

New York City Commission on Human Rights

Notice of Adoption of Rule

NOTICE IS HEREBY GIVEN, pursuant to the authority vested in the Commission on Human Rights by section 905(e)(9) of the New York City Charter and in accordance with the requirements of Section 1043 of the Charter, that the New York City Commission on Human Rights has amended its rules to establish certain definitions and procedures applying Local Law No. 63 of 2015, the Fair Chance Act (“the FCA”) which amended the Human Rights Law’s provisions regarding unlawful discrimination on the basis of criminal history against job applicants and employees, and applicants for licenses, registrations, and permits.

The required public hearing was held on March 21, 2016.

Statement of Basis and Purpose of Final Rule

The New York City Commission on Human Rights (“the Commission”) has amended its rules to establish certain definitions and procedures applying Local Law No. 63 of 2015, the Fair Chance Act, which amended the Human Rights Law’s provisions regarding unlawful discrimination on the basis of criminal history against job applicants and employees, and applicants for licenses, registrations, and permits.

These rules amend title 47 of the Rules of the City of New York by amending section 2-01 to define terms used in the Human Rights Law and update the definition of “domestic partners” to reflect the definition contained in the Administrative Code. The rules also add a new section, section 2-04, to specify chargeable violations under the Human Rights Law as amended by the FCA; define terms and requirements in furtherance of the intent of the FCA, establish guidelines and procedures for enforcement; outline obligations of employers and those evaluating individuals for licenses, registrations, permits and credit; and clarify when and under what circumstances an employer can withdraw a conditional offer or take an adverse employment action against an applicant or employee based on their criminal history. The rules also create a discretionary mechanism for the Commission to resolve Commission-initiated charges of certain *per se* violations under the FCA by offering eligible respondents an option for expedited resolution. This process, called Early Resolution, will allow a respondent to bypass a full investigation and a hearing, by admitting liability and complying with a penalty. The monetary fine associated with the penalty is based on the penalty schedule set forth in the rules. By assessing penalties based upon employer size, the penalty schedule recognizes the impact of the discriminatory action on the public and is designed to ensure that the penalty will incentivize compliance with this program, deter future violations, and educate employers about their obligations under the law. The monetary fines are proportional to the civil penalties awarded in cases of *per se* violations that come before the Commission.

The final rule:

- Amends title 47 of the Rules of the City of New York to establish definitions for “Applicant,” “Adverse Employment Action,” “Article 23-A Analysis,” “Article 23-A Factors,” “Business Day,” “Conditional Offer of Employment,” “Conviction History,” “Criminal Background Check,” “Criminal History,” “Direct Relationship,” “Domestic Partners,” “Fair Chance Process,” “Human Rights Law,” “Inquiry,” “Licensing Agency,”

“Non-Convictions,” “*Per Se* Violation,” “Statement,” “Temporary Help Firms,” and “Terms and Conditions.”

- Establishes *per se* violations, as defined by these rules, of the new provisions added to the Human Rights Law by the FCA.
- Clarifies the types of questions and statements relating to criminal history that are prohibited by the FCA.
- Explains the meaning of a conditional offer and establishes the limited circumstances under which an employer can revoke a conditional offer.
- Explains what an employer should do if they inadvertently learn about an applicant’s criminal history prior to making a conditional offer.
- Clarifies the procedure that an employer must follow upon learning of an applicant’s or employee’s criminal history and what steps must be taken before revoking a conditional offer or taking an adverse employment action.
- Establishes clear guidelines that employers must follow when considering whether and how applicants’ and employees’ criminal convictions relate to the duties of a prospective or current job or would pose an unreasonable risk to the property or the safety or welfare of specific individuals or the general public.
- Establishes what information an employer must provide to an applicant if a determination is made to revoke a conditional offer based on a conviction, and clarifies how an employer must evaluate an applicant’s request for more time.
- Requires an employer to consider any documentation that the applicant presents to support their assertion that the information on the background check contains an error.
- Clarifies exemptions to the FCA.
- Creates a discretionary mechanism for the Commission to respond to *per se* violations of the FCA by allowing the Commission’s Law Enforcement Bureau (“LEB”) to send employers or licensing agencies an Early Resolution Notice.
- Clarifies that employers may not request information or inquire about the non-convictions of applicants or employees and may not deny or take any adverse employment action against applicants or employees based on non-convictions.
- Updates the rule’s definition of “domestic partners” to reflect the definition contained in the Administrative Code.

New material is underlined.

[Deleted material is in brackets.]

“Shall” and “must” denote mandatory requirements and may be used interchangeably in the rules of this department, unless otherwise specified or unless the context clearly indicates otherwise.

Section 1. Section 2-01 of Title 47 of the Official Compilation of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

[The definitions in this section shall be used by the New York City Commission on Human Rights in determining whether an institution, club, or place of accommodation is “distinctly private” as that term is used in the New York City Human Rights Law, Administrative Code §8-101 et seq.]

For purposes of this chapter,

Adverse employment action. “Adverse employment action” refers to any action that negatively affects the terms and conditions of employment.

Applicant. “Applicant” refers to persons seeking initial employment, and current employees who are seeking or being considered for promotions or transfers.

Article 23-A analysis. “Article 23-A analysis” refers to the process required under subdivisions 9, 10, 11, and 11-a of section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.

Article 23-A factors. “Article 23-A factors” refers to the factors that employers must consider concerning applicants’ and employees’ conviction histories under section 753 of Article 23-A of the New York Correction Law.

Business day. “Business day” means any day except for Saturdays, Sundays, and all legal holidays of the City of New York.

Commission. “Commission” means the New York City Commission on Human Rights.

Conditional offer of employment. “Conditional offer of employment,” as used in section 8-107(11-a) of the Administrative Code and section 2-04 of this title for purposes of establishing when an applicant’s criminal history can be considered by an employer, refers to an offer of employment, promotion or transfer. A conditional offer of employment can only be revoked based on one of the following:

1. The results of a criminal background check, and only after the “Fair Chance Process,” as defined in this section, has been followed.

2. The results of a medical exam as permitted by the Americans with Disabilities Act of 1990, as amended, 42 U.S.C. §12101 et seq.
3. Other information the employer could not have reasonably known before making the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material.

For temporary help firms, a conditional offer is the offer to place an applicant in the firm's labor pool, which is the group of individuals from which the firm selects candidates to send for job opportunities.

Conviction history. "Conviction history" refers to records of an individual's conviction of a felony, misdemeanor, or unsealed violation as defined by New York law or federal law, or the law of the state in which the individual was convicted.

Criminal background check. "Criminal background check" refers to when an employer, employment agency or agent thereof orally or in writing:

1. Asks a person whether or not they have a criminal record; or
2. Searches for publicly available records, including through a third party, such as a consumer reporting agency, the Internet, or private databases, for a person's criminal history.

Criminal history. "Criminal history" refers to records of an individual's convictions, unsealed violations, non-convictions, and/or currently pending criminal case(s).

Direct relationship. "Direct relationship" refers to a finding that the nature of the criminal conduct underlying a conviction has a direct bearing on the fitness or ability of an applicant or employee to perform one or more of the duties or responsibilities necessarily related to the license, registration, permit, employment opportunity, or terms and conditions of employment in question.

[Domestic partner. The term "domestic partner" means a person who has registered a domestic partnership in accordance with applicable law with the City Clerk, or has registered such a partnership with the former City Department of Personnel pursuant to Executive Order 123 (dated August 7, 1989) during the period August 7, 1989 through January 7, 1993. (The records of domestic partnerships registered at the Department of Personnel are to be transferred to the City Clerk.)] Domestic partners. "Domestic partners" means persons who have a registered domestic partnership, which shall include any partnership registered pursuant to chapter 2 of title 3 of the Administrative Code, any partnership registered in accordance with executive order number 123, dated August 7, 1989, and any partnership registered in accordance with executive order number 48, dated January 7, 1993, and persons who are members of a marriage that is not recognized by the state of New York, a domestic partnership, or a civil union, lawfully entered into in another jurisdiction.

Employer. “Employer” refers to an employer as defined by section 8-102(5) of the Administrative Code.

Fair Chance Process. “Fair Chance Process” refers to the post-conditional offer process mandated by section 8-107(11-a) of the Administrative Code when employers elect to withdraw a conditional offer of employment or deny a promotion or transfer based on an applicant’s conviction history.

Human Rights Law. “Human Rights Law” refers to Title 8 of the Administrative Code.

Inquiry. “Inquiry,” when used in connection with criminal history, refers to any oral or written question asked for the purpose of obtaining a person’s criminal history, including without limitation, questions in a job interview about an applicant’s criminal history, and any search for a person’s criminal history, including through the services of a third party, such as a consumer reporting agency.

Licensing agency. “Licensing agency” refers to any agency or employee thereof that is authorized to issue any certificate, license, registration, permit or grant of permission required by the law of this state, its political subdivisions or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business or profession.

Members. “Members” [shall mean] means individuals belonging to any class of membership offered by the institution, club, or place of accommodation, including, but not limited to, full membership, resident membership, nonresident membership, temporary membership, family membership, honorary membership, associate membership, membership limited to use of dining or athletic facilities, and membership of members' minor children or spouses or domestic partners.

Non-conviction. “Non-conviction” means any arrest or criminal accusation, not currently pending, that was concluded in one of the following ways:

1. Termination in favor of the individual, as defined by New York Criminal Procedure Law (“CPL”) section 160.50, even if not sealed;
2. Adjudication as a youthful offender, as defined by CPL section 720.35, even if not sealed;
3. Conviction of a non-criminal offense that has been sealed under CPL section 160.55;
or
4. Convictions that have been sealed under CPL section 160.58.

“Non-conviction” includes a disposition of a criminal matter under federal law or the law of another state that results in a status comparable to a “non-conviction” under New York law as defined in this section.

Payment directly from a nonmember. “Payment directly from a nonmember” [shall mean] means payment made to an institution, club or place of accommodation by a nonmember for expenses incurred by a member or nonmember for dues, fees, use of space, facilities, services, meals or beverages.

Payment for the furtherance of trade or business. “Payment for the furtherance of trade or business” [shall mean] means payment made by or on behalf of a trade or business organization, payment made by an individual from an account which the individual uses primarily for trade or business purposes, payment made by an individual who is reimbursed for the payment by the individual's employer or by a trade or business organization, or other payment made in connection with an individual's trade or business, including entertaining clients or business associates, holding meetings or other business- related events.

Payment indirectly from a nonmember. “Payment indirectly from a nonmember” [shall mean] means payment made to a member or nonmember by another nonmember as reimbursement for payment made to an institution, club or place of accommodation for expenses incurred for dues, fees, use of space, facilities, meals or beverages.

Payment on behalf of a nonmember. “Payment on behalf of a nonmember” [shall mean] means payment by a member or nonmember for expenses incurred for dues, fees, use of space, facilities, services, meals or beverages by or for a nonmember.

Per se violation. “Per se violation” refers to an action or inaction that, standing alone, without reference to additional facts, constitutes a violation of title 8 of the Administrative Code, regardless of whether any adverse employment action was taken or any actual injury was incurred.

Regular meal service. “Regular meal service” [shall mean] means the provision, either directly or under a contract with another person, of breakfast, lunch, or dinner on three or more days per week during two or more weeks per month during six or more months per year.

Regularly receives payment. An institution, club or place of [“]accommodation “regularly receives payment for dues, fees, use of space, facilities, services, meals or beverages directly or indirectly from or on behalf of nonmembers for the furtherance of trade or business” if it receives as many such payments during the course of a year as the number of weeks any part of which the institution, club or place of accommodation is available for use by members or non-members per year.

Statement. “Statement,” when used in connection with criminal history, refers to any communications made, orally or in writing, to a person for the purpose of obtaining criminal history, including, without limitation, stating that a background check is required for a position.

Temporary help firms. “Temporary help firms” are businesses that recruit, hire, and assign their own employees to perform work or services for other organizations, to support or supplement the other organization’s workforce, or to provide assistance in special work situations such as,

without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.

Terms and conditions. “Terms and conditions” means conditions of employment, including but not limited to hiring, termination, transfers, promotions, privileges, compensation, benefits, professional development and training opportunities, and job duties.

§ 2. Chapter 2 of title 47 of the Official Compilation of the Rules of the City of New York are amended by adding a new section 2-04 to read as follows:

§ 2-04 Prohibitions on Discrimination Based on Criminal History.

Sections 2-04(a) through 2-04(g) relate to prohibitions on discrimination in employment only. Section 2-04(h) relates to prohibitions on discrimination in licensing only. Section 2-04(i) relates to enforcement of violations of the Human Rights Law under this section in employment and licensing.

(a) Per Se Violations. The Commission has determined that the following are *per se* violations of sections 8-107(10), (11) or (11-a) of the Human Rights Law (regardless of whether any adverse employment action is taken against an individual applicant or employee), unless an exemption listed under subdivision (g) of this section applies:

- (1) Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history. This includes, but is not limited to, advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”
- (2) Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer.
- (3) Making any statement or inquiry relating to the applicant’s pending arrest or criminal conviction before a conditional offer of employment is extended.
- (4) Using within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability.
- (5) Failing to comply with requirements of section 8-107(11-a) of the Human Rights Law, when they are applicable: (1) to provide the applicant a written copy of any inquiry an employer conducted into the applicant’s criminal history; (2) to share with the applicant a written copy of the employer’s Article 23-A analysis; or (3) to hold the prospective

position open for at least three business days from the date of an applicant's receipt of both the inquiry and analysis.

(6) Requiring applicants or employees to disclose an arrest that, at the time disclosure is required, has resulted in a non-conviction as defined in section 2-01 of this chapter.

(b) *Criminal Background Check Process.* An employer, employment agency, or agent thereof may not inquire about an applicant's criminal history or request permission to run a criminal background check until after the employer, employment agency, or agent thereof makes the applicant a conditional offer. At no point may an employer, employment agency, or agent thereof seek or consider information pertaining to a non-conviction.

(1) Employers, employment agencies, or agents thereof may not engage in any of the following actions prior to making a conditional offer to an applicant, unless otherwise exempt pursuant to § 2-04(f) of this chapter:

(i) Seeking to discover, obtain, or consider the criminal history of an applicant before a conditional offer of employment is made.

(ii) Expressing any limitation or specifications based on criminal history in job advertisements. This includes, but is not limited to, any language that states or implies "no felonies," "background check required," or "clean records only." Solicitations, advertisements, and publications encompass a broad variety of items, including, but not limited to, employment applications, fliers, hand-outs, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness programs.

(iii) Using an application that contains a question about an applicant's criminal history or pending criminal case or requests authorization to perform a background check.

(iv) Making any inquiry or statement related to an applicant's criminal history, whether written or oral, during a job interview.

(v) Asserting, whether orally or in writing, that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered.

(vi) Conducting investigations into an applicant's criminal history, including the use of publicly available records or the Internet for the purpose of learning about the applicant's criminal history, whether such investigations are conducted by an employer or for an employer by a third party.

(vii) Disqualifying an applicant for refusing to respond to any prohibited inquiry or statement about criminal history.

(viii) In connection with an applicant, searching for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" or searching websites that

purport to provide information regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history.

- (c) *Inadvertent Discovery or Unsolicited Disclosure of Criminal History Prior to Conditional Offer.* Inadvertent discovery by an employer, employment agency, or agent thereof or unsolicited disclosure by an applicant of criminal history prior to a conditional offer of employment does not automatically create employer liability. Liability is created when an employer, employment agency, or agent thereof uses the discovery or disclosure to further explore an applicant's criminal history before having made a conditional offer or uses the information in determining whether to make a conditional offer.
- (d) *Information Regarding Conviction History Obtained After a Conditional Offer.* After an employer, employment agency, or agent thereof extends a conditional offer to an applicant, an employer, employment agency, or agent thereof may make inquiries into or statements about the applicant's conviction history. An employer, employment agency, or agent thereof may (1) ask, either orally or in writing, whether an applicant has a criminal conviction history; (2) run a background check or, after receiving the applicant's permission and providing notice, use a consumer reporting agency to do so; and (3) once an employer, employment agency, or agent thereof knows about an applicant's conviction history, ask them about the circumstances that led to the conviction and gather information relevant to the Article 23-A factors. Upon receipt of an applicant's conviction history, an employer, employment agency, or agent thereof may elect to hire the individual. If the employer, employment agency, or agent thereof does not wish to withdraw the conditional offer, the employer, employment agency, or agent thereof does not need to engage in the Article 23-A analysis.
- (e) *Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action.* Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's or employee's conviction history, the employer, employment agency, or agent thereof must (1) engage in an Article 23-A analysis, and (2) follow the Fair Chance Process. Employers, employment agencies, or agents thereof must affirmatively request information concerning clarification, rehabilitation, or good conduct while engaging in the Article 23-A analysis.
- (1) Article 23-A analysis
- (i) An employer, employment agency, or agent thereof must consider the following factors in evaluating an applicant or employee under the Article 23-A analysis:
- (A) That New York public policy encourages the licensure and employment of people with criminal records;
- (B) The specific duties and responsibilities necessarily related to the prospective job;
- (C) The bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;

- (D) The time that has elapsed since the occurrence of the criminal offense that led to the applicant or employee's criminal conviction, not the time since arrest or conviction;
- (E) The age of the applicant or employee when the criminal offense that led to their conviction occurred;
- (F) The seriousness of the applicant's or employee's conviction;
- (G) Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
- (H) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.
- (ii) When considering the factors outlined above, a presumption of rehabilitation exists when an applicant or employee produces a certificate of relief from disabilities or a certificate of good conduct.
- (iii) An employer, employment agency, or agent thereof may not change the duties and responsibilities of a position because it learned of an applicant's or employee's conviction history, except as provided in subdivision (e)(2)(v) of this section.
- (iv) After evaluating the factors in subdivision(e)(1)(i) of this section, an employer, employment agency, or agent thereof must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history and the prospective or current job, or (2) employing or continuing to employ the applicant would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- (A) To claim the "direct relationship exception," an employer, employment agency, or agent thereof must first draw some connection between the nature of the conduct that led to the conviction(s) and the position. If a direct relationship exists, the employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated.
- (B) To claim the "unreasonable risk exception," an employer, employment agency, or agent thereof must consider and apply the Article 23-A factors to determine if an unreasonable risk exists.
- (v) If an employer, employment agency, or agent thereof, after weighing the required factors, cannot determine that either the direct relationship exemption or the unreasonable risk exemption applies, then the employer, employment agency, or agent thereof may not revoke the conditional offer or take any adverse employment action.

(2) The Fair Chance Process: If, after an employer, employment agency, or agent thereof determines that either the direct relationship or unreasonable risk exemption applies, the employer, employment agency, or agent thereof wishes to revoke the conditional offer or take an adverse employment action, the employer, employment agency, or agent thereof must first (1) provide a written copy of any inquiry made to collect information about criminal history to the applicant, (2) provide a written copy of the Article 23-A analysis to the applicant, (3) inform the applicant that they will be given a reasonable time to respond to the employer's concerns, and (4) consider any additional information provided by the applicant during this period.

(i) Providing a written copy of the inquiry.

The employer, employment agency, or agent thereof must provide a complete and accurate copy of each and every piece of information relied on to determine that the applicant has a conviction history. This includes, but is not limited to, copies of consumer reporting agency reports, print outs from the Internet, records available publicly, and written summaries of any oral conversations, specifying if the oral information relied upon came from the applicant.

(ii) Providing a written copy of the Article 23-A analysis performed by the employer, employment agency, or agent thereof.

(A) Employers, employment agencies, or agents thereof who seek to revoke an applicant's conditional offer or take an adverse employment action on the basis of an applicant's criminal history must provide the applicant with the Fair Chance Notice below, which is available on the Commission's website, or a comparable notice.



BILL DE BLASIO
Mayor
CARMELYN P. MALALIS
Commissioner/Chair

100 Gold Street, Suite 4600
New York, NY 10038

nyc.gov/humanrights
@NYCCHR

Applicant Name _____

FAIR CHANCE ACT NOTICE

After extending a conditional offer of employment, we checked your criminal record. Based on the enclosed check, we have reservations about hiring you for the position of _____, and may decide to retract our job offer. Below explains why. We invite you to provide us with any information that could help us decide to offer you the job. If you choose to provide us with additional information you have _____ days (must be at least three business days) from the date you receive this to do so.

If you wish to respond, please contact _____.

In your response, you may:

- Tell us about any errors on your criminal record;
- Give us any additional information you'd like us to consider after reviewing this notice.

The following factors were considered, as required by Article 23-A of the New York State Correction Law, before making our determination:

A. The government encourages employers to hire people with criminal records.

B. The specific duties and responsibilities of the job, which are:

- _____
- _____
- _____
- _____

C. We believe your record impacts your fitness or ability to perform these duties and responsibilities because:

D. How long ago your criminal activity, not your conviction, occurred: _____ years _____ months

E. Your age when your criminal activity, not your conviction, occurred: _____ years old

F. The seriousness of the conduct that led to your criminal record, which is:

G. Your evidence of rehabilitation and good conduct, which is listed below.

- _____
- _____
- _____

If you have additional documents we should consider, please send them, including evidence that you attended school, job training, or counseling; or are involved with your community. They can include letters from people who know you, like teachers, counselors, supervisors, clergy, and parole or probation officers.

H. Our legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public, which is:

I. Your certificate(s) of relief or certificate of good conduct shows that you are rehabilitated. If you did not have a certificate, we did not hold that against you.

Based on these factors, we may deny you the job because (choose one or both below):

We believe there is a direct relationship between your criminal record and the job we offered to you, and the factors listed above do not lessen that relationship because:

Your criminal record creates an unreasonable risk to specific persons, the general public, or our property because:

For more information about the law, visit:
nyc.gov/FairChanceNYC

(B) So long as the material substance does not change, the notice may be adapted to a format preferred by the employer, employment agency, or agent thereof to account for the specific circumstances involving the applicant and the adverse employment action or denial of employment. A Fair Chance Notice must (1) include specific facts that were considered pursuant to the Article 23-A analysis and the outcome, (2) articulate the employer's, employment agency's, or agent's concerns and basis for determining that there is a direct relationship or an unreasonable risk, and (3) inform the applicant of their rights upon receipt of the

notice, including how they can respond to the notice and the time frame within which they must respond.

(iii) The employer, employment agency, or agent thereof must allow the applicant a reasonable time to respond to the employer's concerns.

(A) An employer, employment agency, or agent thereof must consider the following information when determining how much time is reasonable: (1) what additional information the applicant is purporting to gather and whether that additional information would change the outcome of the Article 23-A analysis; (2) why the applicant needs more time to gather the information; (3) how quickly the employer needs to fill the position; and (4) any other relevant information. A reasonable time shall be no less than 3 business days.

(B) During this time, an employer, employment agency, or agent thereof may not permanently place another person in the applicant's prospective or current position.

(C) The applicant may provide oral or written evidence of rehabilitation, which, if provided, the employer, employment agency or agent thereof must consider in applying the Article 23-A factors.

(D) The time period begins when the applicant receives both the Fair Chance Notice and a written copy of the inquiry.

(iv) Response of employer, employment agency, or agent thereof to additional information.

(A) If, within the reasonable time allowed by the employer as required by this subdivision, the applicant provides additional information related to the concerns identified by the employer, the employer, employment agency, or agent thereof must consider whether the additional information changes the Article 23-A analysis.

(B) If the employer, employment agency, or agent thereof reviews the additional information and makes a determination not to hire the applicant or take an adverse employment action, the employer, employment agency, or agent thereof must relay that decision to the applicant in writing.

(v) If an employer, employment agency, or agent thereof determines after conclusion of the Fair Chance Process to revoke the conditional offer of employment, the employer, employment agency, or agent thereof may consider whether any alternate positions are vacant and available to the applicant that would alleviate the concerns identified by the Article 23-A analysis, provided that failure to consider or provide an offer to fill an alternative position shall not be considered a violation of this section.

(3) Errors, Discrepancies, and Misrepresentations

(i) If an applicant realizes that there is an error on a criminal background check, they must inform the employer, employment agency, or agent thereof of the error and request the necessary time to provide supporting documentation.

(A) If the applicant demonstrates within the reasonable time allowed by the employer pursuant to this subdivision that the information is incorrect and the applicant has no conviction history, the employer, employment agency, or agent thereof may not withdraw the conditional offer or take any adverse employment action on the basis of the applicant's criminal history.

(B) If the applicant demonstrates that the criminal history resulted in a non-conviction, the employer, employment agency, or agent thereof may not withdraw the conditional offer or take any adverse employment action on the basis of the applicant's criminal history.

(C) If the applicant demonstrates that the conviction history is different than what is reflected in the background check, the employer, employment agency, or agent thereof must conduct the Article 23-A analysis based on the correct and current conviction history and must follow the Fair Chance Process.

(ii) If a background check reveals that an applicant has intentionally failed to answer a legitimate question about their conviction history, the employer, employment agency, or agent thereof may revoke the conditional offer or take an adverse employment action.

(f) Temporary Help Firms.

(1) A temporary help firm is bound by the same pre-conditional offer requirements as other employers and must follow the Fair Chance Process if it wishes to withdraw a conditional offer based on the conviction history of an applicant. A "conditional offer" from a temporary help firm is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients.

(2) In order to evaluate job duties relevant to the conviction history under the Article 23-A analysis, a temporary help firm may only consider the minimum skill requirements and basic qualifications necessary for placement in its applicant pool.

(3) Any employer who utilizes a temporary help firm to find applicants for employment must follow the Fair Chance Process and may not make any statements or inquiries about an applicant's criminal history until after the applicant has been assigned to the employer by the temporary help firm.

(4) A temporary help firm may not aid or abet an employer's discriminatory hiring practices. A temporary help firm may not determine which candidates to refer to an employer based

on an employer's preference not to employ persons with a specific type of conviction or criminal history generally. A temporary help firm may not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

(g) Exemptions.

(1) The Fair Chance Process mandated by § 8-107(11-a) of the Human Rights Law shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment:

(i) In a position where federal, state, or local law requires criminal background checks, or bars employment based on criminal history.

(A) This exemption does not apply to an employer authorized, but not required, to check for criminal backgrounds.

(B) This exemption does not exempt an employer from the requirements of § 8-107(10) of the Human Rights Law.

(ii) In a position where federal, state, or local law bars employment of individuals based on criminal history.

(A) This exemption applies to particular positions where the federal, state or local law bars employment with respect to a particular type of conviction. In such cases, an employer or agent thereof may: (1) notify applicants of the specific mandatory bar to employment prior to a conditional offer; (2) inquire at any time during the application process whether an applicant has been convicted of the specific crime that is subject to the mandatory bar to employment; and (3) disqualify any applicant or employee with such criminal history without following the Fair Chance Process.

(B) This exemption does not apply where the employer's decision about whether to hire or promote an applicant based on their criminal history is discretionary. The fact that a position requires licensure or approval by a government agency does not by itself exempt the employer, employment agency, or agent thereof from the Fair Chance Process. When hiring for such a position, if the exemption in subdivision g(1)(i) or g(1)(ii)(A) does not apply, before making a conditional offer the employer may only ask whether the applicant has the necessary license or approval or whether they can obtain it within a reasonable period of time.

(iii) In positions regulated by self-regulatory organizations as defined in section 3(a)(26) of the Securities Exchange Act of 1934, as amended, 15 U.S.C. § 78a, where the rules or regulations promulgated by such organizations require criminal background checks or bar employment based on criminal history. This exemption includes positions for which applicants are not required to be registered with a self-regulatory organization.

when the applicant nevertheless either chooses to become registered while in the position or elects to maintain their prior registration.

(iv) In positions as police and peace officers, working for law enforcement agencies, and for other exempted city agencies, specifically:

(A) As a police officer or peace officer, as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law;

(B) At a New York City law enforcement agency, including but not limited to the City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Youth and Family Services, the Business Integrity Commission, and the District Attorneys' offices in each borough; or

(C) In a position listed in the determinations of personnel published as a Commissioner's calendar item and listed on the website of the Department of Citywide Administrative Services as exempt because the Commissioner of Citywide Administrative Services has determined that the position involves law enforcement; is susceptible to bribery, or corruption; or entails the provision of services to or the safeguarding of people who, because of age, disability, infirmity or other condition, are vulnerable to abuse.

Once the Department of Citywide Administrative Services exempts a position, an applicant may be asked about their conviction history at any time; however, applicants who are denied employment because of their conviction history must receive a written copy of the Article 23-A analysis.

(2) Standard of Proof: It shall be an affirmative defense that any action taken by an employer or agent thereof is permissible pursuant to paragraph 1 of this subdivision.

(h) Licenses, Registrations, and Permits.

(1) Licensing agencies may not deny any license, registration or permit to any applicant, or act adversely upon any holder of a license, registration or permit, based on criminal history in violation of Article 23-A of the New York Corrections Law.

(2) Prior to denying or taking any adverse action against an individual applying for a license, registration or permit based on their conviction history, the licensing agency must evaluate the candidate using the Article 23-A analysis.

(3) A finding that an applicant lacks "good moral character" cannot be based on an individual's criminal history when such an action is in violation of Article 23-A of the Correction Law.

(4) Under no circumstances may an individual applying for a license, registration or permit, be questioned about non-convictions, nor can any adverse actions or denials be made based on non-convictions.

(5) Exemption as to licenses, registrations, and permits:

(i) Paragraphs (1) through (4) of this subdivision do not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons.

(ii) Any agency authorized to issue a license, registration, or permit may consider age, disability, or criminal history as a criterion for determining eligibility or continuing fitness for a license, registration or permit, when specifically required to do so pursuant to federal, state, or local law.

(i) *Enforcement and Penalties.*

(1) There is a rebuttable presumption that an employer, employment agency, or agent thereof was motivated by an applicant's criminal history if it revokes a conditional offer of employment without following the Fair Chance Process. This presumption can be rebutted by demonstrating that the conditional offer was revoked based on: (1) the results of a medical exam in situations in which such exams are permitted by the American with Disabilities Act; (2) information the employer, employment agency, or agent thereof could not have reasonably known before the conditional offer if, based on the information, the employer, employment agency, or agent thereof would not have made the offer and the employer, employment agency, or agent thereof can show that the information is material; or (3) evidence that the employer, employment agency, or agent thereof did not have knowledge of the applicant's criminal history before revoking the conditional offer.

(2) Early Resolution for Commission-initiated complaints regarding certain *per se* violations.

(i) Early Resolution is an expedited settlement option that is available to respondents in certain circumstances that allows them to immediately admit liability and comply with a penalty in lieu of litigating the matter.

(ii) Except as provided in subparagraph (iii) below, the Law Enforcement Bureau will offer Early Resolution for Commission-initiated complaints of *per se* violations under the following circumstances: (1) the respondent has committed a *per se* violation as defined in section 2-04(a); (2) there are no other pending or current allegations against the respondent concerning violations of the Human Rights Law; (3) the respondent has 50 or fewer employees at the time of the alleged violation; and (4) the respondent has had no more than one violation of the Human Rights Law in the past three years.

(iii) Notwithstanding any other provision of this section, the Commission retains discretion to proceed with a full investigation and a referral to the Office of Administrative Trials and Hearings when the offer of Early Resolution will not serve the public interest. Factors that indicate that an Early Resolution is not in the public interest include, without limitation: (1) the respondent has had prior contact with the Commission from which an inference of willfulness regarding the violation may be inferred; (2) the respondent works with vulnerable communities; or (3) the Commission has reason to believe discrimination is rampant in respondent’s industry. For purposes of this section, a violation of any provision of the Human Rights Law that resulted in an admission pursuant to Early Resolution, conciliation or other settlement agreement, or a finding of liability issued after a hearing or trial pursuant to a complaint filed with or by the Commission shall be considered a past violation.

(iv) Early Resolution: Notice, Penalties and Procedure

(A) A respondent shall be served with a copy of the Early Resolution Notice simultaneously with service of the complaint.

(B) The Notice shall state that the respondent has 90 days to answer a complaint in which the respondent has been offered the option of Early Resolution, and that there will be no extensions of time granted.

(C) The Notice shall inform the respondent of their right to either: (1) admit liability and agree to the affirmative relief and penalty, or (2) file an answer to the complaint in compliance with section 1-14 of this title, except that the time to respond shall be 90 days instead of 30.

(D) An Early Resolution penalty shall include: (1) a mandatory and free training provided by the Commission; (2) a requirement that the respondent post a notice of rights under the Human Rights Law; and (3) a monetary fine as determined by the penalty schedule outlined in paragraph (E) of this subdivision. The Notice shall inform the respondent that a private individual aggrieved by the same violation may also file an independent complaint with the Commission or may bring a court action.

(E) Fines will be assessed according to the following penalty schedule:

<u>Employer Size (at the time of the violation)</u>	<u>1st Violation</u>	<u>2nd Violation (within 3 years of the resolution date of the first violation)</u>
<u>4-9 employees</u>	<u>\$500.00</u>	<u>\$1000.00</u>
<u>10-20 employees</u>	<u>\$1000.00</u>	<u>\$5000.00</u>
<u>21-50 employees</u>	<u>\$3500.00</u>	<u>\$10,000.00</u>

** Distinct and contemporaneous violations will be counted separately for the purpose of calculating a monetary penalty. For example, an employer who has between four and nine employees and is using a discriminatory advertisement in violation of section 2-04(a)(1) and an application that references criminal history in violation of section 2-04(a)(2) will be charged with two separate violations of \$500.00 each. However, multiple violations of one section, for example, posting a discriminatory advertisement on three different websites, will be counted as one violation for the purpose of assessing a penalty under this section.

(F) If the employer believes that the employer size used to assess the imposed penalty is incorrect, the employer may call the number listed on the Early Resolution Notice.

(v) Admission of liability. An admission of liability must be returned to the Commission in the manner prescribed in the Early Resolution Notice. Once the admission is received, the Law Enforcement Bureau shall promptly forward such agreement to the Chair. The signature of the Chair with the notation "SO ORDERED" shall be construed to be a final order of the Commission. A copy of such order shall be served upon the respondent.

(vi) Contesting Liability and Filing an Answer

(A) Notwithstanding any provision of sections 1-61 or 1-62 of this title, if a respondent elects to deny liability and contest the allegations in the complaint, the respondent shall file an answer and upon receipt of the answer, the Law Enforcement Bureau shall refer the case to the Office of Administrative Trials and Hearings for a hearing pursuant to section 1-71 of this title.

(B) For purposes of a hearing, the case will proceed in accordance with subchapter C of Chapter 2 of Title 48 of the Rules of the City of New York.

(vii) Failure to Respond

(A) If a respondent fails to respond within 90 days to a complaint accompanied by an Early Resolution Notice, all allegations in the complaint will be deemed admitted unless good cause to the contrary is shown pursuant to section 8-111(c) of the Human Rights Law.

(B) Upon default, the Law Enforcement Bureau may refer the case to the Office of Administrative Trials and Hearings pursuant to § 1-71 of this title and, in a written motion pursuant to chapter 1 of Title 48 of the Rules of the City of New York, seek an expedited trial and issuance of a report and recommendation that finds respondent in default and recommend the affirmative relief and penalties requested by the Law Enforcement Bureau. The motion papers will include: all supporting evidence; a copy of the complaint and any additional documentation

sent to the respondent; the Early Resolution Notice; and proof of service of the motion.

(viii) Relief from Default in an Early Resolution Case. At any time prior to the issuance of a decision and order, the respondent may move for relief from default.

(j) Criminal Record Discrimination in Obtaining Credit. No person may ask about or take any adverse action based on the non-conviction history of an individual in connection with an application or evaluation for credit.

(k) Employers Seeking the Work Opportunity Tax Credit (“WOTC”). Employers who wish to claim the WOTC credit are not exempt from this chapter or the Fair Chance Act. Employers may, however, require an applicant to complete IRS form 8850 and US Department of Labor Form 9061 before a conditional offer is made so long as the information gathered is used solely for the purpose of applying for the WOTC.