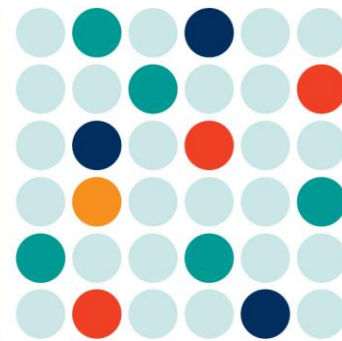


LEGAL UPDATE

October 2015 By: Pryor Cashman's Labor and Employment Group



IMPORTANT CHANGES TO NEW YORK'S HIRING PRACTICES

As announced in Pryor Cashman's [June 10, 2015 Client Alert](#), New York City employers should be aware of two important changes to the New York City Human Rights Law ("NYCHRL"), which affect how employers hire their employees. The Fair Chance Act ("FCA"), which becomes effective on October 27, 2015, and New York City Bill Int-261-2014 (the "Consumer Credit Act" or "CCA"), which became effective on September 3, 2015, restrict the ability of employers to inquire into prospective hires' criminal and credit histories. An employer that violates the NYCHRL is subject to civil penalties and may also be subject to private causes of action seeking punitive damages, compensatory damages, and attorneys' fees.

THE FAIR CHANCE ACT

Prohibiting Questions About An Applicant's Criminal Convictions

The FCA makes it a violation of NYCHRL for employers (with at least four employees) to inquire into an applicant's criminal record prior to making a conditional offer of employment. Notably, employers will have to remove questions about criminal convictions (pre-employment arrest questions are already banned) from their job applications. Additionally, employers may not perform searches of public records or consumer reports concerning an applicant prior to making a conditional offer.

The FCA does *not* require an employer to hire a person with criminal convictions. After an offer of employment has been made, employers may ask about a person's criminal background and perform criminal background checks. If an employer decides to withdraw the offer of employment based on an applicant's criminal history, it must give the applicant a written explanation of its reasoning and provide copies of the documents upon which the

decision was based. Thereafter, the employer must hold the position open for at least three business days to allow the applicant an opportunity to respond. Moreover, if an employer does decide to deny employment based on criminal history, there are other New York State laws which may be implicated, and the advice of counsel should certainly be sought prior to any adverse employment action. The FCA further prohibits employers from inquiring about the criminal history of an independent contractor, if such contractor does not have employees.

Exceptions to the FCA

The FCA provides several exceptions that include persons applying for the following:

- a position in any law enforcement agency;
- a position related to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons; and
- a person in a position that has been determined and published on the website of the Department of Citywide Administrative Services to be a position that "is susceptible to bribery or other corruption, or entails the provision of services to or safeguarding of persons who, because of age, disability, infirmity or other condition, are vulnerable to abuse."

THE CONSUMER CREDIT ACT

Prohibiting Questions About An Applicant's Consumer Credit History

The CCA amends NYCHRL to make it an unlawful discriminatory practice for an employer (with at least four employees) to request or use an applicant's or employee's "consumer credit history" as the basis for employment decisions and actions. The CCA further prohibits employers from basing

any hiring, compensation or other decisions concerning the terms or conditions of employment upon the applicant's or employee's "consumer credit history."

Under the CCA, "consumer credit history" is defined as "an individual's credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

- (a) consumer credit report;
- (b) credit score; or
- (c) information an employer obtains directly from the individual regarding: (1) details about credit accounts, including the individual's number of credit accounts, late or missed payments, charged-off debts, items in collections, credit limit, prior credit report inquiries, or (2) bankruptcies, judgments or liens."

"Consumer credit history" also extends to "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history."

Exceptions to the CCA

Although the CCA is intended to apply broadly to all employers, several exceptions are included based on the sensitive nature of certain positions requiring additional layers of security.

A position is exempt from the CCA if it:

- (i) has signatory authority over third party funds or assets valued at \$10,000 or more; or (ii) involves a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more on behalf of the employer;
- includes regular duties that allow the employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases;
- is subject to background investigation by the Department of Investigation under certain circumstances enumerated in the CCA;
- is required to be bonded under city, state or federal law;
- is required to possess security clearance under

federal law or the law of any state;

- is a non-clerical position having regular access to trade secrets, intelligence information or national security information; or
- is as a police officer, or peace officer, or in a position with a law enforcement or investigative function at the Department of Investigation.

The CCA also does not apply to employers who are required by state or federal law or regulations or by a self-regulatory organization (e.g. a securities exchange or registered clearing agency), to use an individual's consumer credit history for employment purposes.

CONCLUSION

This update covers the key issues facing New York City employers raised by the passage of the FCA and the CCA. However, it is highly recommended that employers of all sizes consult with counsel to ensure that they are compliant with the newly enacted laws. Please feel free to reach out to Pryor Cashman with any questions that may arise.

The foregoing is merely a discussion of the Fair Chance Act and New York City Bill Int-261-2014. If you would like to learn more about this topic or how Pryor Cashman LLP can serve your legal needs, please contact Alice Stock at (212) 326-0480, astock@pryorcashman.com, or Joshua Zuckerberg at (212) 326-0885, jzuckerberg@pryorcashman.com.

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