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NEW YORK CITY COUNCIL PASSES “BAN THE BOX” LEGISLATION

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Following the lead of more than 100 other jurisdictions, the New York City Council passed the New York City Fair Chance Act (FCA), which prohibits private employers from seeking information from job applicants regarding their past criminal convictions prior to making a conditional offer of employment. Mayor Bill de Blasio is expected to sign the law shortly as he has vocally supported such measures in the past. The FCA will go into effect 120 days after it is signed by the mayor.

Under the FCA, employers with at least four employees will be prohibited from asking individuals about any prior criminal conviction until after a conditional offer of employment is made. Thus, once the FCA becomes effective, employers will not be able to ask questions about prior criminal convictions on employment applications and similar pre-hire paperwork until they make a conditional job offer to the applicant. There are a few, narrow exceptions to this prohibition where the FCA will not apply:

- To any actions taken by an employer pursuant to any federal, state or local law that requires criminal background checks for employment purposes or bars employment based upon criminal history;
- To individuals applying for employment as a police officer, as a peace officer or at a law enforcement agency; or

- To individuals applying for a position listed on the website of the New York City Department of Citywide Administrative Services as having been determined to involve law enforcement, be susceptible to bribery or other corruption or entails the provision of services to or safeguarding of individuals who, because of age, disability, infirmity or other condition, are vulnerable to abuse.

Once a conditional offer of an employment is made, the employer may inquire about the individual's prior criminal conviction. However, if an employer obtains information related to the individual's criminal conviction history, which results in the employer determining that an adverse employment action must be made (such as the revocation of a conditional job offer), a specific process must be followed. Under the process, employers must:

1. Provide a written copy of the inquiry to the applicant in a manner to be determined by the New York City Commission on Human Rights;
2. Perform an analysis required by Article 23-A of the New York Corrections Law. Such analysis requires employers to consider the duties and responsibilities of the position at issue and whether the criminal conviction inhibits the individual's fitness or ability to perform any of

the position's duties or responsibilities. In making the determination, employers must also take into account the public policy of encouraging the employment of individuals previously convicted of crimes; the temporal proximity of the conviction; the individual's age at the time of the occurrence; the seriousness of the act; the information provided by the individual or someone on his behalf regarding his rehabilitation; and the legitimate interest of the employer in protecting property and the safety of the public and specific individuals;

3. Following this analysis, the employer must provide a written copy of the analysis to the applicant in a format to be determined by City Commission. The written analysis must include supporting documents and an explanation of the employer's reason for taking an adverse employment action; and
4. Allow the applicant at least three business days to respond to the written analysis. During those three days, the position must be held open.

Employers who violate the FCA could be liable for, among other things, compensatory damages (i.e., the wages the individual would have earned had he or she

been hired), unlimited punitive damages, civil penalties of up to \$250,000 and attorneys' fees as well as being subjected to injunctive relief. In addition, employers who conduct a background check of their applicants and/or employees through a consumer reporting agency must comply with the Fair Credit Reporting Act, the New York Fair Credit Reporting Act and Article 23-A of the New York Corrections Law.

As a result of the passage of the FCA, New York City employers should review their job applications to ensure that they do not seek information regarding individuals' criminal conviction history. Indeed, New York City employers who ask about prior criminal convictions on employment applications must revise those applications to remove such questions. Employers should also review job postings and other pre-hire paperwork to ensure that they do not inquire about or reference information concerning an applicant's prior criminal conviction prior to making a conditional job offer.

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