

## New York City Council Considers Legislation Limiting Inquiries into Applicants' Criminal and Credit Histories

Currently pending before the New York City Council (the "Council") are two bills that could significantly affect hiring processes utilized by New York City employers. The proposed [Fair Chance Act](#) and the [Stop Credit Discrimination in Employment Act](#) would restrict what employers may inquire about regarding job applicants' criminal and consumer credit histories. If passed, the bills would require employers to review and potentially revise their hiring practices, including the use of criminal background searches and credit checks.

Introduced in April 2014, the Fair Chance Act (the "FCA"), which has been described as "ban-the-box" legislation, would amend the New York City Human Rights Law (the "NYCHRL") to prevent pre-employment inquiries into an applicant's conviction or arrest history. The New York Correction Law § 23-A currently requires employers to conduct a multi-factor analysis before refusing to hire an applicant based on his or her criminal history. This analysis considers, among other things, any bearing the criminal offense would have on the applicant's fitness or ability to perform the duties related to the position, the time that has elapsed since the offense, the applicant's age at the time of the offense, the seriousness of the offense, any information produced on behalf of the applicant relating to his or her rehabilitation and good conduct, and the employer's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public. The employer may only refuse to hire an applicant based on his or her criminal conviction if there is a direct relationship between the prior criminal offense and the specific job sought, or if hiring the individual would pose an unreasonable risk to property or others' safety.

The FCA extends these protections by requiring that employers first deem an applicant qualified for a job and make a conditional job offer before inquiring into an applicant's criminal history or conducting any criminal history search. The bill defines "inquiries" to include questions in a job application or in a standalone document, searches of publicly available records or consumer reports, or even mentioning that a background check will be required. However, employers who are legally required to conduct a criminal history search may inform applicants that the job is subject to a

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background check and that the employer is prohibited from employing individuals with certain criminal convictions.

The FCA also provides that if an employer intends to take an adverse employment action based on a criminal inquiry, it must provide the applicant with a written copy of the criminal inquiry and the multi-factor analysis the employer is required to conduct. The applicant must then be provided a minimum of seven business days to respond, during which time the position must remain open. Once the response time has lapsed, the employer no longer needs to wait for an answer. An employer who violates these new requirements could be liable for a minimum of \$1,000 in damages and is presumed to have engaged in unlawful discrimination, which can only be overcome with "clear and convincing evidence" demonstrating otherwise. Further, an applicant may not be disqualified from prospective employment based on a response to an unlawful inquiry or statement under the FCA. Employees who claim that their rights have been violated under the FCA would be entitled to a private cause of action.

Also pending before the Council is the Stop Credit Discrimination in Employment Act (the "Act"), which would amend the NYCHRL to prohibit employers from requesting or using for employment purposes information contained in an applicant's consumer credit history or to retaliate or otherwise discriminate against an applicant based on the applicant's credit history. The Act defines "consumer credit history" as "any information bearing on an individual's credit worthiness, credit standing, or credit capacity, including but not limited to an individual's credit score, credit account and other consumer account balances and payment history." However, the Act would not apply to employers that are required under state or federal law to use an individual's consumer credit history for employment purposes.

Employers should monitor the Council's legislative activity on both bills and, if they are passed, review and revise hiring policies and practices.

This post was authored by [Matt Lampe](#), [Emilie Hendee](#), and [Sharon Cohen](#) of Jones Day. The views and opinions expressed herein are those of the authors and do not necessarily reflect the views of Jones Day or the New York State Bar Association.