



New Law Relaxes Restrictions on Financial Institutions Hiring Persons with Criminal Histories

March 7, 2023

President Biden has signed into law [H.R. 7776](#), the “James M. Inhofe National Defense Authorization Act for Fiscal Year 2023” (“NDAA 2023”), which, among other things, is intended to ease restrictions on financial institutions hiring candidates with criminal records by reducing the types of convictions that prevent the institution from making an offer of employment.

Section 5705 of the NDAA 2023 contains the Fair Hiring in Banking (“FHB”) provisions which amend both (i) Section 19 of the Federal Deposit Insurance Act, 12 U.S.C. § 1829 (“FDIC Section 19”), which restricts hiring at depository institutions insured by the Federal Deposit Insurance Corporation (“FDIC”), and (ii) Section 205(d) of the Federal Credit Union Act, 12 USC § 1785(d) (“FCUA Section 205(d)”), which restricts hiring at credit unions insured by the National Credit Union Administration (“NCUA”).

I. FDIC Section 19

Without prior written consent of the FDIC, a person convicted of any criminal offense involving dishonesty, breach of trust, or money laundering (i.e., a “covered conviction”), or who has agreed to enter into a pretrial diversion or similar program (i.e., “program entry”) in connection with a prosecution for such an offense, is prohibited by Section 19 from directly or indirectly owning, controlling, or otherwise participating in the affairs of an FDIC-insured depository institution. Section 19 also prohibits any insured depository institution from permitting such a person to engage in any conduct or to continue any relationship prohibited by Section 19.

Additionally, Section 19 imposes an affirmative duty upon an FDIC-insured depository institution to make a “reasonable inquiry” regarding an applicant’s criminal record history to avoid hiring someone with a covered conviction without obtaining this consent. Prior to the passage of NDAA 2023, the practical effect of Section 19 was to impose a lifetime statutory bar, by operation of law, against any person with a covered conviction from obtaining employment with an FDIC-insured depository institution, absent the written consent of the FDIC.

II. FCUA Section 205(d)

Like Section 19, Section 205(d) prohibits, without the prior written consent of the NCUA, a person convicted of any covered conviction, or who has agreed to a program entry in connection with a prosecution for such an offense,

from directly or indirectly participating in the affairs of an NCUA-insured credit union. Moreover, like Section 19, prior to the passage of NDAA 2023, the effect of Section 205(d) for many individuals was a lifetime statutory ban on employment with an NCUA-insured credit union, absent the written consent of the NCUA.

III. Fair Hiring in Banking Provisions in NDAA 2023

The FHB provisions narrow the scope of the crimes which are subject to Sections 19 and 205(d) and the circumstances under which consent is required. An individual no longer needs the consent of the FDIC or the NCUA to become employed with an insured bank or credit union for “Certain Older Offenses,” under the following circumstances:

1. It has been seven years or more since the individual committed the offense; or the individual was incarcerated with respect to the offense, and it has been five years or more since the individual was released from incarceration;
2. If the offense was committed when the individual was 21 years of age or younger, such person no longer needs the consent of the FDIC or the NCUA to become employed with an insured bank or credit union if more than 30 months have passed since the date of sentencing.

The FHB provisions also allow the FDIC and NCUA to exempt other de minimis (lesser/low risk) offenses by rulemaking, which must satisfy the following requirements:

- The de minimis offense was punishable by a term of three years or less confined in a correctional facility;
- Any de minimis exception with respect to offenses for writing insufficient-fund checks requires that the aggregate total face value of all insufficient-fund checks is \$2,000 or less (regardless of the number of convictions and/or pretrial diversion programs); and
- The FDIC and NCUA may designate exemptions for other lesser offenses (including the use of a fake ID, shoplifting, trespassing, fare evasion, and driving with an expired license or tag) if at least one year has passed since the conviction and/or pretrial program for such offense.

This new law also codifies that the potentially disqualifying employment standards set forth in Sections 19 and 205(d) do not apply to candidates that had an otherwise covered offense expunged, sealed, or dismissed.

Finally, the FHB provisions codify the process for making an application to the FDIC and NCUA to obtain consent to hire a person with a covered conviction and the standards the agencies must apply in considering such an application. Specifically, the FDIC and NCUA are required to conduct an “individualized assessment” (consistent with Title VII of the Civil Rights Act of 1964) when reviewing consent applications that consider evidence of rehabilitation. **[1]** Title VII can be violated when an employer treats criminal history information differently for different applicants or employees, based on their race or national origin (disparate treatment liability) or an employer's neutral policy (e.g., excluding applicants from employment based on certain criminal conduct) may disproportionately impact some protected individuals, and may violate the law if such impact is not job related and consistent with business necessity (disparate impact liability). The Equal Employment Opportunity Commission (“EEOC”) guidance under Title VII provides that an employer may demonstrate that it has avoided causing disparate impact and thus met the “job related and consistent with business necessity” standard by: (i) developing a targeted screen considering at least the nature of the crime, the time elapsed, and the nature of the job; and (ii) then providing an opportunity for an individualized assessment for those people identified by the

screen, to determine if the policy as applied is job related and consistent with business necessity.

IV. Summary

As with any new statute, the FDIC and/or NCUA may issue regulations or other further guidance on how financial institutions should implement these changes into their hiring practices. Insured institutions should keep in mind, however, that the amendments in the FHB provisions significantly narrow the legal bases provided by Section 19 and Section 205(d), which previously allowed such institutions to disqualify from employment, with minimal legal risk, applicants and employees who have been convicted of a covered conviction. Further, certain offenses that once prevented employment are now exempted or excluded from coverage under these laws.

Insured institutions should review their policies, practices, and forms to ensure that, when scrutinizing applicants and employees, they recognize that certain older offenses and records of expungement, sealing, or dismissal, and the expanded exemptions for de minimis offenses (to be defined by the FDIC and NCUA) do not disqualify candidates.

This advisory is a general overview of the FHB provisions and is not intended as legal advice. The FHB provisions are very detailed and must be reviewed in their totality.

If you have any questions about the FHB provisions, please feel free to contact Joseph D. Simon at (516) 357-3710 or via email at jsimon@cullenllp.com, Kevin Patterson at (516) 296-9196 or via email at kpatterson@cullenllp.com, Elizabeth A. Murphy at (516) 296-9154, or via email at emurphy@cullenllp.com, or Gabriela Morales at (516) 357-3850 or via email at gmorales@cullenllp.com.

Footnotes

[1] The U.S. Equal Employment Opportunity Commission's has published guidance documents regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964, as amended, [here](#) .

Practices

- Banking and Financial Services
- Regulatory and Compliance

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