

New York City Council Amends New York City Fair Chance Act

By Richard I. Greenberg, Daniel J. Jacobs, Susan M. Corcoran &

December 22, 2020

Meet the Authors



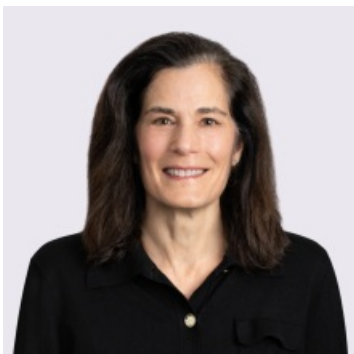
Richard I. Greenberg

(Rich)
Principal
(212) 545-4080
Richard.Greenberg@jacksonlewis.com



Daniel J. Jacobs

(He/Him)
Principal
(212) 545-4049
Daniel.Jacobs@jacksonlewis.com



The New York City Council passed a bill expanding the scope of New York City's Fair Chance Act (FCA). The bill significantly extends employment protections for applicants and employees with criminal charges or arrests. New York City Mayor Bill de Blasio has until January 9, 2021, to take action on this legislation, but enactment is expected.

Existing Requirements

New York City's FCA, which became effective on October 27, 2015, generally prohibits New York City employers from making an inquiry about an applicant's *criminal conviction* record until after a conditional offer of employment had been extended and requires employers to balance numerous factors (FCA factors) as part of their analysis of the job-relatedness of the conviction. The FCA also prohibits employers from searching publicly available sources to obtain information about an applicant's criminal history prior to a conditional offer. For details, see our article, [New York City Enacts Ban-the-Box Legislation](#).

New Requirements

The amendments to the FCA include the following key new obligations:

- Requires employers to *solicit information on all FCA factors* as part of their job-related analysis.
- Requires employers to *engage in a job-related analysis before disqualifying an applicant or taking an adverse job action based on an employee's pending criminal offense* and may make a disqualification decision only if it concludes there is: (i) a direct relationship between the alleged wrongdoing that is the subject of the pending arrest or criminal accusation and the employment sought or held; or (ii) the granting or continuation of the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.
- Requires employers to *consider a series of factors similar to those an employer already must utilize in determining the job-relatedness of a criminal conviction in evaluating whether to revoke a conditional offer or take an adverse employment action against an employee based on a pending criminal matter*. The significant difference between these factors and the factors for evaluating criminal convictions is that: (i) for convictions, the employer must analyze the length of time since the offense, but for pending matters, the employer must consider whether the applicant is age 25 or younger at the time of the offense; and (ii) for convictions, the employer must consider evidence of rehabilitation or good conduct, but for pending matters employers must consider "any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including history of positive

Susan M. Corcoran

(She/Her)

Principal

(914) 872-6871

Susan.Corcoran@jacksonlewis.com

Related Services

Background Checks

Employment Litigation

performance and conduct on the job or in the community, or other evidence of good conduct.”

- Requires employers to *follow the FCA process for a pending criminal matter and provide a notice setting forth the substantive basis for any disqualification decision* and review any responsive information timely submitted by the applicant or employee.
- Requires employers to *engage in the same job-related analysis for convictions occurring during employment* as it already is obligated to do for convictions that occurred pre-employment.
- Prohibits employers from *making any inquiries related to non-pending arrests and criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications, or convictions sealed pursuant to certain sections of the criminal procedural law*. Currently, the law prohibits only consideration of such information.
- Prohibits employers from *making inquiries or basing any employment actions on violations and non-criminal offenses*.

The amendments also codify an existing rule that an employer can revoke a conditional offer only based on criminal information reviewed after all other screening and background checks have been completed.

Misrepresentation

Finally, the legislation codifies that an employer may act on a misrepresentation regarding criminal background made by the applicant or employee, as long as the inquiry was lawful and the applicant is provided a copy of the documents supporting the employer’s position and is given an opportunity to respond.

If the bill becomes law, all covered New York City employers must refine their practices to ensure legal compliance. Jackson Lewis attorneys are available to answer inquiries and provide assistance with this and other workplace issues.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.’s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients’ goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.