



New York City Limits Employers' Ability to Perform Background Searches on Prospective Employees

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Recently, New York City enacted its own version of “ban-the-box” legislation. The ordinance, titled the Fair Chance Act (“FCA”), was signed by Mayor de Blasio and restricts when employers may inquire into a job applicant’s criminal background during the initial stages of the hiring and application process. Additionally, it imposes significant obligations on employers who intend to take action based on such information. The FCA will take effect on September 27, 2015.

The FCA is similar to other “ban-the-box” laws, which generally prohibit an employer with at least four employees from inquiring about an applicant’s pending arrest or criminal history until after a conditional offer of employment has been made. Pursuant to the FCA, employers are prohibited from asking an applicant question, both verbally and in writing, and from searching publicly available sources for information about the applicant’s criminal history.

However, the Act provides exceptions that permit an initial inquiry into an applicant’s criminal history. Notably, the FCA does not apply when an employer, under applicable law, is required to obtain criminal history information through background checks for employment purposes, such as for jobs involving children and the elderly. It also does not apply to prospective police officers, peace officers, and law enforcement agency and other law enforcement related employees.

Moreover, the FCA does not prevent an employer from running a background check after giving a job applicant a conditional offer of employment. However, if adverse employment action is to be taken after the background check is done, employers must now, pursuant to the FCA, follow an extremely rigorous process. More specifically, employers must:

1. Provide the applicant with a “written copy of the inquiry” which complies with the City’s Commission on Human Right’s required format;
2. Perform the required analysis pursuant to Article 23(a) of the New York Correction Law, “Licensure and Employment of Persons Previously Convicted of One or More Criminal Offenses”;
3. Provide the applicant with a copy of its properly formatted analysis, which includes supporting documents and an explanation of the employer’s decision; and
4. Allow the applicant at least three business days to respond to the written analysis by holding the position open during this time.

In the next few weeks, all covered New York City employers should review, and if necessary, revise internal hiring practices and policies to ensure compliance with the FCA. Likewise, human resources professionals must receive training in light of these new restrictions.

If you or your institution has any questions or concerns regarding employment related issues, please contact Hayley B. Dryer at hdryer@cullenanddykman.com or at 516-357-3745.

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