

## CLIENT ALERT REGARDING CHANGES TO BACKGROUND CHECK LAWS

New York City employers should be aware of changes to background check laws that will take effect on July 29, 2021. The New York Fair Chance Act (FCA), which has been in effect since 2015, prevents most employers from asking about or considering the criminal history of job applicants before making a conditional job offer. The FCA also requires that, before rescinding a conditional offer based on the applicant's conviction history, an employer must provide the applicant with an opportunity to respond to the employer's assessment.

The amendments add new protections for people whose criminal history includes unsealed violations and unsealed non-criminal offenses. The amendments also expand the protections of the FCA to current employees and pending cases.

Some of these changes are discussed below, but employers should reach out to HNRK's employment group to ensure they are adequately applying the requirements of these detailed laws.

- Employers are now prohibited from making an inquiry into an applicant's *pending* arrest or criminal accusation, before tendering a conditional offer. In addition, employers must engage in a job-related analysis before disqualifying an applicant or taking an adverse job action based on a current employee's pending criminal offense. An employer can take such action only if it concludes that 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) granting or continuing the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- Currently, an employer considering whether to revoke a conditional job offer must evaluate the job-relatedness of a criminal conviction using the factors outlined in New York Corrections Law Article 23-A. Pursuant to the amendments, an employer must apply similar but not identical factors when evaluating whether to revoke a conditional offer or take an adverse employment action against an employee based on *pending* criminal matter. For example, the Article 23 Factors require an employer to consider how much time has passed since the offense occurred, but for pending matters, the employer must consider whether the applicant was 25 or younger at the time of the occurrence.
- The amendments also require the employer to *request from the employee or applicant* information relating to the relevant fair chance factors.
- The current version of the FCA prevents employers from *considering* 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. Pursuant to the amendments, employers are also prohibited from making any *inquiries* related to such incidents.
- The amendments also require that before taking any adverse employment action against a *current* employee based on a criminal conviction, or on a pending arrest or criminal accusation, the employer shall engage in the fair chance process that is required for convictions that occurred *pre-employment*.
- The legislation makes clear that it does not prevent an employer from taking adverse action against an

applicant or employee who is found to have made intentional misrepresentations regarding their arrest or conviction history, provided that: (1) the misrepresentation does not involve information that the person wasn't required to divulge in the first place (such as prior *arrests*); and (2) the employer provides the applicant or employee with any documents that caused it to determine that an intentional misrepresentation was made and gives the person a reasonable time to respond.

**For Questions Relating to  
This Client Alert, Please Contact:**

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Amory represents employers and executives in all aspects of the employment relationship with a focus on counseling, litigation avoidance and, when necessary, litigation. Her counseling experience on behalf of a broad range of employers includes advice on issues ranging from discrimination and retaliation to wage-and-hour issues to compensation. She also regularly drafts, updates, and negotiates agreements and policies on behalf of clients concerning executive employment agreements, separation agreements, and other business arrangements.



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Kathleen's practice focuses on employment matters on behalf of both employees and employers, and also includes general commercial litigation. She advises employers on compliance with federal, state, and local employment statutes. She has defended mass transit agencies, as well as other U.S. and foreign defendants, in suits by employees alleging sex, race, and disability discrimination, civil rights violations, violations of the Family and Medical Leave Act, and violations of the Fair Labor Standards Act.

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