

MORE CHANGES TO NYC'S "BAN THE BOX" LAW

In our July client alert we discussed several changes to the provisions of the New York City Fair Chance Act, which prohibits most employers from asking about or considering the criminal history of job applicants before making a conditional job offer. This law is commonly referred to as "Ban the Box" legislation, because it means that employment applications cannot include a box for applicants to check about prior arrests or convictions. This alert discusses one more change to the Fair Chance Act, one which is likely to cause headaches for employers.

The Fair Chance Act was recently amended by adding a definition for the term "Conditional Offer." While on its face the new definition is fairly benign, in fact it has far-reaching consequences for employers, because it mandates a rather onerous two-stage background check procedure.

How Background Checks Have Been Conducted Up Until Now

Prior to this change, employers were well-advised to refrain from performing any background checks on employees prior to issuing conditional offers, for fear that any background check might reveal criminal history – which employers were not permitted to see prior to such an offer. Employers were able to tell applicants that they were hired, pending the results of a background check. Then the employer would run a full background check, which might include asking the applicant about any criminal convictions; engaging a consumer reporting agency to conduct a background check (including criminal history); contacting previous employers, schools and references; performing general internet searches, etc. If the employer then decided not to hire the employee based on any factor *other* than a criminal conviction (such as false academic credentials or a bad

reference), it could provide notice to the applicant (consistent with the federal Fair Credit Reporting Act if the information came from a consumer reporting agency) and withdraw the offer. If the employer was contemplating withdrawing the offer based on a *criminal conviction*, the employer would first have to follow the multi-step Fair Chance process, including a detailed Fair Chance analysis that considered several factors and required input from the applicant.

How Background Checks Must Be Conducted Now

The new definition of "conditional offer" changes this process, essentially requiring employers to run two background checks – one for noncriminal information and then another for criminal conviction history. It provides that a "conditional offer" may *only* be revoked based on the results of three things: 1) a criminal background check; 2) the results of a medical exam; or 3) information the employer could not reasonably have known prior to making the offer. In other words, once the employer has made a conditional offer, it cannot then conduct a full background check and withdraw the offer based on information about the applicant's prior employment, academic credentials, etc. If that non-criminal information is to be considered, it can only be considered *before* even making a conditional offer.

The practical result is that employers should now conduct two background checks. First, they should conduct a non-criminal background check – which they can seemingly do before making any type of offer at all. (If they are going to use a consumer reporting agency, they must still get the applicant's prior written authorization.) If, after the initial non-criminal background check, the

employer still wishes to hire the applicant, they can then make a conditional offer and conduct a criminal background check. If they then wish to withdraw the offer based on the results of the criminal background check, they must engage in the Fair Chance process, including the multi-factor analysis and input from the applicant.

The New York City Department of Human Rights ("DHR") has issued a Guidance on the Fair Chance Act, https://www1.nyc.gov/site/cchr/law/fair-chance-act.page#_ftn50. There is also a Frequently Asked Questions page, https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/FairChance_FAQ.pdf.

In these resources, the DHR acknowledges that a two-stage background check will likely be required. The DHR suggests that most background check companies can do a single background check and then produce separate reports for criminal and non-criminal information. Where such a bifurcated report is not possible, it advises employers to establish "a system to internally segregate criminal history information" to ensure that criminal history information is available to decision-makers only *after* a conditional offer has been made.

New York City employers would be well-advised to update their hiring practices to comply with the amended Fair Chance Act.

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