SULLIVAN & CROMWELL LLP

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New York City Council Passes Bill Prohibiting Certain Criminal Background Inquiries in Hiring Decisions

Amendment to New York City Human Rights Law Prohibits Employers from Inquiring into Applicants' Criminal Records Prior to Making Conditional Offers of Employment

SUMMARY

On June 10, 2015, the New York City Council voted to amend the New York City Human Rights Law[1] to prohibit employers from inquiring into the arrest or criminal conviction record of an applicant for employment prior to extending a conditional offer to the applicant. The bill, termed the Fair Chance Act ("FCA"),[2] permits employers to examine applicants' criminal records after making such conditional offers. An employer that rejects an applicant on the basis of a post-offer criminal record inquiry must provide a written explanation of the decision and allow the applicant at least three business days to respond to the explanation, while holding open the position sought by the applicant. The act exempts employers from compliance in situations where applicable federal, state, or local laws or regulations require consideration of applicants' criminal background information in connection with hiring decisions. The FCA imposes requirements not established under either federal or New York State law and thus exposes employers to potentially inconsistent obligations.

Mayor Bill de Blasio has signaled support for the bill and will likely sign it into law. The amendment will take effect 120 days after its enactment.

BACKGROUND

In passing the FCA, New York City joined a growing cohort of more than ten states and municipalities that have restricted private employers from inquiring into the criminal backgrounds of job applicants.[3] Over 100 jurisdictions, including eleven states—not including New York State—have adopted similar prohibitions applicable only to public employers.[4] Advocates of such legislation base their arguments in

favor of it on the perceived discriminatory impact, particularly on members of racial minorities, of employers' consideration of prior criminal convictions in making hiring decisions.[5] Federal law, like New York State law, does not proscribe such consideration of applicants' criminal records. However, guidance issued by the EEOC in 2012 identified as an employer best practice "[e]liminat[ing] policies or practices that exclude people from employment based on any criminal record."[6]

DISCUSSION

The FCA makes it "an unlawful discriminatory practice for any employer, employment agency or agent thereof to . . . [m]ake any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant." The term "inquiry" encompasses not only questions posed to an applicant, but also "searches of publicly available records or consumer reports" conducted "for the purpose of obtaining an applicant's criminal background information."

Under the act, an employer may look into a prospective employee's criminal background after extending a conditional offer to the applicant. Before rejecting the applicant based on such an inquiry, however, the employer must (i) provide the applicant with a written explanation of the reasons for the employer's anticipated decision, along with any supporting documents; (ii) allow the applicant at least three business days to respond to that explanation with countervailing information or argument; and (iii) hold the position open during the three-day period. The employer's decision whether to proceed with the employment of an applicant who has a criminal record will also be subject to the provisions of New York State law requiring that before rejecting an applicant based on a criminal record, an employer must assess a variety of state-mandated factors, including the relationship between the relevant job duties and the applicant's prior offense, the length of time since the offense, the seriousness of the offense, and the like.[7]

EXEMPTIONS

The FCA does not prohibit employers from considering applicants' criminal background information where such consideration is required by federal, state, or local law or by rule or regulation promulgated by a self-regulatory organization as defined by the Securities Exchange Act of 1934.[8] Accordingly, the FCA does not conflict directly with federal regulations requiring certain employers to inquire into some applicants' criminal history. For example, Rule 17a-3 promulgated under the Securities Exchange Act mandates that broker-dealers question applicants for certain positions about their arrest and conviction records with respect to pertinent crimes, including felonies and misdemeanors relating to securities, commodities, fraud, and false statements.[9] The FCA should not affect compliance programs maintained by covered employers in connection with such regulations.

The amendment also exempts employers with respect to applicants for certain civil service positions or positions involving law enforcement, care for vulnerable persons, or "susceptib[ility] to bribery or other corruption."

REMEDIES AND POTENTIAL PENALTIES

As an amendment to the New York City Human Rights Law, the act incorporates the private rights of action set forth in that statute. Individuals claiming violations of the act by private employers may seek relief in New York State court or, alternatively, through administrative channels, by filing a complaint with the New York City Commission on Human Rights. Penalties under the Human Rights Law may include punitive damages or injunctive relief.[10]

IMPLICATIONS

Consistent with other provisions of the New York City Human Rights law—including an amendment passed in April of this year prohibiting employers from requesting or using consumer credit history for employment purposes[11]—the FCA marks out a sphere of employee protection broader than that created by either federal or New York State law. Employers seeking to comply with the act must reconcile the potentially inconsistent obligations resulting from these differing standards.

Employers should consider assessing whether any positions for which they hire fall under the FCA's exemptions, obviating the need for any alterations to hiring practices applicable to those positions. With respect to positions subject to the act's prohibitions, if employers seek to continue to examine applicants' criminal histories in jurisdictions permitting such inquiries, then they should consider creating separate employment application forms for use within New York City or adding language to existing forms instructing New York City applicants for positions covered by the act not to answer questions concerning criminal history. Employers should also consider educating human resources staff and other relevant personnel on the act's requirements in order to prevent improper questions concerning applicants' criminal histories during interviews. In addition, in light of the act's broad definition of "inquiry" to include searches of public records, employers should consider amending any policies permitting or requiring public-source criminal background checks with respect to applicants for non-exempt positions in New York City, and consulting with any background check firms they may use to confirm those firms' compliance with the act.

Because the act prohibits inquiries into an applicant's criminal history only prior to issuance of a conditional offer of employment, employers may establish procedures for conducting post-offer inquiries into applicants' criminal records, along the lines set forth in the act. Such employers may wish to consider

implementing policies mandating documentation of decisions not to hire applicants with prior convictions, in order to comply with the act's requirement that employers provide rejected applicants with written explanations of those determinations.

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ENDNOTES

[1] N.Y.C. Administrative Code §§ 8–101 *et seq*.

[2] *See* N.Y.C. Council Bill Int. No. 318-A.

[3] *See* Michelle Natividad Rodriguez, *Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies*, NATIONAL EMPLOYMENT LAW PROJECT (May 26, 2015), http://www.nelp.org/publication/ban-the-box-fair-chance-hiring-state-and-local-guide/. These jurisdictions include Chicago, the District of Columbia, Hawaii, Illinois, Massachusetts, Minnesota, New Jersey, Philadelphia, Rhode Island, and San Francisco.

[4] *See id*. The eleven states that have adopted such restrictions are California, Colorado, Connecticut, Delaware, Georgia, Maryland, Nebraska, New Mexico, Ohio, Vermont, and Virginia.

[5] *See*, *e.g.*, REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION, NEW YORK CITY COUNCIL COMMITTEE ON CIVIL RIGHTS, Int. No. 318-A, at 3–4 (June 9, 2015).

[6] *See* U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, ENFORCEMENT GUIDANCE NO. 915.002, CONSIDERATION OF ARREST AND CONVICTION RECORDS IN EMPLOYMENT DECISIONS UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964, at 25 (Apr. 25, 2012).

[7] *See* N.Y. Correction Law §§ 752–53.

[8] *See* 15 U.S.C. § 78c(a)(26).

[9] *See* 17 C.F.R. § 240.17a-3.

[10] *See* N.Y.C. Administrative Code § 8-502.

[11] *See* N.Y.C. Council Bill Int. No. 261-A.

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