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Ban the Box: An Equal Playing Field But More Regulations for Employers

New York City is often known for being the most restrictive area in the state when it comes to regulations for employers. Consistent with this history, in August 2017, New York City implemented a new set of regulations, aimed at eliminating bias in the hiring process. This latest regulation is known as New York City's Fair Chance Act (FCA).[1] The FCA first took effect in 2015, and its accompanying regulations, which took effect on August 5, 2017, aim to eliminate bias in hiring otherwise qualified individuals with criminal histories by preventing employers from requesting information from job applicants about any past criminal arrests and convictions before extending an offer of employment.

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While the FCA was enacted to eliminate discrimination and place all job applicants on an even playing field, it increases regulations, and any business employing people in New York City must be sure that its hiring practices comply with these new regulations. Failure to follow these regulations will subject employers to potential litigation, and administrative enforcement by the New York City Commission on Human Rights.

In August 2017, a class action litigation was filed against the Barclay's Center in the Eastern District of New York[2] alleging that the company that runs the Barclay's Center violated the FCA when hiring employees to service the sports and entertainment arena. This is likely just the first lawsuit of its kind to be filed, as there is an increased push across the country to pass similar ban the box laws.

Fair Chance Act

Under the FCA, during the hiring process, an employer may not advertise, either directly or indirectly, that an applicant is disqualified due to an arrest or criminal conviction. Additionally under the FCA, an employer may not make any inquiry into an applicant's criminal history or pending arrest prior to extending a conditional offer of employment. In this way, the FCA aims to place all applicants, regardless of their criminal history, on an equal playing field, and to eliminate any biases in the hiring process. Applicants who may have otherwise been wrongfully overlooked because of their criminal histories are now on the same footing as applicants that do not have a criminal background.

Fair Chance Process

Although the FCA eliminates any inquiry about an applicant's criminal history during the initial phase of the hiring process, it does permit an employer to inquire into an applicant's criminal history once a conditional offer of employment has been extended. However, if the employer is going to rescind the offer of employment because of an applicant's prior criminal history, it may only do so after undergoing a rigorous analysis known as the Fair Chance Process, and the applicant must be given an opportunity to review the employer's analysis, and provided with an opportunity to rebut the employers' analysis.[3]

When an employer is evaluating whether to rescind a conditional offer of employment based on an applicant's criminal history, it must determine whether there is a direct relationship between the applicant's conviction history and the job to which he has applied. In order to find a direct relationship, the "employer, employment agency, or agent thereof must first draw some connection between the nature of the conduct that led to the conviction(s) and the position." The other circumstance under which an offer of employment may be rescinded is where employing the applicant would involve an unreasonable risk to the "property or to the safety or welfare of specific individuals or the general public."

However, before an employer may rescind a conditional offer of employment either under the "direct relationship" or "unreasonable risk" exceptions, it must conduct an analysis looking to the eight factors listed in Article 23-A of the New York State Correction Law (Corr. Law) 753, to determining whether the criminal conviction has a direct relationship to the positon, or whether hiring the applicant would pose an unreasonable risk to the safety and welfare of the general public. These eight factors are:

A. That New York public policy encourages the licensure and employment of people with criminal records;
B. The specific duties and responsibilities necessarily related to the prospective job;
C. The bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
D. The time that has elapsed since the occurrence of the criminal offense that led to the applicant or employee's criminal conviction, not the time since arrest or conviction;
E. The age of the applicant or employee when the criminal offense that led to their conviction occurred;
F. The seriousness of the applicant's or employee's conviction;
G. Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct; and
H. The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.[4]

If the employer decides to rescind the conditional offer of employment, either because there is a direct relationship between the conviction and the position, or the applicant poses a direct threat, the employer must provide the applicant with a copy of its analysis, and any of the underlying documentation considered in making the determination, which is known as the Fair Chance Notice. The Applicant must be provided with at least three business days to respond to the employer's determination, during which time the conditional offer of employment must remain open.

All employers should keep a detailed written record of the analysis undertaken under of the Corr. L Art. 23-A, because a failure to follow the analysis is a *per se* violation of the Act.[5] Further, failing to undergo the above analysis creates a rebuttable presumption that the employer violated the FCA.

Additionally, it is a per se violation of the FCA to take any adverse employment action due to what the FCA defines to be "non-convictions." Non-convictions are defined by the FCA as any criminal action, not currently pending, which was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by CPL 160.50, even if it is 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 106.55; or
4. Convictions that have been sealed under CPL 160.58.

Although an employer should proceed with caution when considering an applicant's criminal background, it is important to note that the FCA does not "prevent an employer…from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record."[6] Accordingly, an employer is not prevented from taking any adverse actions against an employee or applicant for any reason unrelated to the employee or applicant's criminal background.

Exemptions

While the FCA applies to all employers who employ at least four employees in New York City, it does provide for certain exemptions.[7] As with most anti-discrimination statutes, exemptions are considered narrowly. Legal Guidance published by the New York City Commission on Human Rights provides that employers planning to use an exemption should inform applicants of the exemption they believe applies, and keep record of their use for a period of five (5) years.

New York State Correction Law

It is not just New York City's employers who should be cautious when using an employee's criminal history when taking any adverse employment actions. While the FCA explicitly provides that no inquiry can be made about an applicant's criminal history until after a conditional offer of employment is made, and requires employers to provide rejected applicants with the Fair Chance Notice, the non-discrimination provisions and eight factors to consider before taking any adverse employment action against an employee are set forth of the New York State Corr. Law §§ 752 and 753. These sections apply to all employers in New York State, and were enacted in 1976 "to reverse the long history of employment discrimination against" people with criminal records by "eliminating many of the obstacles to employment."[8] In this way, all employers should proceed with caution when basing any adverse employment action on an employee or applicant's criminal history.

Fair Credit Reporting Act

Additionally, any employer who uses information obtained in a background check that was prepared by any third-party vendor may be subject to liability under the Fair Credit Reporting Act (FCRA). Under the federal FCRA, if an employer obtains any information, either a credit or background check, from a third-party consumer reporting agency, the employer must provide written notice that the employer is obtaining information about the applicant's criminal or credit history, and advise the applicant or employee that this information may be used to make decisions about his or her employment. If the employer will be taking any adverse action based on the information found in the credit or background report, the employer must provide the applicant with notice including a copy of the consumer report, and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." This provides the applicant with an opportunity to review the report and correct or explain any negative information. After any adverse employment action is taken, the employer must advise the applicant either orally, or in writing:

1. That he or she was rejected because of the information in the report;
2. The name, address and phone number of the company who sold the report;
3. That the company selling the report did not make the hiring decision, and cannot give a specific reason for it; and
4. That he or she has a right to dispute the accuracy and completeness of the report, and to get an additional free report from the reporting company within 60 days.

The Barclay's Center Cases

The class action styled *Kelly v. Brooklyn Events Center, LLC, et al.,* which is currently pending in the Eastern District of New York, perfectly illustrates the liability an employer will face if it fails to follow the requirements and the Fair Chance Act and Fair Credit Reporting Act, and have a blanket policy not to hire any applicants with a criminal history. In *Kelly,* plaintiff, Felipe Kelly, is an African-American Latino from the Bronx with a prior criminal conviction. Kelly applied for and was offered a conditional offer of employment at the Barclay's Center.

After running a criminal background check, Kelly's offer of employment was rescinded; however, Kelly was not provided with a copy of the background check, or with the Fair Chance Notice, outlining the analysis undertaken under the Corr. Law Art. 23 explaining why his prior criminal conviction precluded him from employment at the Barclay's Center. Kelly then filed a class action against Barclay's Center on behalf of himself and all others similarly situated who were wrongfully denied employment and not provided with the requisite notices under the FCA and FCRA. The *Kelly* case illustrates the potential cost that employers face if they fail to follow the appropriate procedures and fail to provide the requisite notices when taking any adverse employment actions based on an applicant's criminal history.

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1. N.Y.C. Admin. Code 8-107(11-a).
2. *Kelly v. Brooklyn Events Center, LLC, et al.,* No. 1:17-cv-4600 (E.D.N.Y. filed Aug. 4, 2017).
3. NYC Admin. Code 8-107(11-a(2)(b)).
4. NY Corr. Law §753 Article 23-A.
5. §2-04(a)(5) of the Regulations.
6. NYC Admin. Code §8-107(11-a)(c).
7. NYC Admin. Code § 8-107(11-a)(e).
8. Governor's Bill Jacket, 1976, Ch. 931 Memorandum of Senator Ralph J. Marino & Assemblyman Stanley Fink in Support of S. 4222-C and A. 5393-C.