

WEBINAR SERIES

Employee Background Services for Your Business

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Today's Agenda

- Laws regulating background checks in New York
- Fair Credit Reporting Act
- New York City Fair Chance Act Overview
- Two-step Background Check / Criminal History Check
- Non-convictions
- Inadvertent Disclosures
- Intentional Misrepresentation
- Adverse Action: Withdrawing a Conditional Offer
- Temporary Staffing Companies / Agencies
- Exceptions
- Per se violations
- Enforcement
- Artificial Intelligence
- Next steps and Compliance

Webinar Forum

All participants are muted.

Please type questions in the side navigation panel and we will try to address most questions during today's session.

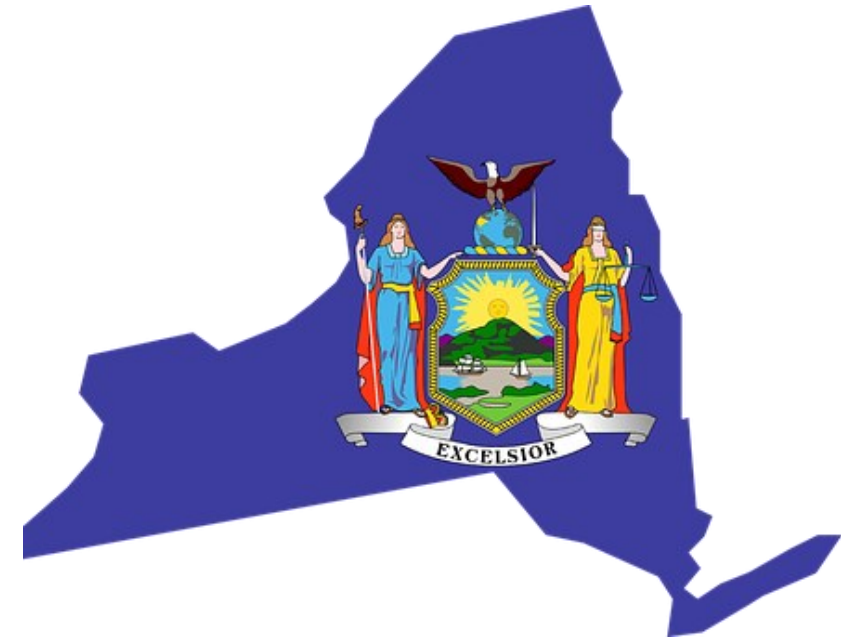
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Laws regulating background checks in New York

- Fair Credit Reporting Act
- New York Corrections Law
- New York General Business Law
- New York State Human Rights Law
- New York City Fair Chance Act



Fair Credit Reporting Act

- Federal consumer protection statute
- Imposes obligations on “Consumer Reporting Agencies”
 - E.g., permissible purpose
- Imposes obligations for “End-Users” of this information (such as employers)
 - E.g., disclosure & authorization; pre-adverse & adverse action forms



New York City Fair Chance Act Overview



- Passed 2015; Amended July 2021
 - Covered employers: at least 4 employees (only 1 needs be in NYC)
 - Protects employees, interns, freelancers, and independent contractors (and gig workers)
 - Criminal history questions/inquiries are not permissible prior to a “**conditional offer**”
 - Job postings, applications, interviews, etc.
 - No questions; No public records; No Google; No social media
 - References to criminal history in any job application or advertisement is prohibited
 - BUT: “people-first language” → “People with criminal histories are encouraged to apply”
 - **Be careful!!** --- “no good deed goes unpunished”
 - **Exception:** does *not apply* where any state, federal or local law either:
 - 1) requires criminal background checks for employment purposes or
 - 2) bars employment based on criminal history

New York City Fair Chance Act Overview



- Non-convictions & Pending Criminal Charges
- Inadvertent / Unsolicited Disclosure
 - Inadvertence = **not liable**
 - **But** – cannot ask further questions
- Falsification
 - If **applicant lied** about criminal background, can revoke conditional offer
 - **But** – must still follow FCRA
- N.Y. Gen. Bus. Law sec. 380-g(d) – if there is a criminal hit,
 - 1) *CRA must notify applicant,*
 - 2) *employer must send a copy of Art. 23-A*

Two-step Background Check / Criminal History Check

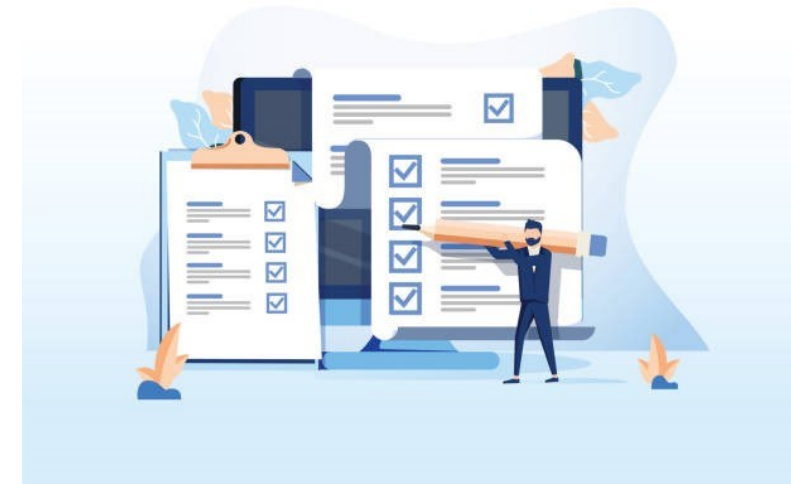
- Two options when conducting criminal background checks in NYC:

2-step bifurcated process OR segregation of information

- **Step 1:** Clear non-criminal history components
 - e.g., education, credit(?), employment, drug test (but not cannabis), reference checks, OFAC, etc.
 - Non-criminal history FCRA forms

→ *Make a “conditional offer” of employment*
Can only be conditioned on criminal or MVR

- **Step 2:** Criminal history only (incl. MVR; SORA)
 - Use criminal-only FCRA forms



FORMS: one set of D & A forms or two sets?

Two-step Background Check / Criminal History Check

- Alternative: **segregation of information**
 - Makeshift 2-step process
 - internal system to segregate information to ensure it is available to decision-makers only after a conditional offer is made
- Employer bears burden of proving this system works
- Could have issues with FCRA depending on forms used



Two-step Background Check / Criminal History Check



- New York State Unified Court System
 - Search for specific person
 - \$95 per name
 - Results provide within 1 day & can be viewed for 6 months
 - Results based on exact match of name and DOB



Non-convictions



CANNOT be asked about or considered/used

What are “non-convictions?”

- criminal charges that have been
 - adjourned in contemplation of dismissal,
 - terminated in favor of the individual,
 - adjudicated as a youthful offender, or
 - resulted in a conviction for a violation, non-criminal offense, or that were sealed
- NYC Commission provides list of example “non-convictions” & sample language to avoid soliciting non-convictions

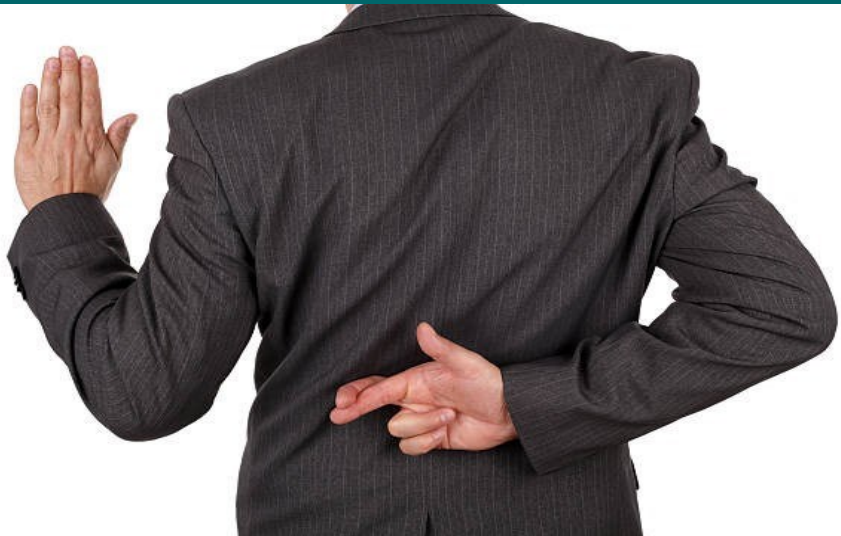
Inadvertent Disclosures



- Applicant reveals criminal history without being asked
- Good faith effort to exclude criminal information prior to conditional offer = no liability
 - Proof?
- If it happens:
 - Criminal history may be considered after a conditional offer is made
 - Criminal background check may be conducted only after a conditional offer
 - Then... change the subject



Intentional Misrepresentation



Applicant can be disqualified for intentional dishonesty

- Considered “**intentional**” only
 - 1) if it is made with knowledge it was false, and
 - 2) with the intent to deceive
- To disqualify, employer must:
 - 1) provide the applicant with a copy of any information that shows misrepresentation; AND
 - 2) give the applicant at least 5 days to respond
- If the applicant “credibly” demonstrates no misrepresentation or no intent → cannot disqualify

Adverse Action: Withdrawing a Conditional Offer

- Once conditional offer is made, it can be revoked only:
 - Case on criminal information through [Fair Chance Process](#)
 - ADA-compliant [medical exam](#)
 - Information that “employer [could not have reasonably known](#) before making the conditional offer”



Adverse Action: Withdrawing a Conditional Offer

- Fair Chance Process:
 - Copy of **everything** the employer considered
 - E.g., background report, internet search results, summary of oral conversation, etc.
 - Copy of **Fair Chance Analysis** (individualized assessment), and
 - Allow **5 business days** (from receipt) to respond with mitigating information
 - Applicants: use method agree upon by applicant and that provides record of receipt
 - E.g., in person, electronic, registered mail
 - Current employees: can be placed on unpaid leave for this time period
 - If mitigating information provided → repeat process



Adverse Action: Withdrawing a Conditional Offer

- Fair Chance Individualized Analysis
 - [Article 23-A](#) Factors for [criminal conviction history](#):
 - [Public policy](#) of NY to encourage employment of people with conviction history
 - Specific [duties and responsibilities](#) necessarily related to the job
 - The [bearing](#) the criminal offense will have on the person's fitness or ability to perform one or more such duties or responsibilities
 - [Time](#) since the occurrence of the criminal offense
 - Person's [age](#) at the time of occurrence of the criminal offense
 - [Seriousness](#) of the offense
 - Information about [rehabilitation](#) and good conduct
 - Employer's legitimate interest in protecting [property](#) and the [safety and welfare](#) of specific individuals or the general public
 - [Certificate of relief from disabilities](#) or good conduct
 - Creates a presumption of rehabilitation



Adverse Action: Withdrawing a Conditional Offer

- Fair Chance Individualized Analysis
 - Fair Chance Factors for pending criminal cases:
 - Policy of NYC to overcome stigma toward and unnecessary exclusion from employment of persons with criminal justice involvement
 - Specific duties and responsibilities necessarily related to the job
 - The bearing of the criminal offense for which the applicant/employee was convicted, or that is alleged in the case of pending arrests or criminal accusations, on the applicant/ employee's fitness or ability to perform one or more such duties or responsibilities
 - Whether the person was 25 years of age or younger at the time of occurrence
 - Seriousness of the offense
 - Employer's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public; and
 - Additional information of rehabilitation or good conduct, incl. history of positive performance and conduct on the job or in the community



Adverse Action: Withdrawing a Conditional Offer

- Fair Chance Individualized Analysis
 - NYC Commission [form](#) (can substantially similar form)
 - Should be sent: [same time as pre-adverse](#) action (or shortly after)
 - Must be [filled out completely](#)
 - [Thoughtful](#) analysis of [particular circumstances](#)
 - **Cannot** take [adverse action](#) unless you can establish:
 - [Direct relationship](#) between the [criminal record](#) and [the job](#)
 - And the Fair Chance Factors do not lessen that relationship
 - Criminal record creates an [unreasonable risk](#) to
 - (1) specific [persons](#),
 - (2) the [general public](#), or
 - (3) our [property](#)



Temporary Staffing Companies / Agencies

- Potentially 2 rounds of background checks
 - First – when worker is put in agency’s database
 - Second – employer-client can do their own prior to placement



Exception:

Required Background Check



- Employer still required to follow Fair Chance Act to the extent it does not conflict with governing law
- May advise once applicant applies that a background check is required
- Required background check can be performed prior to conditional offer

Exception:

Prohibition of Criminal History

- Employer still required to follow Fair Chance Act to the extent it does not conflict with governing law
- May advise applicant that such criminal history is disqualifying due to legally-mandated exclusion
- Can run criminal background check and disqualify **prior** to confidential offer based on legally-mandated exclusion (not necessarily any/all criminal history)
- BUT: must provide a copy of information employer relied upon



Exception:

Recordkeeping Requirement



Exemption log:

- Keep all records for 3 years from exemption being used
- Keep criminal history separately where only people who are making decisions have access

Per se violations



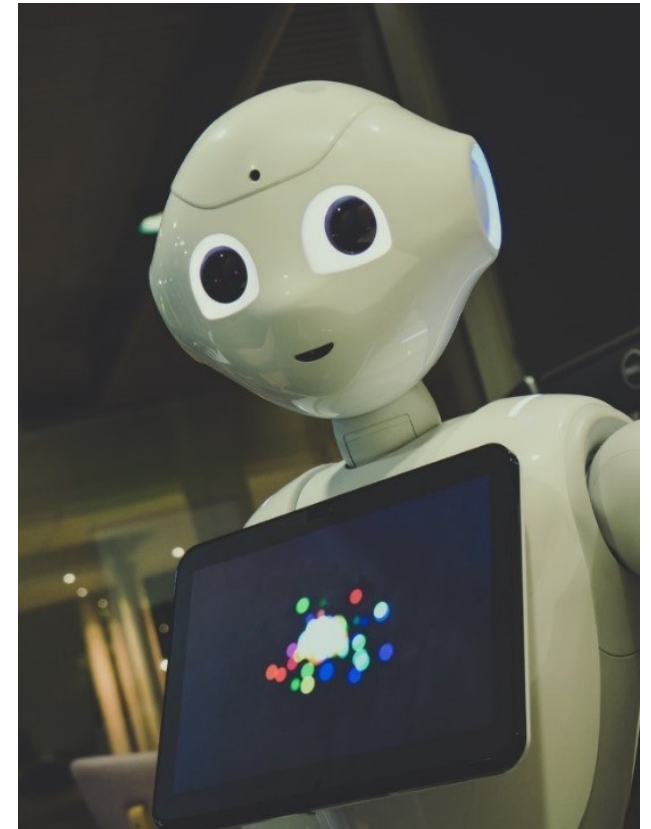
1. Any reference to a criminal background check or limitation based on criminal history in a job solicitation, advertisement or publication
 - E.g., “no felonies”; “background check required”; “must have clean record”
2. Any inquiry into criminal background prior to conditional offer, even if there is no adverse action
3. Withdrawal of conditional offer without following Fair Chance Process
4. Adverse action based on non-conviction
5. Before disqualification based on intentional misrepresentation, failing to provide a copy of the information upon which the employer is relying

Enforcement



- NYC Commission on Human Rights
 - Vigorous enforcement
 - Civil penalties based on:
 - 1) Severity of violation
 - 2) Existence of previous/contemporaneous violations
 - 3) Employer size: number of employees & revenue
 - E.g., 4-9 employees; 10-20; 21-50; 50+
 - 4) Whether employer should have known the law
 - Violations:
 - Negligence = up to \$125,000
 - Willful = up to \$250,000
 - Plus other remedies (back pay, front pay, emotional distress, punitives, attorneys' fees)
 - Private lawsuits
 - **Aiding & abetting** liability

- New York City Local Law 144
 - Effective 1/1/23; enforcement 4/15/23
- Automated Employment Decision Tools (AEDT)
 - any computational process, derived from [machine learning, statistical modeling, data analytics, or artificial intelligence](#), that issues [simplified output](#), including a score, classification, or recommendation, that is used [to substantially assist or replace discretionary decision making](#) for making employment decisions that impact natural persons



Next steps and compliance:

- Which method (bifurcated vs. segregated) best aligns with:
 - Business needs?
 - Administrative burden?
 - Compliance?
 - Risk tolerance?
 - Multi-jurisdictional considerations?
- Fine-tuning the process:
 - What information is necessary? Why?
 - What information is available?
 - Do exemptions apply?
- Compliance with requirements:
 - Optimized forms / job ads / communications
 - Best practices for notice – pre-adverse & adverse action
 - Record-keeping
- Training of HR / front line managers / recruiting
- Artificial intelligence – AEDT?

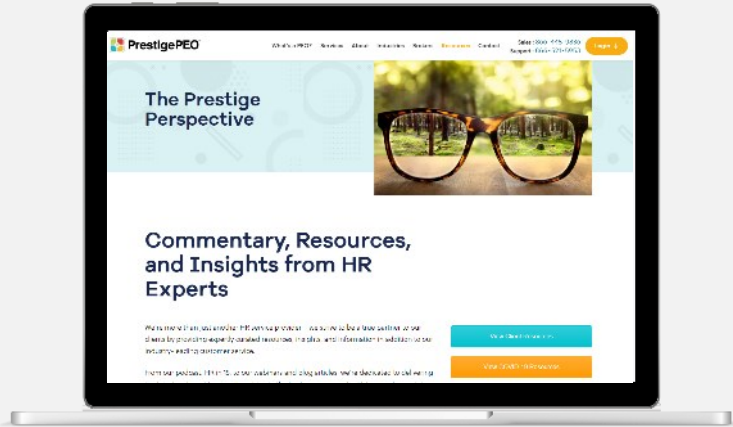
Help!!

I have a “situation”

- We have a hit!
 - Fair Chance Process
 - Communications & mitigating information
- Applicant caught in a lie!
 - “Intentional misrepresentation” procedure
- Inadvertent disclosures
 - Training
 - Remediation
- Lawsuit / NYC Commission charge or investigation
 - Efficient exit strategy (fight to win vs. settlement)
 - Minimizing “fallout” and business disruption
 - Compliance afterwards

QUESTIONS?

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