

PERSONNEL SERVICES BULLETINS (PSBs)

100-13

Subject: Consideration of Criminal Convictions and Arrests in Employment

Supersedes: PSB 100-13 Consideration of Criminal Convictions in Hiring,
issued January 27, 2020

Source: [Article 23-A, New York State Correction Law](#)
[Section 296, New York Executive Law](#)
[Section 8-107, New York City Administrative Code](#)
[Local Law 4 of 2021](#)

Date: December 3, 2021

Policy

I. Background

This Bulletin discusses local and state laws that prohibit discrimination in employment decisions based on an applicant's or employee's record of arrests or criminal convictions. It explains when an agency may inquire about an applicant's conviction record; exceptions to the general rule; the standards an agency must apply when considering an applicant's prior criminal convictions in determining their suitability for employment; and the process to be followed when employment is denied. It also discusses the standards and procedures that an agency must follow when considering whether to take an adverse employment action against a current employee based on arrests or convictions that occur during employment.

A. Article 23-A of the Correction Law: Record of Criminal Convictions Article 23-A of the New York Correction Law prohibits the denial of an application for employment or other adverse employment action because an applicant has been convicted of one or more criminal offenses unless (1) there is a direct relationship between the criminal offense and the employment sought or (2) the granting of employment involves an unreasonable risk to property or persons. Membership in a law enforcement agency is not included in the definition of employment under Article 23-A. A violation of Article 23-A is also an unlawful discriminatory employment practice under the New York State Executive (Human Rights) Law and the New York City Human Rights Law.

B. The State and City Human Rights Laws Non-pending Arrest Records

It is an unlawful discriminatory practice for a City agency to deny employment to an individual or act adversely upon or make any inquiry about the arrest of or criminal accusation against an individual which is not pending, and which (1) was terminated in favor of the individual; (2) resulted in a youthful offender adjudication; (3) resulted in a conviction for a violation; or (4) is sealed pursuant to the New York Criminal Procedure Law. However, those prohibitions do not

¹ In general, an arrest or charge is terminated in favor of the individual when the charges are dismissed, when the individual is acquitted, or when a conviction is vacated. A more complete description of the term "terminated in favor of a person" is set forth at Section 160.50(1)(e) of the New York Criminal Procedure Law.

apply to an application for employment as a police officer or peace officer and for employment or membership in any law enforcement agency.

C. Juvenile Delinquency Proceedings – No inquiries

Section 380.1(3) of the Family Court Act, which pertains to Juvenile Delinquency proceedings under Article 3 of the FCA, provides that “no person shall be required to divulge information pertaining to the arrest of the respondent or any subsequent proceeding under this article.” It has no exceptions. No agency, including a law enforcement agency, may request or rely upon information concerning Juvenile Delinquency arrests or proceedings in making hiring or other employment decisions.

D. The Fair Chance Act: Pre-employment Inquiries

1. Local Law 63 of 2015, also known as “The Fair Chance Act,” amended the City Human Rights Law. It sets forth additional requirements regarding inquiries into and consideration of an applicant’s prior criminal convictions and pending arrests in the hiring process. Subject to exceptions described below, it prohibits an employer from making an inquiry or statement relating to a pending arrest or criminal conviction record of an applicant before the employer has made a conditional offer of employment. It is codified at section 1-107(9) – (11-a) of the Administrative Code of the City of New York.
2. Local Law 4 of 2021 amended provisions of the City Human Rights Law added by the Fair Chance Act to require employers making hiring decisions to consider factors similar to the Article 23-a factors applicable to consideration of records of conviction. It also required agencies to follow certain procedures when determining whether to take adverse employment actions against current employees on arrests or convictions occurring during employment.

II. Applicability and Procedure in Hiring

A. Pre-employment Inquiries – The Fair Chance Act

1. General Rule: No Inquiries about Arrests or Convictions before a Conditional Offer of Employment

An Agency may inquire into and consider an applicant’s prior criminal convictions only after the agency has made a conditional offer of employment. In general, under “The Fair Chance Act,” agencies must not ask questions regarding an applicant’s prior criminal convictions on any preliminary employment application or ask questions about an applicant’s prior criminal convictions before making an offer of employment to the applicant. After the agency has extended a conditional offer of employment, it may inquire about the applicant’s pending arrest or conviction record. However, before an agency withdraws a conditional offer of employment because of a criminal conviction, it must provide to the applicant a written copy of the analysis explaining why the withdrawal is permitted under Article 23-A. (See attachment: “How to Comply with Article 23-A When Hiring”).

2. Exceptions to the General Rule: The Fair Chance Act permits agencies to inquire about records of criminal convictions and pending arrests before a conditional offer of employment has been made for certain positions.
 - a. Law enforcement: An agency may inquire about a record of arrests or criminal convictions before a conditional offer of employment is made for positions of police officer and peace officer, including positions that require NYPD special patrolman status, or for a position at a law enforcement agency, including but not limited to the New York City Police Department, the New York City Fire Department, the New York City Department of Correction, the New York City Department of Investigation, the New York City Department of Probation, the Division of Youth and Family Services of the Administration for Children's Services, the Business Integrity Commission, and the District Attorneys' offices.
 - b. Investigation before Appointment: Agencies may inquire about records of criminal convictions or pending arrests before a conditional offer of employment has been made when the position sought is for employment in positions known as "Investigation before Appointment" or "IBA" titles. IBA titles include positions in law enforcement other than police officer or peace officer, positions that are susceptible to bribery or other corruption, and positions that entail the provision of services to or safeguarding of persons, who because of age, disability, infirmity or other condition, are vulnerable to abuse. Pursuant to the Fair Chance Act, DCAS determines which titles are IBA titles, and publishes the list of them on its website which is listed in the attachments below.

B. Consideration of Convictions in Hiring

1. General Rule

Agencies' review and consideration of an applicant's criminal convictions is limited to (a) an applicant's felony convictions in the state of New York or in any other jurisdiction and (b) an applicant's unsealed misdemeanor convictions in the state of New York or in any other jurisdiction. Arrests not leading to a criminal conviction must not be considered, unless specifically required or permitted by statute, consistent with state law. Charges resulting in a youthful offender disposition may not be considered. Juvenile Delinquency arrests and proceedings may not be considered.

Agencies must comply with Article 23-A when considering an applicant's prior criminal convictions in determining their suitability for employment. However, an agency has the authority to withdraw a conditional offer of employment based on the determination (1) that the applicant has been convicted of a crime that bears a direct relationship to the duties and responsibilities of the position sought, or (2) that the applicant's hiring would pose an unreasonable risk to property or to the safety of individuals or the general public.

Article 23-a sets forth 8 factors that an agency should consider when making the determination:

- a. The public policy of the state to encourage the licensure and employment of persons previously convicted of one or more criminal

offenses.

- b. The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- c. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- d. The time which has elapsed since the occurrence of the criminal offense or offenses.
- e. The age of the person at the time of occurrence of the criminal offense or offenses.
- f. The seriousness of the offense or offenses.
- g. Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- h. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Where practicable, a decision not to hire based on prior criminal convictions must be reviewed by a supervisor.

2. Law Enforcement Positions

Article 23-A of the Correction Law excepts from the definition of employee members of a law enforcement agency. Therefore, an agency may consider arrest and conviction records when hiring for "police officer" and "peace officer" positions, including positions that require NYPD special patrolman status, as defined by New York State Criminal Procedure Law, Section 1.20 and New York State Criminal Procedure Law, Section 2.10, in the New York City Police Department, the New York City Fire Department, the New York City Department of Correction, the New York City Department of Probation and the Division of Youth and Family Services of the Administration for Children's Services.

3. Notification of Withdrawal of Conditional Offer of Employment

Except when the position under consideration is an IBA title, the Fair Chance Act requires an agency to provide the applicant notice before taking an adverse employment action, including withdrawal of the conditional offer of employment, based on a record of criminal conviction. As required by the Rules of the City Human Rights Commission, the agency must provide the applicant with (i) a written copy of the inquiry and (ii) a written copy of its analysis under Article 23-A (see attached sample cover letter and template). The analysis must include supporting documents that formed the basis for the adverse action and the agency's reasons for taking the adverse action. After providing the required documents to the applicant, the agency must allow the applicant a reasonable time not less than three days to respond, while holding the position open for the applicant during the response period.

When DCAS or another agency finds an applicant for an IBA title not qualified based on a record of criminal conviction, it must provide a written copy of the analysis under Article 23-A, if required, to the applicant.

III. Applicability and Procedure Concerning Convictions and Arrests Occurring During Employment

A. General Rule

Local Law 4 amended the Fair Chance Act to prohibit an agency from taking adverse employment actions against an employee who has been convicted of one or more criminal offenses or has a pending arrest during their employment, or based on a finding that the person lacks "good moral character" based on such person having been convicted of one or more criminal offenses or has a pending arrest during their employment, unless, after considering the relevant fair chance factors, the employer determines that either (i) there is a direct relationship between the criminal conviction and the employment held by the person; or (ii) the continuation of the employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals or the general public.

The "relevant Fair Chance factors" are:

1. the policy of the city, as expressed in this chapter, to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in the areas of licensure and employment;
2. the specific duties and responsibilities necessarily related to the employment held by the person;
3. the bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in the case of pending arrests or criminal accusations, on the applicant or employee's fitness or ability to perform one or more such duties or responsibilities;
4. whether the person was 25 years of age or younger at the time of occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations;
5. the seriousness of such offense or offenses;
6. the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public; and
7. any additional information produced by the applicant or employee, or produced on their behalf, concerning their rehabilitation or good conduct, including history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

B. Procedure

1. It is not an adverse employment action for an agency to place an employee on unpaid leave for a reasonable time while the employer takes the steps required to determine whether the conviction or pending arrest should be grounds for an adverse employment action under the relevant Fair Chance factors.
2. An agency may not consider a proceeding on a charge that has been adjourned in contemplation of dismissal to be pending unless the order to adjourn in contemplation of dismissal is revoked and the case restored to the calendar for further prosecution.
3. Before taking any adverse employment action against a current employee based on a criminal conviction, or pending arrest or criminal accusation, the agency must:
 - a. Request from the employee information relating to the relevant fair chance factors;

- b. Perform an analysis whether the conviction or pending arrest should be grounds for an adverse employment action under the relevant Fair Chance factors;
- c. Provide a written copy of such analysis to the employee in a manner to be determined by the commission, which shall include but not be limited to supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such employee; and
- d. After giving the employee the inquiry and analysis in writing, allow the employee a reasonable time to respond before taking adverse action.

C. Applicability

The requirements of paragraph B(3) do not apply:

1. To an adverse action against an employee where the employee is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law;
2. With regard to an applicant for employment or a current employee employed as a police officer or peace officer or at a law enforcement agency as that term is used in article 23-A of the correction law, including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family [services] justice of the administration for children's services, the business integrity commission, and the district attorneys' offices; or
3. With regard to an applicant for employment or a current employee employed in an IBA position. If the employer takes adverse action against any applicant or employee based on the [applicant's] person's arrest or criminal conviction record, it shall provide to the person a written copy, in a form and manner to be determined by the department, of an analysis considering the relevant fair chance factors and concluding that either (i) there is a direct relationship between criminal history or alleged wrongdoing and the employment sought or held by the person; or (ii) the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public;
4. Pursuant to any federal, state or local law requiring criminal background checks for employment purposes or barring employment based on criminal history.

IV. Role of DCAS

DCAS provides training for Agency Personnel Officers on the appropriate manner in which to ask about the prior criminal convictions of qualified applicants, and protocols for consideration of prior criminal convictions in the hiring decision. Agency Personnel Officers will train their Agency Human Resources staff.

DCAS will audit agency compliance with the policies and procedures set forth in this PSB.

V. Disclaimer

This PSB shall not be construed to create any substantive rights.

Attachments: [HC-0012 Sample Cover Letter - Article 23-A Analysis](#)
[HC-0013 Sample Template - Article 23-A Analysis](#)
[How to Comply With Article 23-A When Hiring](#)
[IBA Title List](#)
[Best Practices for Conducting Background Investigations](#)

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