Engage PEO Client Alert:

NYC Expands Fair Chance Act

On July 15, 2021, the New York City Commission on Human Rights released updated enforcement guidance which clarifies the Fair Chance Act ("FCA") amendments that became effective on July 29, 2021. The FCA prohibits employers from asking about an applicant's criminal history, including on job advertisements, and prohibits employers from stating that applicants will be subject to a background check on job postings and online applications until the employer has extended a conditional offer of employment. The July FCA amendments extended protections for current employees, applicants, and independent contractors with criminal charges and pending arrests.

Employers should keep in mind the following key changes, when utilizing background checks.

1) Institute A Two-Step Background Check Process During Hiring

Employers may conduct criminal background checks only after:

(i) offering a conditional offer of employment and then

(ii) conducting non-criminal pre-employment screenings, such as references and credit, drug screening, and confirming education and employment history.

2) Implement A "Fair Chance Process"

After offering a conditional offer of employment and then conducting non-criminal pre-employment assessments, an employer may request to review and analyze the applicant's criminal history in accordance with the FCAs "Fair Chance Process," set out in the NYCCHR's Fair Chance Notice. This Notice must be provided to the employee if the employer may take adverse action pursuant to the information, such as rescinding a conditional offer of employment and/or terminating employment.

The Fair Chansce Process requires an individualized assessment of the pending criminal arrests and charges of applicants and employees, as well as criminal convictions of existing employees. Specifically, employers must consider the following factors:

(i) New York City's policy of encouraging "employers to hire people with criminal records;"

(ii) "specific duties and responsibilities of the job;"

(iii) whether the criminal offense(s) bear on the individual's "fitness or ability to perform the duties or responsibilities" of the position;

(iv) how long ago [the] criminal activity occurred, not [the] conviction;

(v) age of the individual when the alleged/convicted criminal activity (not arrest or conviction) occurred, with activity occurring under the age of 25 years being a mitigating factor;

(vi) "the seriousness of the conduct that led to [the] criminal record;"

(vii) "evidence of rehabilitation and good conduct," such as job training, counseling, involvement in the community, etc.;

(viii) the employer's "legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public;" and

(ix) certificate(s) of relief or good conduct showing rehabilitation.

After analyzing the factors in the Fair Chance Process, an employer may deny or terminate employment pursuant to criminal conviction history or pending case, if the employer determines that (1) "there is a direct relationship between the applicant's conviction history or pending case and the job;" or (2) the individual's "criminal record creates an unreasonable risk to specific persons, the general public, or [the employer's] property." Employers should make sure that job descriptions are accurate and clear in advance of taking this step and such decisions should be related to important duties for the role.

3) Do Not Ask About or Consider Non-Convictions

"Non-convictions" are non-criminal violations and instances related to criminal conduct that employers may neither consider while hiring, nor use as a basis for adverse action against an employee or applicant. Non-convictions include, but are not limited to:

- Instances when the police decide not to charge a person following their arrest;
- Cases in which the prosecutor declined to prosecute the person following their arrest;
- Cases that were adjourned in contemplation of dismissal (unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution);
- Cases in which all charges were dismissed;
- Cases that resulted in an acquittal on all charges;
- Cases in which the verdict was set aside or the judgment was vacated by the court and no new trial was ordered, nor is any appeal by the prosecution pending;
- Cases in which the person was adjudicated as a youthful offender;
- Cases that resolved in a conviction for a violation, even if not sealed, including but not limited to: Trespass, disorderly conduct, failing to respond to an appearance ticket, loitering, harassment in the second degree, disorderly behavior, loitering for the purpose of engaging in prostitute offense;
- Cases that resolved in a conviction for a non-criminal offense under laws of a state other than New York;
- Convictions that have been sealed.

4) Employees and Applicants Have Five Days to Respond to A Fair Chance Act Notice

Employers must provide applicants and employees with a copy of the completed Fair Chance Notice, as well as any other information that the employer considered in its assessment. The employee or applicant has at least five (5) days to respond to the information, including the opportunity to provide supplemental and responsive information for the employer's assessment.

Please contact your Engage HR Consultant if you have questions regarding the New York City Fair Chance Act.