criminal history be collected and maintained on separate forms and kept confidential. An applicant’s criminal history should not be used, distributed, or disseminated to any persons other than those involved in making an employment decision about an applicant.<sup>38</sup>

### **IX Enforcement**

The Commission will vigorously enforce the FCA. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the particular violation;
- The existence of additional previous or contemporaneous violations;

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<sup>37</sup> N.Y.C. Admin. Code § 8-107(11-a)(f)(2).

<sup>38</sup> After hire, the employee’s supervisor or manager may also be informed of the applicant’s criminal record.

- The employer’s size, considering both the total number of employees and its revenue; and
- Whether or not the employer knew or should have known about the FCA.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with compensatory and punitive damages.

The Commission will presume, unless rebutted, that an employer was motivated by an applicant’s criminal record if it revokes a conditional offer of employment, as defined in Section II of this Guidance. Consistent with that definition, the Commission will presume that any reason known to the employer before its conditional offer is not a legitimate reason to later withdraw the offer.

## **X Criminal Record Discrimination in Obtaining Credit**

The FCA additionally prohibits inquiries and adverse actions based on non-convictions when a person is seeking credit.