

# New York City Expands Its Ban-the-Box Law

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On January 10, 2021, amendments to the New York City Fair Chance Act (“FCA”) – New York City’s “ban-the-box” law – were passed into law. The amended FCA will significantly expand employment protections for applicants and employees with criminal backgrounds, including convictions, charges, and arrests. The FCA amendments will go into effect in July 2021.

## Current Requirements

The New York City FCA initially took effect on October 27, 2015 as an amendment to the New York City Human Rights Law (NYCHRL). The FCA incorporated existing New York State criminal background provisions, including Article 23-A of the New York Correction Law, into New York City law. The FCA currently prohibits employers from inquiring about an applicant’s conviction history until after the employer extends a conditional offer of employment.

If an employer decides to run a criminal background check and take adverse action based on that inquiry, the FCA requires the employer to: (1) provide the applicant with a written copy of the inquiry; (2) provide the applicant with an Article 23-A factor analysis; and (3) allow the applicant at least three business days to respond to the analysis by holding the position open during the time.

## New Requirements Effective July 2021

The FCA amendments establish new “relevant fair chance factors” that employers must consider if they wish to take adverse action against an applicant or employee due to a pending arrest, criminal accusation, or conviction, including the following:

- the city’s policy to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in the areas of licensure and employment;
- the duties and responsibilities necessarily related to the employment sought or held by the person;
- the bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in case of pending arrests or criminal accusations, on the applicant’s or employee’s fitness or ability to perform one or more such duties or responsibilities;
- whether the person was 25 years or younger at the time of the occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations;
- the seriousness of such offense or offenses;
- the legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public; and

- any additional information produced by the applicant or employee, or produced on their behalf, in regard to their rehabilitation or good conduct, including history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

## Current Employees

The FCA amendments extend protections to current employees in connection with convictions arising during employment. This is a departure from the original FCA, which applied only to job applicants. With the FCA amendments, an employer cannot take any adverse employment action against an employee based a conviction during employment unless the employer determines, after reviewing the “relevant fair chance factors,” that there is a direct relationship between the conviction and the employment or that continuing employment would involve an unreasonable risk to property or the safety or welfare of individuals or the general public.

## Conditional Offers

Under the current FCA, a conditional offer may be withdrawn if there is a relationship between a prior conviction and the job being sought. Under the FCA amendments, an employer also cannot withdraw a conditional offer of employment or take an adverse employment action unless (1) there is a direct relationship between the alleged wrongdoing that is the subject of a pending arrest or criminal accusation and the employment sought or held; or (2) the granting or continuation of the employment would involve an unreasonable risk to property, safety, or welfare of specific individuals or the general public.

## Extended to Non-Pending Arrests and Criminal Accusations

Importantly, with the FCA amendments, employers may not make any inquires or deny employment on the basis of non-pending arrests and criminal accusations, adjournments in contemplation of dismissal, youthful offender adjudications and convictions sealed pursuant to certain sections of the criminal procedure law. Additionally, employers may not make any inquiries or deny employment on the basis of violations or non-criminal offenses.

## Independent Contractors and Freelancers

The amended FCA applies not only to employees and applicants, but also to independent contractors and freelance workers. As independent contractors and freelancers are considered “employees” for certain purposes under the NYCHRL, employers must also apply the FCA to these individuals if, for example, a company has a background check conducted with respect to an independent contractor or uses a contractor’s criminal background or proceedings to make decisions about the engagement or retention of the contractor.

## Misrepresentations

The amended FCA does not prevent employers from taking adverse action against an applicant or employee who has made misrepresentations regarding an arrest or conviction, provided that such adverse action is not based on a failure to disclose information that a person is not required to divulge. In such cases, however, the employer still must provide the applicant with a copy of the documents that formed the basis of the determination that an intentional misrepresentation was made and give the applicant a “reasonable” time to respond.

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