

New York City “Ban the Box” FAQs

The Fair Chance Act ([Int. 0318-2014](#)); amended by [Int. 1314-A](#).

This Compliance Alert has been republished to include updates from the recent Fair Chance Act amendments passed in January 2021, and a 2021 updated guidance from the NYC CHR.¹ These amendments became effective July 29, 2021.

1. Who does the law apply to?

The Fair Chance Act (“FCA”) applies to employers with four or more employees, and only when the position is in New York City. For small businesses, the owner her/himself counts. The four employees need not work in the same location, as long as one of them works in New York City.² It generally does not apply to New York City residents applying for jobs outside the city, even if the company’s headquarters and HR team are based in New York City.

2. What is the effective date?

October 27, 2015. The Fair Chance Act was amended on January 11, 2021 by Int. 1314-A. Those provisions will become effective on or about July 28, 2021.

3. When is it permissible to ask an applicant about criminal records?

After extending a conditional offer of employment, the employer is permitted to inquire into an applicant’s pending arrest or conviction record.

4. Does the law affect when you can conduct a background check?

Yes. Background checks can only be conducted after a conditional offer of employment. In addition, employers must delay asking applicants for authorization to obtain a background check until after a conditional offer of employment is made. The NYC CHR updated its guidance in July 2021. The updates state that employers who request a background check should first receive the non-criminal information, evaluate it, and then receive and evaluate the criminal information. Employers should have a system in place that internally segregates criminal history information

¹ NYC Commission on Human Rights, Legal Enforcement Guidance on the Fair Chance Act, Local Law No. (2021), [Legal Guidances - CCHR \(nyc.gov\)](#)

² <https://www1.nyc.gov/site/cchr/media/fair-chance-employers.page>

to ensure that it is available to decision makers only after a conditional offer has been made.

BIG can also offer the option to customize reports into separate criminal and non-criminal packages to those required to comply with the law.

5. Do I still need to comply with the two-step background check process even if I already postpone requesting a background check until after extending a conditional offer of employment?

Yes. In NYC, employers, unless exempt, must review all non-criminal search results (e.g., employment verification, education verification, etc.) before extending a conditional job offer, and then, if such offer is extended, employers can order and review criminal and MVR searches. Hence, a two-stage ordering and review process is required, regardless of the employer’s current practices in ordering background checks.

6. Are there any “pre-adverse” notification requirements beyond those of the FCRA?

Yes. If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the “Fair Chance Process”:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant’s criminal history;
2. Request from the applicant information relating to the relevant fair chance factors;
3. Provide the applicant with a copy of the Article 23-A analysis using the Commission’s Fair Chance Notice; and
4. Allow the applicant at least five business days, from receipt of the inquiry and analysis, to respond to the employer’s concerns.

When an employer wishes to take adverse action based on an applicant or employee's pending, open criminal charges, arrests, or accusations, or an employee's convictions that occurred during employment, the FCA fair chance factors must be evaluated. The notification process is similar to the requirements above; however, the factors assessed and disclosed slightly differ. Employers should continue to use Article 23-A factors to analyze convictions that occurred prior to the start of employment.

The NYC CHR provides a sample Fair Chance notice (Article 23-A form) that employers may use and access [here](#). Please consult this [white paper](#) for NYC employers for a more detailed analysis on the fair chance factors.

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer. Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA's report on the applicant, provided the consumer report is the only information relied upon.

Pursuant to recent amendments, a conditional offer of employment can only be revoked based on 1) the results of a criminal background check, after the FCA factors have been assessed and followed; 2) the results of a medical exam permitted by the Americans with Disabilities Act, or 3) other information the employer could not reasonably have known before making the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material.

7. Are there any "adverse action" notification requirements beyond those of the FCRA?

Yes. After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A or FCA Factor analysis. If, after communicating with an applicant, the employer decides not to hire him or her, it must relay that decision to the applicant.

8. Are there any other additional notice/disclosure requirements?

No.

9. Are there certain offenses I cannot inquire about?

Int. 1314-A provides significant additional protections for applicants. The amendment makes it unlawful for an employer to inquire about any "non-pending" criminal accusations or arrests, adjournments in contemplation of dismissal, youthful offender adjudications, or convictions sealed pursuant to certain sections of the criminal procedure law, when the inquiry would violate the New York State Human Rights Law (NYSHRL), N.Y. Exec. L. §296.15. The amendments also prohibit an employer's ability to ask about a non-criminal violation or offense or to consider the information in making an adverse employment decision.

10. Does the law allow employment applications to still include the criminal history question with a carve-out for this jurisdiction?

No. Employment applications for positions in New York City should not include a criminal history question or any statements regarding criminal history inquiries or background checks.

11. Does the law provide any exceptions?

The Act provides an exemption for and does not apply to any actions taken by an employer pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. Under the Act, a "federal" law includes any rules or regulations promulgated by a Self-Regulatory Organization ("SRO") as defined by Sec. 3(a)(26) of the Securities Exchange Act of 1934. Thus, employers in the financial services industry are exempt from the FCA when complying with industry-specific rules and regulations promulgated by an SRO.

The Act also provides an exemption for police or peace officers, and for certain positions within the department of citywide administrative services.

The FCA exception for situations in which employment is barred based on criminal history applies only if the employer's decision is compelled by law. If the employer's choice is discretionary, then the FCA applies.

12. Does the law supersede or preempt any other law?

No.