Comments to Proposed Rules on the Fair Chance Act

On February 17, 2016, the New York City Commission on Human Rights ("CCHR") published its proposed rules on the Fair Chance Act, which amended the New York City Human Rights Law regarding unlawful discrimination on the basis of criminal history against job applicants and employees and applicants for licenses, registrations, and permits. The proposed rules were published in the City Record, and copies of the proposed rules were available on the New York City Rules website and CCHR's website.

On March 21, 2016, CCHR held a public hearing so that members of the public could comment on all aspects of the proposed rules. At the hearing, eight members of the public testified, including advocates, members of the private bar, and representatives of employers. Comments were also submitted in writing at the hearing and via email. No comments were received via fax or at the mailing address provided in the notice of comment.

The following individuals submitted written testimony, via email or in person at the public hearing:

Jonathan A. Wexler, Vedder Price

Community Service Society of New York

Greenberg Traurig on behalf of ELRAC LLC ("Enterprise")

32BJ SEIU

Congressmen Charles B. Rangel and Joseph Crowley

Coalition of Reentry Advocates

Legal Aid Society

Lawrence D. Bernfeld

Legal Action Center

Morgan, Lewis & Bockius LLP

National Association of Professional Background Screeners

National Employment Law Project

National Employment Opportunity Network

New York City Bar Association, Civil Rights Committee

New York City Department of Small Business Services and the Mayor's Office of Workforce Development

New York Staffing Association

Proskauer Rose LLP

The following individuals testified at the public hearing held on March 21, 2016:

Melissa Ader, Legal Aid Society

Nicole Salk, Brooklyn Legal Services

William Mack, Greenberg Traurig

Sebastian Solomon, Coalition of Reentry Advocates

Emily Hoffman, Community Service Society

Kate Wagner-Goldstein, Legal Action Center

Keren Farkas, Brooklyn Defender Services

Lawrence Bernfeld

Elfant, Lauren (CCHR)

From: Wexler, Jonathan A. [redacted]
Sent: Tuesday, March 01, 2016 4:33 PM
To: Policy (CCHR)
Subject: Fair Chance Act Proposed Rule

Follow Up Flag: Follow up
Flag Status: Completed

The Proposed Rule prohibits an employer's use of an employment application which authorizes a criminal background check prior to the making of a conditional offer of employment.

Does the Proposed Rule also purport to prohibit employers, prior to making a conditional offer of employment, from asking applicants to complete forms pursuant to the federal Fair Credit Reporting Act (FCRA) which forms authorize the employer to obtain a background check, including a criminal background check? If so, would it be permissible to use FCRA forms which authorize background checks other than criminal background checks, such as education, licensure, employment experience, etc. That would require two versions of the FCRA forms if the employer later wants to obtain a criminal background check.

Query why employers cannot request authorization for background checks prior to making a conditional offer of employment if the employers comply with the Fair Chance Act and do not seek or obtain criminal background checks prior to making a conditional offer of employment.

Also, it is odd that employers may not under the Proposed Rule advise applicants, prior to making a conditional offer of employment, that an offer of employment is contingent on the successful completion of a criminal background check. Presumably, the purpose of that is to avoid dissuading applicants with criminal backgrounds from applying.

The Fair Chance Act Process is unduly burdensome and complicated.

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March 21, 2016

Submitted via E-mail
Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights
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Re: New York City Fair Chance Act Proposed Rules: Comments from the Community Service Society of New York

Dear Ms. Sussman:

The Community Service Society of New York ("CSS") has served as an unwavering voice for positive action on behalf of more than three million New Yorkers. CSS draws on a 170-year history of excellence in addressing the root causes of economic disparity through research, advocacy, litigation and innovative program models that strengthen and benefit all of the city's residents. Because hundreds of thousands of New Yorkers with conviction histories continue to face legal, practical and discriminatory attitudinal barriers that keep well-paid, steady employment out of reach, CSS tackles re-entry and discrimination issues from multiple angles, including litigation, advocacy, and direct service. Our work has led to significant accomplishments, and has changed the lives of individuals and families who are impacted by mass incarceration.

CSS commends the City Council and the Manhattan Borough President for passing the Fair Chance Act ("FCA"), among the toughest "ban the box" laws in the nation, and are honored to have participated in the legislative process from inception to enactment. The FCA goes beyond simply "banning the box" to ensure that job applicants and current employees who have had contact with the criminal justice system are allowed to compete on their merits, rather than being judged and rejected solely because of past mistakes. Through the FCA, New York City can and will be a place where a criminal record does not bar an individual from becoming a productive member of society.

CSS offers the following specific comments regarding the New York City FCA Proposed Rules:

Section 2-01 Definitions

- The definition of "**applicant**" should reflect that current employees may be considered for job changes that are not necessarily "positive," such as transfers or lateral position changes. It is just as important to avoid discrimination in these employment decisions. We therefore recommend that the word "positive" be deleted from the definition.

- Similarly, the definition of the term "**conditional offer of employment**" should recognize that an employment offer may not necessarily reflect a positive change, so we recommend omitting the word "positively."

- "**Conviction history**" should include unsealed violation convictions (or their analogues) in other states, just as it currently includes unsealed violation convictions in New York. Applicants with out-of-state unsealed violations should receive the same legal protections as applicants with unsealed violations from New York State.

- The definitions of **"criminal background check"** and **"inquiry"** in the proposed rules are very similar: each encompasses both an employer asking an applicant about their criminal history and an employer performing an independent search for the applicant's criminal history. We suggest that, for the sake of clarity, the Commission explain the distinction between these two terms, or if there is none, using only one of these terms in the final rules. Additionally, part 2 of the definition of **"criminal background check"** in the proposed rules defines such a background check as including a search of "public records." However, Section 2(a)(iv), which details the Criminal Background Check Process, prohibits investigations into an applicant's criminal history "using public records or the Internet." In order to clarify that employers cannot do Internet searches related to applicants' criminal histories before making a conditional job offer, we suggest that the rules be amended to add "the Internet" to the sources of criminal history information listed in the definition of "Criminal Background Check."

- The definition of the term **"criminal history"** should refer to "convictions" rather than "criminal convictions," so as to make clear that individuals with unsealed violation convictions have the same legal protections as individuals with misdemeanor or felony convictions.

- While the definition of "**employer**" is clear, the final rules should change every mention of that word to "**employer, employment agency, or agent thereof**," as the text of the FCA explicitly states that all three of these entities are covered by the law. They should also state that the owner of a company constitutes one of the four employees required to place the employer under the FCA's purview. Finally, the rules should indicate that only *one* of a company's four employees must be located in New York City to trigger application of the FCA. These revisions would ensure that employers and applicants are on notice as to whether a given position is covered by the FCA.

- The definition of **"licensing agency"** should be modified so that it aligns with the definition of "license" given in Correction Law Article 23-A: "any agency or employee thereof that is authorized to issue any certificate, license, permit or any other grant of permission included in Article 23-A of the New York State Correction Law.

- The list of "**non-conviction**" outcomes should include juvenile delinquency findings and pardons. Although juvenile delinquency cases are processed by Family Court and by definition are not convictions, they should be included on this list to ensure people are aware that they are not convictions. The Commission should also clarify that cases in which pardons were granted are considered "non-convictions."

Clarify statement of *per se* FCA violations to specify that applications are only prohibited from asking about an applicant's conviction history if the applicant is required to complete the application before the employer has extended a conditional offer to the applicant:

Section 2-04(1)(b) of the proposed rules identifies the following as a *per se* violation of the FCA: "Using applications for employment that require applicants to either grant employers permission to run a background check, or to provide information regarding criminal history." In the interest of clarity and consistency, we recommend that this restriction be amended to clarify that an application for employment is only prohibited from asking about an applicant's conviction history if the applicant is required to complete the application *before* receiving a conditional offer from the employer. This will ensure that both applicants and employers have an accurate understanding of the scope of the FCA.

Amend Section 2-04(3) to protect applicants against employer reliance on inadvertently-discovered information regarding their conviction history while allowing applicants to voluntarily initiate discussions regarding their conviction history:

The proposed rules address the issue of inadvertent discoveries and unsolicited disclosures of information regarding an applicant's conviction history prior to conditional offer by specifying that these occurrences do not open the door for the employer to "further explore an applicant's criminal history before having made a conditional offer." The proposed rules do not, however, clarify whether an employer is permitted to consider information regarding an applicant's conviction history obtained through an inadvertent discovery or an unsolicited disclosure when deciding whether to extend a conditional offer to an applicant. We recommend that the proposed rules be amended both to address this issue and to ensure that an applicant may voluntarily initiate a discussion regarding their conviction history whenever the applicant thinks such a discussion would be appropriate or useful. CSS therefore recommends:

- The final rules should explicitly instruct employers not to consider an applicant's conviction history when they inadvertently discover it prior to making a conditional offer: We strongly support the FCA's general requirement that conviction history be considered

only after a conditional offer. Therefore, when an employer inadvertently learns of an applicant's conviction history before making a conditional offer, the rules should explicitly instruct employers not to consider that information when deciding whether to extend a conditional offer to an applicant. To clarify this principle, we suggest removing the phrase "unsolicited disclosure" from Section 2-04(3), so that this section only applies to information derived from sources other than the applicant. While this section rightfully protects employers from liability for inadvertent discoveries, it should also hold them accountable for relying on the information gleaned from such discoveries.

- If, however, an applicant chooses to initiate conversation about his or her record, employers should not be liable for engaging in the conversation and should be allowed to consider that information:
  If an applicant voluntarily initiates discussion of conviction history, the prospective employer should inform the applicant that they are not required to talk about their conviction history until they receive a conditional offer. The applicant may then opt to discontinue the conversation at which point the employer must reserve consideration of conviction history until the appropriate point in the Fair Chance Process, i.e. after the conditional offer.

  However, applicants should be permitted to discuss their conviction history when they determine it will be useful. Some individuals' conviction histories are obvious from their resumes, or from the organizations that refer them to the job, so that employers will frequently "inadvertently discover" that they have conviction histories, albeit not the details of those histories. It would not be fair to those applicants to entirely prevent them from engaging in any kind of constructive contextualizing of their record because an employer would be liable for allowing them to discuss it. Additionally, some applicants may have gained skills, training or certification while incarcerated or as part of their sentence and may have difficulty addressing them without engaging in discussion of their conviction history or contacts with the criminal justice system. Ultimately, we think it is important to allow individuals to discuss their records when they so choose.

  That said, employers still must not in any way initiate conversation about conviction history prior to a conditional offer, including by asking applicants if they wish to discuss their conviction history. The law clearly requires that employers make no inquiry whatsoever about conviction history prior to the conditional offer. Employers also certainly must not hold it against an applicant that he or she did not initiate conversation about their conviction history. Generally, conversations about conviction history should not occur before a conditional offer, and applicants, employees and employers should receive training to that effect. But individual applicants should be permitted to initiate discussion of their record on their own terms prior to a conditional offer.

Clarify language in the proposed rules to normalize the hiring of applicants who have conviction histories:

The proposed rules contain language confirming that an employer has the option to hire an applicant after legally obtaining information about an applicant's conviction history. The relevant language, however, is tentative and could confuse employers. In particular, Section 2-04(4)(d) of the proposed rules states that "[u]pon receipt of an applicant's conviction history or information regarding a pending criminal case, an employer *may* elect to hire the individual" (emphasis added). We recommend that Section 2-04(4)(d) of the final rules include language that normalizes the hiring of applicants with a history of criminal conviction. Specifically, we recommend that Section 2-04(4)(d) of the rules be amended to state: "If an employer decides to hire an applicant after receiving information regarding the applicant's conviction history or a pending case, no additional actions are required to comply with the Fair Chance Act." By clarifying that the FCA does not place any burdens on employers who choose to hire applicants who have a conviction history, this amendment would support the statute's goal of encouraging the hiring of qualified individuals with conviction histories.

Clarify the language of Section 2-04(5) regarding the withdrawal of a conditional offer of employment or taking an adverse employment action to ensure that the final rules conform with the requirements of Article 23-A:

Although the FCA is meant to make Article 23-A a more effective tool in combatting unlawful employment discrimination against individuals with criminal records, some of the language in the proposed rules actually has the potential to undermine Article 23-A. Because of the way Section 2-04(5) has been drafted, an employer could legally deny a position to an applicant based on the applicant's criminal conviction history without ever incorporating evidence of rehabilitation into its analysis of that history. Such an outcome was surely not intended by the New York City Commission on Human Rights when drafting these proposed rules. CSS therefore recommends:

- The final rules should clarify that employers must affirmatively ask for any additional information needed to conduct a legally-sufficient Article 23-A analysis as the first step in the Fair Chance Process: An analysis conducted without adequate information about all of the required factors – such as evidence of rehabilitation or a Certificate of Relief from Disabilities or Good Conduct – will neither be complete nor pass legal muster.

- The rules and the Fair Chance Act Notice should avoid using the terms "determination" or "decision" to describe a preliminary stage that is not a final determination: We recommend that the sentence in the top gray box of the Fair Chance Act Notice that concludes, "before making our determination," simply omit that phrase to avoid suggesting there has been a final decision. Doing so would be consistent with the language above that describes the employer has "hav[ing] reservations." We suggest that in Section 2-04(5)(b)(ii)(2) the word "determination" be replaced by "assessment" and the word "decision" be replaced by "notice."

- The rules should not hold applicants or employees solely responsible for demonstrating to employers that background checks contain errors, discrepancies or misrepresentations: An applicant is often not in a position to know how to "demonstrate" a background check error to an employer's satisfaction. Furthermore, if an employer conducts a background check through a third party (generally, a consumer reporting agency), an applicant has no control or authority over the third party reporting the erroneous information. To the extent an employer uses a third party to run a background check on an applicant, it should not be able to withdraw an offer as long as the applicant has lodged a dispute with that third party. We therefore request that the Commission modify this rule accordingly.

  About ninety-two percent of employers conduct criminal background checks for some potential applicants, and about seventy-three percent of employers do so for all potential applicants.[1] Many employers engage consumer reporting agencies to obtain background checks on applicants. Consumer reporting agencies and employers who engage them are regulated by the federal Fair Credit Reporting Act, and, in this state, by New York's Fair Credit Reporting Act. If an employer obtains a background report through a consumer reporting agency, then the consumer reporting agency bears responsibility for investigating the error if the applicant reports it.[2] Under federal law, the consumer reporting agency has a 30 day period to investigate the error.[3] The consumer reporting agency is also required to notify the requester (e.g., the employer) that a dispute has been lodged.[4] This subsection should explicitly acknowledge that consumer reporting agencies are responsible for investigating errors when a dispute is lodged, and that applicants cannot and should not bear the responsibility of fixing errors on such reports.

Clarify the manner in which applicants or employees may relay evidence of rehabilitation to an employer:

Section 2-04(5)(a)(i)(7) of the proposed rules requires employers to take any evidence of rehabilitation provided by or on behalf of the applicant or employee into account in its Article 23-A analysis. Because of the limited time that applicants have to gather this information, and the limited resources available to most individuals with criminal records, we urge the Commission to clarify that the evidence of rehabilitation submitted by or on behalf of the applicant or employee may be submitted either verbally *or* in writing.

Clarify what information an employer is required to relay to an applicant when the employer decides to withdraw a conditional offer of employment based on the applicant's conviction history and/or pending case(s), and how this information should be relayed:

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[1] Soc. for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), *available at https://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx*

[2] 15 U.S.C. 1681i; N.Y. Gen. Bus. Law § 380-f.

[3] 15 U.S.C. § 1681i(a)(A); *see also* N.Y. Gen. Bus. Law § 380-f(a).

[4] 15 U.S.C. § 1681i(a)(2).

Section 2-04(5)(b)(iv)(2) of the proposed rules addresses situations where an employer has decided to withdraw a conditional offer of employment based on its Article 23-A analysis of the applicant's conviction history and/or pending case(s) after reviewing any additional information submitted by the applicant. In particular, the proposed rules state that "[i]f the employer reviews the additional information and makes a determination not to hire the individual or take an adverse employment action, the employer must relay that decision to the applicant or employee." The proposed rules do not, however, specify what information an employer must relay to an applicant to satisfy this requirement, nor how this information should be relayed.

We recommend that the final rules clarify this issue by specifying that employers must provide applicants with a written explanation of the reasons behind the employer's decision not to hire the applicant. Such a rule will help prevent confusion for individuals concerning reasons they were not hired.

Amend the proposed rules to specify that an updated Fair Chance Act Notice is required after errors, discrepancies and/or misrepresentations have been clarified:

Section 2-04(5)(c)(i)(3) of the proposed rules specifies that "[i]f the applicant or employee can demonstrate that the conviction history or pending criminal case is different than what is reflected in the background check, the employer must conduct the Article 23-A analysis based on the correct and current conviction history or pending case information to ensure its decision is not tainted by the previous error." We recommend that the final rules specify what information employers are required to provide to applicants in situations where the employer has been notified that its post-conditional offer criminal background check contains errors, discrepancies or misrepresentations *and the employer, after performing a second Article 23-A analysis based on accurate information, has decided to stand by its assessment that the applicant falls into one of the two Article 23-A exceptions*.

We further recommend that the final rules specify that in the circumstances described above, the employer is required to provide the applicant with an updated Fair Chance Act Notice explaining the employer's reasons for its assessment that takes the new, accurate information into account. This would ensure that applicants are not penalized for an employer's inaccurate background check, and are given a full and fair Article 23-A analysis.

Change "criminal history" to "conviction history and pending cases" in Sections 2-04(5)(c)(i)(1) and 2-04(6)(d) to ensure that applicants and employees are granted the full protections of the FCA:
There are two places in the proposed rules where the term "criminal history" is used when the phrase "conviction history and pending cases" would be a more accurate choice of words.

Section 2-04(5)(c)(i)(1) of the proposed rules states that an employer may not withdraw a conditional offer or take adverse employment action on the basis of a criminal background check "if the applicant or employee can demonstrate that the information is incorrect and the applicant

or employee has no criminal history." In this instance, however, "criminal history" is too broad a category because — as defined in the proposed rules — it includes convictions, pending cases and *non-convictions*. An applicant should never be required to prove that they do not have any non-convictions. The statement of basis and purpose of the proposed rule plainly states that "employers may not request information or inquire about the non-convictions of applicants or employees and may not deny or take any adverse actions against applicants or employees based on non-convictions." In order to avoid creating a loophole that would allow employers to see applicants' and employees' non-convictions after the applicant or employee contests the content of the criminal background check, we suggest changing "criminal history" to "conviction history and pending cases" in Section 2-04(5)(c)(i)(1). This change would ensure that an applicant or employee will be able to prove to an employer that they have no unsealed convictions or pending cases without being required to reveal their non-convictions to the employer.

Similarly, in Section 2-04(6)(d), the proposed rules state that 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." In fact, as explained above, a temporary help firm may not provide the applicant's *criminal convictions and pending cases* to prospective employers until after the employer has made a conditional offer to the applicant; a temporary firm may *never* provide an applicant's non-convictions to an employer. Therefore, we suggest changing "criminal history" to "conviction history and pending cases" in Section 2-04(6)(d).

Amend Section 2-04(7) to clarify the narrow scope of certain exemptions from the FCA:

The FCA states that the section of the Act titled "arrest and conviction records; employer inquiries" "shall not apply to any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." (New York City Human Rights Law §8-107(11-a)(e)). The plain language of the statute makes clear that only actions taken pursuant to other state, federal or local laws are exempt, not the entire process relating to such a position.

The Commission must clarify that the FCA still applies to positions for which criminal background checks are mandated by law, with only such exceptions as are necessary to ensure compliance with the applicable law(s). The exception does not exempt the position from FCA coverage entirely. In such a case, the employer may advise that a background check is necessary for the position and that persons with certain convictions are ineligible for the position, and shall be permitted to ask if the applicant has a disqualifying conviction. But, if the applicant has a conviction that does not legally disqualify him or her from the position, the employer may not take adverse employment action based on such conviction without conducting the Fair Chance Process described in 8-107(11-a) (b)(i-iii) of the FCA. For example, where a nursing home worker who was mandated to be fingerprinted when hired is thereafter arrested while employed, the Fair Chance Act Processes should apply to the new arrest.

Clarify how the FCA will be enforced against public employers:

While we understand that investigating and prosecuting FCA violations committed by public employers are outside the Commission's jurisdiction, we ask that the final rules explain how the Commission will hold these employers accountable. The only vehicle currently available to an applicant or employee contesting a public employer's hiring or firing decision is an Article 78 petition. In these cases, a legal victory can often have little practical effect for an applicant because — even if a judge concludes that a hiring or firing decision violated the New York City Human Rights Law or was "arbitrary and capricious" — judges almost uniformly see their power as limited to ordering the employer to reconsider its hiring or firing decision. Additionally, the position in question is often long gone by the time the judge issues an opinion. Moreover, many individuals with criminal records do not have the resources (legal, financial, time) to bring these kinds of cases in the first place.

We recommend that the Commission create a mechanism for individuals to report potential FCA violations by public employers to the Commission, while nonetheless advising them that the Commission will not be permitted to prosecute the violations. This would allow the Commission to reach out to public employers when necessary to ensure that they are aware of the FCA and are complying with the statute.

Conclusion

Thank you for the Commission's leadership, vision and commitment to ensuring that New Yorkers with conviction histories are provided with a full and fair opportunity to get and keep jobs, provide for themselves and their families, and more fully engage with their communities. CSS joins with you to vigilantly enforce the FCA and the principles of equal treatment and second chances underlying it.

Yours very truly,

The Community Service Society of New York
Dep't of Legal Counsel
Judith M. Whiting, General Counsel
Estee Konor, Senior Staff Attorney
Emily Hoffman, Legal Fellow

GT GreenbergTraurig

TESTIMONY ON BEHALF OF ENTERPRISE

NEW YORK CITY COMMISSION ON HUMAN RIGHTS

HEARING ON FAIR CHANCE ACT RULES

MARCH 21, 2016

Greenberg Traurig represents ELRAC LLC. ("Enterprise"), a wholly owned subsidiary of Enterprise Holdings. Inc. ("EHI"). We write in response to the Notice of Public Hearing and Opportunity to Comment on Proposed Rules (the "Proposed Rules") published by the New York City Commission on Human Rights ("the Commission") which proposes to amend its rules to establish certain definitions and criteria around procedure and application of the Human Rights Law provisions regarding unlawful discrimination on the basis of criminal history against job applicants and employees, and applicants for licenses, registrations and permits, enacted by Local Law No. 63 of 2015, the Fair Chance Act ("the FCA"). These proposed rules will amend title 47 of the Rules of the City of New York.

EHI is the largest rental car company operating in North America. Through its brands Enterprise Rent-A-Car®, National Car Rental and Alamo Rental Car, EHI engages in renting vehicles through more than 7,200 locations worldwide. Locally, within New York City ("NYC"), Enterprise has 42 locations and over 11,000 rental vehicles. Enterprise employs more than 800 employees working in NYC and approximately 90% of those employees are in positions that require driving as part of their job description. In any given month, Enterprise averages approximately 3,500 to 4,000 vehicle moves where rental cars are repositioned from one location to another throughout all 5 boroughs of NYC. Additionally, Enterprise operates shuttle buses at both John F Kennedy and LaGuardia airport where customers are picked up from and returned to the airport. These shuttle bus routes run every 5 -10 minutes, all day, and all night picking up over 350 customers daily. In keeping with Enterprise's "We'll Pick You Up" service model, Enterprise employees also pickup customers from their homes, auto body repair shops and dealerships and bring them to and from our rental locations.

Enterprise's founder, Jack Taylor developed a simple but enduring business philosophy that still guides Enterprise's efforts: take care of your customers and your employees first, and the profits will follow. This guiding principle is the reason the Enterprise brand has become known for "Superior Customer Service" as evidenced by winning the JD Power award for Rental Car Customer Satisfaction for ten out of the past twelve years; including 2015 and 2014. This

commitment to service applies not to only Enterprise's customers, but also to Enterprise's current and prospective employees. That is why we are submitting this testimony. We believe that the issues presented by the Proposed Rules are vitally important to the operation of our company and those that apply for employment with Enterprise.

Enterprise seeks to hire safe drivers for the protection of its customers and employees. Thus, Enterprise and other transportation companies, such as delivery companies, find themselves in a dilemma: an applicant's ability to safely operate a vehicle is essential to employment, yet the Proposed Rules prohibit employers from making an inquiry as to the driving record of an applicant until they have made a contingent offer of employment because such inquiry could inadvertently result in the discovery of a criminal conviction (certain driving infractions are considered criminal). While Enterprise supports the intent of the Proposed Rules, we urge the Administration to amend the Proposed Rules to establish certain definitions and criteria relating to motor vehicle operators.

Enterprise is not seeking to run criminal background checks on applicants prior to making a conditional offer. The exception Enterprise seeks is far narrower—where operation of a motor vehicle is an essential function of a position—Enterprise believes that an employer should be able to make an inquiry, prior to a conditional offer, concerning any or all of the following:

(1) The validity of or any restrictions imposed upon an applicant or employee's driver's license;
(2) The number of moving violations by an applicant or employee in the past three years;
(3) The number of motor vehicle accidents in which the applicant or employee has been found at fault in the past three years;
(4) Whether the applicant or employee's drivers' license has been revoked, denied, suspended or cancelled in the past five years; and
(5) Whether an applicant or employee has been convicted of or pled guilty to any alcohol or drug related driving offense in the past five years.

Further, upon the making of an such an inquiry, Enterprise believes that the employer should be able to disqualify and reject any applicant from consideration for the position if the employer determines that the inquiry responses evidence the applicant's inability to safely operate a motor vehicle. Driving violations, unlike other convictions, tend to be very specific and are directly relevant to whether or not the applicant is qualified for the job. From the job applicant's perspective, the current guidelines would string candidates along in the interview process only to find out in the end that based on their unsafe driving record that they did not qualify for a driving position. The above change is in the best interest of both Enterprise and the applicant; neither of which, should be required to continue the interview process if an applicant's driving record does not indicate that he or she would be a good choice for a driving position due to safety concerns.

In sum, because the operation of a motor vehicle is an essential function of most positions with Enterprise, Enterprise must be able to make an inquiry about an applicant's driving record prior to making a conditional offer, preferably at the time of first contact with the applicant.

I, on behalf of Enterprise, would like to reiterate my gratitude for the opportunity to present this testimony. We look forward to the opportunity to continue working with the Commission on this matter. We welcome the opportunity to discuss these matters further and we are willing to meet with you or members of your staff. In the meantime, please feel free to contact me if you have any questions. You may also contact my colleague, John Mascialino at 212 801 9355.

Respectfully,

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Written comments of 32BJ SEIU
21 March 2016

RE: Proposed Rules to Amend Title 47 of the Rules of the City of New York, Related to the Fair Chance Act

Attn: Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights

Via e-mail: policy@cchr.nyc.gov

Thank you for the opportunity to submit comments regarding the Commission's proposed rules to implement the Fair Chance Act.

32BJ SEIU is a Union of over 145,000 women and men working in the property services industry on the East Coast, including 70,000 members here in New York City and Long Island. Our membership represents the diversity of New York City – hailing from 64 different countries and speaking 28 different languages.

32BJ strongly supports a successful implementation of the Fair Chance Act. Our members' communities are amongst those disproportionately exposed to the criminal justice system. We know firsthand what it's like to have a family or neighbor who is boxed out of the labor market for a minor offense or a crime they committed years ago.

We wish to highlight a number of aspects of the proposed bill that we believe will be particularly effective:

- Restricting inquiries into criminal history until a "conditional offer" of employment is made;
- The clear stipulation of what factors an employer may consider when evaluating a job applicant's criminal record, and how they must communicate an adverse employment action to an applicant;
- The presence of a tiered penalty structure that takes into account employer size and past violations of the law; and
- The clarification that only federal, state and local laws that *require*, rather than simply *authorize*, background checks are exempted.

Further to these elements, 32BJ suggest the following provisions be considered for incorporation into the final rules wherever possible:

- Greater incentives for complainants, such as directing some portions of the penalty funds or damages to complainants to encourage jobseekers to come forward;

- The adoption of remedies that specifically apply to employers with City contracts, up to and including the recession of the contract;

- Clarify that the law applies to independent contractors as well as employees;

- The complaint process should be accessible and transparent, and ensure anonymity and protection from retaliation. The proposed rules should clarify the complaint process from the point of view of a jobseeker who wishes to report violations of the Fair Chance Act. Specifically, the rules should outline the protections that jobseekers can expect if they decide to come forward, to protect their anonymity and to ensure that they do not experience retaliation for coming forward;

- Require that employers retain all documentation and forms related to their consideration of applicants with criminal records for a specified period of time; and

- The Commission should produce an annual compliance report, available to the public, to allow policymakers, advocates and jobseekers to assess how the law is working and what adjustments may be helpful to strengthen effectiveness.

On behalf of our members, we applaud the Council for passing this bill. We are confident that by giving those with a criminal record a fair chance at a job in our City we can improve employment and recidivist rates for this at risk group, and in doing so, substantially improve the quality of life for all New Yorkers.

CHARLES B. RANGEL
13TH CONGRESSIONAL DISTRICT
NEW YORK

COMMITTEE
WAYS AND MEANS
JOINT COMMITTEE
ON TAXATION

GEORGE H. HENRY
CHIEF OF STAFF

Congress of the United States
House of Representatives

March 21, 2016

Carmelyn P. Malalis
Chairperson
New York Commission on Human Rights
P.O. Box 2023
New York, NY 10272

Dear Chairperson Malalis,

As the original author and a major supporter of the Work Opportunity Tax Credit (WOTC), we wanted to share our concerns with the proposed rules for New York City's Fair Chance Act. We are pleased and proud that New York City has taken a lead in trying to help ensure that ex-offenders have a fair shot at getting a job. The federal WOTC was also enacted as a way to improve the likelihood that ex-offenders have a real chance of getting a job. WOTC does that by providing a tax incentive to participating employers who hire individuals from several targeted categories, ex-offenders among them. Unfortunately, the proposed rules as drafted would preclude New York City employers from using WOTC to hire not only ex-offenders, but also anyone else who is eligible. This would hurt not only ex-offenders, but also thousands of other structurally unemployed stigmatized individuals who face significant challenges in finding work.

The concern here is that the federal WOTC program requires the employer have an applicant complete an IRS 8850 pre-screening form prior to offering them a job in order to ensure that the employer knows that the applicant is likely to be eligible for WOTC before they offer them a job. This pre-screening allows WOTC to act as an incentive to hire these individuals. If the pre-screening form were filled out after the job offer, however, WOTC would not be a hiring incentive, but rather a windfall for to an employer who happened to hire an eligible individual.

The ex-felon category is grouped together as part of seven categories on the 8850, and as a result, applicants checking that box on the Form could be members of any of seven targeted groups. If Form 8850 were the only form that related to employers seeking to claim WOTC, the Proposed Rules would not be a problem, as the employer does not know specifically whether the applicant is in the ex-felon category.

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Unfortunately, job applicants must also supply the information needed to complete a US Department of Labor Form 9061, the Individual Characteristics Form (ICF) for the state workforce agency to issue a certification that the applicant qualifies for WOTC. The vast majority of employers use an electronic job application and have the applicant fill out both forms which are then reviewed by a third party who indicates electronically that the applicant is WOTC eligible, but not what category they are eligible in. This is because the applicant could be eligible in a number of categories, and the employer will not know what category they qualify in until the state workforce agency issues a certification. However, the ICF asks questions to help the state workforce agency to determine which category/categories an applicant may qualify for under WOTC, and this is what brings the WOTC screening process in conflict with the proposed rules.

Because of concerns that WOTC might be in conflict with Federal Equal Employment Opportunity Commission (EEOC), the EEOC has on numerous occasions confirmed in written guidance that completing the both the 8850 and the ICF does not violate federal anti-discrimination laws and rules based upon the way the information is solicited on the 8850 and the ICF. This is because the EEOC has determined that WOTC is designed to encourage participating employers to hire those targeted. In fact, the EEOC and the U.S. Department of Labor have indicated that the Federal Law Defense permits employers to ask pre-employment questions where the question is needed to meet the requirements of another Federal law or regulation, which it is for WOTC.

We would point out that both Massachusetts and Illinois have adopted similar "ban the box" laws designed to protect ex-felons from not being considered for a job. Both Massachusetts and Illinois have indicated that they understand that WOTC is designed to increase – not decrease – job opportunities for ex-offenders and have indicated that filing out the IRS and DOL forms is permitted, but have reserved the right to pursue an employer under their "ban the box" laws if a pattern of discrimination can be shown.

The New York State Department of Labor has indicated that WOTC helps thousands of dependent New Yorkers find a job each year. We are concerned that unless the Human Rights Commission changes its proposed rules, not only will ex-offenders no longer benefit from the WOTC hiring incentive, but also those on TANF and SNAP, the disabled, veterans, and other disadvantaged groups will no longer be able to benefit from the WOTC hiring incentive. According to the most recent New York State certification numbers, 66,000 New York State residents, most of who reside in New York City, will not be able to benefit from WOTC. Accordingly, we urge the Commission to reconsider its proposed rules for the Fair Chance Act and support the use of WOTC by New York City employers by adopting a resolution that reflects what was done in Massachusetts and Illinois.

Sincerely,

CHARLES B. RANGEL

JOSEPH CROWLEY

COALITION OF REENTRY ADVOCATES

SUBMITTED VIA EMAIL

March 21, 2016

New York City Commission on Human Rights
P.O. Box 2023
New York, NY 10272
policy@cchr.nyc.gov

RE: New York City Fair Chance Act Proposed Rules

Dear Ms. Sussman:

The Coalition of Reentry Advocates[1] (CoRA) is a New York State coalition of advocates who work to change laws and policies to ensure that people who have had contact with the criminal justice system have a fair chance to succeed as full community members. Founded in 2005, CoRA has primarily focused on legislative and administrative reform that would remove barriers to employment for individuals with conviction histories. In submitting these comments, CoRA has been joined by a number of legal assistance, addiction treatment, mental health, and community organizing groups that are committed to ensuring correct and full implementation of the Fair Chance Act.

CoRA and its allies applaud the efforts of the New York City Commission on Human Rights to provide meaningful employment opportunities to New Yorkers with criminal records through its rigorous implementation and enforcement of the Fair Chance Act. The Act helps all New Yorkers – employers, employees, and customers – by giving applicants and current employees the chance to be considered on their full professional record rather than risk rejection before their professional qualifications are even considered.

Comments in Response to the Proposed Rules:
Overall, the Commission provides a clear description of the steps employers must take to ensure that they are giving every person a full and fair chance at employment. The following suggestions are aimed at making the Proposed Rule even clearer:

[1] CoRA members include The Bronx Defenders, Center for Community Alternatives, College and Community Fellowship, Community Service Society, The Fortune Society, JustLeadershipUSA, Legal Action Center, The Legal Aid Bureau of Buffalo, Inc., MFY Legal Services, Open Hands Legal Services, The Prisoner Reentry Institute at John Jay College, The Sex Workers Project at the Urban Justice Center and Youth Represent. CoRA also partners with The Legal Aid Society, Legal Services NYC and Legal Assistance of Western New York, Inc.

Section 2-01 Definitions

- The definition of "**applicant**" should reflect that current employees may be considered for job changes that are not definitively "positive," such as transfers or lateral position changes. It is just as important to avoid discrimination in these employment decisions. We therefore recommend that the word "positive" be deleted from the definition.

- Similarly, the definition of the term "**conditional offer**" should recognize that an employment offer may not necessarily reflect a positive change, so we recommend omitting the word "positively."

- "**Conviction history**" should include unsealed violations (or their analogues) in other states, just as it currently includes unsealed violation convictions in New York. Applicants with out-of-state unsealed violations should receive the same legal protections as applicants with unsealed violations from New York State.

- The definition of the term **"criminal history"** should refer to "convictions" rather than "criminal convictions," so as to make clear that individuals with unsealed violation convictions have the same legal protections as individuals with misdemeanor or felony convictions.

- While the definition of "**employer**" is clear, the final rules should change every mention of that word to "**employer, employment agency, or agent thereof**," as the text of the Fair Chance Act explicitly states that all three of these entities are covered by the law.

- The definition of **"licensing agency"** should be modified to clarify that it includes the definition in Correction Law Article 23-A. This could be accomplished by adding: "or any other grant of permission included in Article 23-A of the New York State Correction Law."

- The list of "**non-conviction**" outcomes should include juvenile delinquency findings and pardons. Although juvenile delinquency cases are processed by Family Court and by definition are not convictions, they should be included on this list to ensure people are aware that they are not convictions.

Section 2-04(3) Inadvertent Discovery or Unsolicited Disclosure of Criminal History Prior to Conditional Offer

- **CoRA recommends that the rules explicitly instruct employers not to consider an applicant's conviction history when they inadvertently discover it prior to making a conditional offer.**
  We strongly support the Fair Chance Act's general requirement that conviction history be considered only after a conditional offer. Therefore, when an employer inadvertently

learns of an applicant's conviction history before making a conditional offer, the rules should explicitly instruct employers not to consider that information when deciding whether to extend a conditional offer to an applicant. To clarify this principle, we suggest removing the phrase "unsolicited disclosure" from section 2-04(3), indicating that this section only applies to information derived from sources other than the applicant. While this section rightfully protects employers from liability for inadvertent discoveries, it should also hold them accountable for relying on the information gleaned from such discoveries.

- **If, however, an applicant intentionally initiates conversation about his or her record, employers should not be liable for engaging in the conversation and should be allowed to consider that information.**

  If an applicant voluntarily initiates discussion of conviction history, an employer should inform the client that they are not required to address conviction history until they receive a conditional offer. The applicant may then opt to discontinue the conversation at which point the employer must reserve consideration of conviction history until the appropriate time in the Fair Chance Process, i.e. after the conditional offer.

  However, individual applicants should be able to choose to discuss their conviction history when they determine it will be prudent. Some individuals' conviction histories are obvious from their resumes, or from the organizations that refer them to the job, so that employers will frequently "inadvertently discover" their record. It would not be fair to those individuals to entirely prevent them from engaging in any kind of constructive contextualizing of their record because an employer would be liable for allowing them to discuss it. Additionally, some applicants may have gained skills through a component of their sentence and may have difficulty addressing those skills without engaging in discussion of their conviction history. Ultimately, we think it is important to allow individuals with conviction histories to discuss their records when they so choose.

  Employers still must not in any way initiate conversation about conviction history prior to a conditional offer, including by asking applicants if they wish to discuss their conviction history. The law clearly requires that employers make no inquiry whatsoever about conviction history prior to the conditional offer. Employers also certainly must not hold it against an applicant that he or she did not initiate conversation about their conviction history. Generally, conversations about conviction history should not occur before a conditional offer, and applicants, employees and employers should receive training to that effect. But individual applicants should be permitted to initiate discussion of their record on their own terms prior to a conditional offer.

Section 2-04(5) Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action:

- **We recommend that the rules clarify that employers must affirmatively ask for any additional information needed to conduct a thorough Article 23-A analysis as the first step in the Fair Chance Process.**
  Any analysis before obtaining adequate information about all of the required factors – such as evidence of rehabilitation or a Certificate of Relief from Disabilities or Good Conduct – will neither be complete nor legally sufficient. Delaying such full consideration until a Fair Chance Notice is triggered will waste time and resources for both employers and applicants.

- **The rules and the Fair Chance Act Notice should avoid using the terms "determination" or "decision" to describe a preliminary stage that is not a final determination.**
  We recommend that the sentence in the top gray box of the Fair Chance Act Notice that concludes, "before making our determination," simply omit that phrase to avoid suggesting there has been a final decision. Doing so would be consistent with the language above that describes the employer as "hav[ing] reservations."
  In (5)(b)(ii)(2) the word "determination" could be replaced by "assessment" and the word "decision" could be replaced by "notice."

- **The rules should not suggest applicants or employees are solely responsible for demonstrating errors, discrepancies or misrepresentations on background checks to employers.**
  An applicant is often not in a position to know how to "demonstrate" a background check error to an employer's satisfaction. Furthermore, if an employer conducts a background check through a third party (e.g., a consumer reporting agency), an applicant has no control or authority over the practices of the third party reporting the erroneous information. To the extent an employer uses a third party to run a background check on an applicant, it should not be able to withdraw an offer as long as the applicant has lodged a dispute with the third party. We therefore request that the Commission modify this rule accordingly.

  About ninety-two percent of employers conduct criminal background checks for some potential applicants, and about seventy-three percent of employers do so for all potential applicants.[2] Many employers engage consumer reporting agencies to obtain background checks on applicants. Consumer reporting agencies and employers are regulated by the

[2] Soc. for Human Res. Mgmt., Background Checking: Conducting Criminal Background Checks (Jan. 22, 2010), *available at https://www.shrm.org/research/surveyfindings/articles/pages/backgroundcheckcriminalchecks.aspx*

federal Fair Credit Reporting Act, and, in this state, by New York's Fair Credit Reporting Act. If an employer obtains a background report through a consumer reporting agency, then the consumer reporting agency bears responsibility for investigating the error if the applicant reports it.[3] Under federal law, the consumer reporting agency has a 30 day period to investigate the error.[4] This subsection should explicitly acknowledge that consumer reporting agencies are responsible for investigating errors when a dispute is lodged, and that applicants cannot and should not bear the responsibility of fixing errors on such reports.

Section 2-04(7) Exemptions under the Fair Chance Act

- **CoRA recommends that the Rules clarify the narrow scope of certain exemptions from the Fair Chance Act.**
  The Fair Chance Act states that the section of the act titled, "arrest and conviction records; employer inquiries" "shall not apply to any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." (New York City Human Rights Law §8-107(11-a)(e).) The plain language of the statute makes clear that only actions taken pursuant to other state, federal or local laws are exempt, not the entire process relating to such a position.

  The Commission must clarify that the Fair Chance Act still applies to positions for which criminal background checks are mandated by law, with only such exceptions as are necessary to ensure compliance with the applicable law(s). The exception does not exempt the position from Fair Chance Act coverage entirely. In such a case, the employer may advise that a background check is necessary for the position and that persons with certain convictions are ineligible for the position, and shall be permitted to ask if the applicant has a disqualifying conviction. But, if the applicant has a conviction that does not legally disqualify him or her from the position, the employer may not take adverse employment action based on such conviction without conducting the Fair Chance Process described in 8-107(11-a) (b)(i-iii) of the Act. For example, when a nursing home worker who was mandated to get fingerprinted when hired is thereafter arrested while employed, the Fair Chance Act processes should apply to the new arrest.

Conclusion:

CoRA members look forward to the Commission's continued education and enforcement efforts surrounding the Fair Chance Act. We hope that the above comments will be useful in further elucidating the proposed rules implementing the Act.

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[3] 15 U.S.C. 1681i; N.Y. Gen. Bus. Law § 380-f.
[4] 15 U.S.C. § 1681i(a)(1)(A); *see also* N.Y. Gen. Bus. Law § 380-f(a).

Thank you for your consideration.

Sincerely,

Sebastian Solomon, co-chair

The Coalition of Reentry Advocates
Member Organizations:
The Bronx Defenders
Center for Community Alternatives
Community Service Society
The Fortune Society
Legal Action Center
MFY Legal Services, Inc.
Open Hands Legal Services
The Prisoner Reentry Institute at John Jay College
Youth Represent

Additional Organizations Signing On to These Comments:
Brooklyn Defender Services
Brooklyn Legal Services
The Coalition of Behavioral Health Agencies
Coalition of Medication-Assisted Treatment Providers and Advocates (COMPA)
Drug Policy Alliance (DPA)
Families United for Racial and Economic Equality (FUREE)
LatinoJustice PRLDEF
The Legal Aid Society
Legal Services NYC – Bronx
Manhattan Legal Services
National Employment Lawyers Association/New York (NELA/NY)
The New York City Employment and Training Coalition
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March 21, 2016

Testimony of The Legal Aid Society, Employment Law Unit
In Support of Proposed Amendments to Title 47 of the Rules of the City of New York

Presented Before the New York City Commission on Human Rights

Presented by Melissa S. Ader, Equal Justice Works Fellow, Sponsored by AIG and Sullivan & Cromwell LLP, and Staff Attorney, Employment Law Unit

Thank you for the opportunity to present this testimony.

The Legal Aid Society is the oldest and largest legal services provider for low-income families and individuals in the United States. Annually, the Society handles more than 300,000 cases and legal matters for low-income New Yorkers with civil, criminal and juvenile rights problems, including some 45,000 individual civil matters in the past year benefiting nearly 117,000 New Yorkers as well as law reform cases which benefit all two million low-income families and individuals in New York City.

Through a network of 16 neighborhood and courthouse-based offices in all five boroughs and 22 city-wide and special projects, the Society's Civil Practice provides direct legal assistance to low-income individuals. In addition to individual assistance, The Legal Aid Society represents clients in law reform litigation, advocacy and neighborhood initiatives, and provides extensive back up support and technical assistance for community organizations.

Through our Employment Law Unit, we provide legal services to over 2,000 low-wage workers each year to ensure these workers receive fair wages, fair treatment, decent working conditions, and the benefits to which they are entitled if they lose their jobs. Most of these cases involve wage and hour violations, family and medical leave issues, workplace discrimination, including discrimination based on involvement with the criminal justice system, labor trafficking, and unemployment insurance. The Employment Law Unit advises and represents many low-income workers who have arrest or conviction records.

The Society's Criminal Practice serves as the primary defender of poor people prosecuted in the State court system, under our contract with New York City. Each year, the City contract requires the Society to provide representation in nearly 210,000 trial-level criminal cases. The Society staffs the great majority of arraignment shifts in the New York City Criminal Court, and last year represented approximately 90% of all defendants arraigned in those shifts. Well over half of our clients are charged with misdemeanors or petty offenses, and a large share of these clients are young persons of color, whose neighborhoods bear the brunt of especially intensive law enforcement by the Police Department. Time and again, we see these clients lose their jobs and lose opportunities for career advancement merely by reason of having been arrested, punishments more severe than the actual sentences imposed by judges. Time and again, applicants for entry-level positions are thrown on the discard pile simply because they have arrest or conviction records, without even a chance to be interviewed and prove that they deserve an opportunity. This is why the New York City Commission on Human Rights' proposed rules interpreting the Fair Chance Act are so important, and so necessary, if we wish to be a City where everyone who's willing to work has a chance to climb the ladder of success.

The Proposed Rules Will Have a Great Impact

The Society applauds the Commission for proposing rules that will protect both applicants with arrest or conviction histories and employees who are arrested or convicted while currently employed. The proposed rules do not bar employers from terminating or disciplining employees after they are arrested. Instead, they require employers to use the same careful, multi-factor analysis that the City Human Rights Law already required with respect to applicants who have a conviction history. Unionized and civil service employees already have contractual or legal protection against arbitrary firings, whether based on arrests and convictions or otherwise. Lower-paid, struggling workers deserve such protections as well. The Society has seen too many workers lose their jobs automatically, forcing them to start over in a difficult job market, because of relatively minor offenses that had nothing to do with the job and don't fairly reflect on the worker's ability to continue working competently and honestly.

Indeed, the Society currently represents a low-wage worker who was arrested a few months before the Fair Chance Act went into effect, and was terminated from his job solely because of the arrest. The worker had been arrested for a crime he did not commit. After his termination, the District Attorney's Office moved to dismiss the criminal case, and the case was dismissed and sealed. The Society has informally advocated for the employer to reinstate our client, but because our client was unprotected by the Fair Chance Act at the time of his termination, the employer has near-total discretion to deny reinstatement. Our client is currently unemployed and was forced to move his four-person family into a friend's apartment because he could no longer afford to pay rent. If the Fair Chance Act, as interpreted by the proposed rules, had been in effect at the time of our client's automatic firing, the firing would have been unlawful, and the Society could have enforced our client's right to an individualized and careful assessment of whether he was qualified to keep his job.

We also applaud the Commission for many other portions of the proposed rules. For instance, we strongly support the Commission's explicit statement that multi-jurisdictional employers cannot avoid liability by using boilerplate job applications that ask about criminal history but include disclaimers for New Yorkers. In addition, we strongly support the content of the Commission's Fair Chance Notice, which requires employers to make truly individualized assessments of each job applicant. The Commission's proposed rules would successfully further the City Council's goals of giving applicants and employees a meaningful fair chance at securing and maintaining employment.

Suggested Modifications to the Proposed Rules

We urge the Commission to consider amending its proposed rules in the following ways to further protect the rights of low-income workers.

The Society recommends that 47 RCNY § 2-04(7)(a) clarify the narrow scope of the exemption listed at N.Y.C. Admin. Code § 8-107(11-a)(e).
Section 8-107(11-a) of the Fair Chance Act does not apply to "any actions taken by an employer or agent thereof pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history." N.Y.C. Admin. Code § 8-107(11-a)(e). The plain language of the statute makes clear that the exemption applies to actions taken by an employer or agent pursuant to other laws, not, as proposed 47 RCNY § 2-04(7)(a) states, to "position[s]" or the entire process relating to those positions. Indeed, the only employer actions that are exempt from § 8-107(11-a) are (1) the performance of background checks for employment purposes, where required by law and (2) actions necessary to ensure the disqualification of someone whose conviction bars them from employment. The Commission should clarify that where a relevant law exists, an employer may advise that a background check is necessary for the position and that persons with certain convictions are ineligible for the position; the employer may also ask if the applicant has a disqualifying conviction. If the applicant does not have a conviction that legally "bars" them from the position, the employer may not take adverse employment action based on such conviction without conducting the Fair Chance Process described in 8-107(11-a)(b) of the Act.

For example, the Society has many clients who are home health aides (HHAs) and certified nurse aides (CNAs). Neither N.Y. Executive Law § 845-b nor any other law requires HHA and CNA employers to deny employment based on specified convictions. Therefore, HHA and CNA employers should be required to go through the Fair Chance Process if they seek to deny an applicant a job on the basis of their criminal record; if the State Department of Health deems the applicant ineligible to work because of their criminal record, the employer may then deny the applicant the job on the basis of their ineligibility to work. In addition, when our HHA and CNA clients are arrested after being hired and cleared to work by the Department of Health, their employers should be required to go through the Fair Chance Process if they want to fire them based on the arrest. Only the Fair Chance Process will protect our clients from arbitrary firing for arrests that may result in dismissal or in non-criminal dispositions.

The Society recommends that 47 RCNY § 2-04(5) clarify that before engaging in the Article 23-A analysis, employers must affirmatively ask for any additional information required for a thorough and complete analysis.

Any Article 23-A analysis that occurs before the applicant provides evidence of rehabilitation will be incomplete and legally insufficient. Many low-income job applicants will not be aware that they can submit rehabilitation evidence after they receive a conditional offer. If applicants do not submit rehabilitation evidence before the Article 23-A analysis, employers may form an initial inaccurate assessment of their criminal history. Moreover, the current version of § 2-04(5) is inefficient for employers: if rehabilitation evidence changes the result of the Article 23-A analysis, the initial analysis was a waste of the employer's time. Relatedly, the Society recommends that the Commission delete the phrase "before making our determination" from the Fair Chance Notice and that the Commission replace the words "choose," "determination," and "decision" in proposed § 2-04(5)(b)(ii) with "seek," "assessment," and "notice."

The Society recommends that the amendments to Title 47 of the Rules instruct employers not to consider inadvertently discovered criminal history prior to making a conditional offer and create a mechanism for applicants to voluntarily initiate conversation about their criminal history.

The Society agrees with the detailed recommendation on this point set forth in the testimony of the Coalition of Reentry Advocates. 47 RCNY § 2-04(3) should explicitly instruct employers not to consider inadvertently discovered criminal history prior to making a conditional offer. But those job applicants who choose to voluntarily disclose their criminal history should be permitted to do so, with appropriate mechanisms in place to protect applicants unaware of their rights under the Fair Chance Act. Some of the Society's clients have large gaps on their resume or other indicators of incarceration. Rather than permitting an employer to make assumptions about their criminal record, some of these clients may wish to contextualize their criminal record and discuss their rehabilitation to increase their chances of getting a conditional offer. These clients should have the opportunity to engage in such a discussion with an employer.

The Society recommends that 47 RCNY § 2-01 clarify that the definition of "criminal history" includes unsealed violation convictions.

An individual convicted of a violation was convicted in a criminal action. See N.Y. Crim. Proc. Law §§ 100.05, 100.10(1), 1.20(13), 1.20(17). Accordingly, we recommend that the Commission clarify that the definition of "criminal history" refers to "records of convictions or non-convictions and/or a currently pending criminal case." This clarification is important to the Society's clients, many of whom are convicted of violations that remain unsealed permanently or for a period of time. It would be contrary to the text and purpose of the Fair Chance Act for those clients to be unprotected by the Act.

The Society recommends that 47 RCNY § 2-04(6)(a) clarify that temporary help firms must abide by the Fair Chance Process if they wish to withdraw a conditional offer based on a pending criminal case, or if they wish to take adverse action against a current employee based on their criminal history.

N.Y.C. Admin. Code § 8-107(11-a)(2) creates only one distinction between temporary help firms and other employers: the meaning of a conditional offer. Other than that single distinction, 47 RCNY § 2-04(6)(a) should treat temporary help firms identically to other employers. This clarification will have a significant impact on some of the Society's clients. For instance, the Society currently represents a client who was fired by a temporary help firm when the firm discovered her criminal record, which stemmed from incidents that occurred almost a decade before. The Commission should ensure that she and others are able to protect their rights against discrimination by temporary help firms.

The Society recommends that the Commission clarify that actions that are illegal if taken by employers are also illegal if taken by employment agencies or agents of employers or employment agencies.
The Fair Chance Act specifies that employment agencies, which "include[] any person undertaking to procure employees or opportunities to work," are liable for violations of the Fair Chance Act, as are agents of employment agencies and agents of employers. See N.Y.C. Admin Code §§ 8-102(2), 8-107(11-a). The amendments to Title 47 of the Rules should make clear that these agencies and agents are just as liable as employers.

The Society recommends that the 47 RCNY § 2-01 modify the definition of the term "employer" to state that "natural persons employed as independent contractors to carry out work in furtherance of an employer's business enterprise who are not themselves employers shall be counted as persons in the employ of such employer."
Such a definition is consistent with the City Human Rights Law. See N.Y.C. Admin. Code § 8-102(5). It is also essential for low-wage workers, who have very little bargaining power and whose employers are particularly likely to strategically misclassify them as independent contractors.

The Society recommends that the Commission make the following additional changes to 47 RCNY § 2-01:

- The definition of "conviction history" should include unsealed violations or their analogues in other states. Applicants with out-of-state unsealed violations should receive the same legal protections as applicants with unsealed violations from New York State.
- The word "public" should be deleted from the definition of "criminal background check." Searches of private records can be as damaging as searches of public records.
- The definition of "licensing agency" should be changed 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."
- The definition of "non-conviction" should include juvenile delinquency findings and pardons.

In conclusion, The Legal Aid Society thanks and commends the Commission for proposing these amendments to Title 47 of the Rules of the City of New York. All New Yorkers

deserve a fair chance to support themselves and their families. These proposed rules will help them to get that chance.

Respectfully Submitted:

Melissa S. Ader
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March 21, 2016

Supplemental Testimony of The Legal Aid Society, Employment Law Unit
In Support of Proposed Amendments to Title 47 of the Rules of the City of New York

The Legal Aid Society writes to supplement the written testimony that we submitted earlier today.

We have one additional concern regarding the Proposed Rules. Many employers in New York City have arrest notification policies or conviction notification policies. These policies require employees to notify their employers that they have been arrested or convicted shortly after the arrest or conviction takes place.

We urge the New York City Commission on Human Rights to clarify that all arrest notification policies are illegal under the Fair Chance Act. In the case of arrests which result in an immediate sealed disposition, such policies necessarily require some employees to report arrests that have been sealed in violation of N.Y.C. Admin. Code § 8-107(11).

We also urge the Commission to clarify that employers with conviction notification policies must notify employees that if the employer wishes to take adverse action on the basis of an employee's conviction, the employee has the right to the Fair Chance Process. The Commission should require employers to place this notification in whatever employment documents mention the conviction notification policy, and to send this notification to any employee that reports a conviction pursuant to the conviction notification policy.

Respectfully Submitted:

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Sponsored by AIG and Sullivan & Cromwell LLP
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Elfant, Lauren (CCHR)

From: [redacted]

Sent: Friday, March 18, 2016 5:42 PM
To: Policy (CCHR)
Subject: Fair Chance Act
Attachments: FCA Article.pdf

Members of the Commission:

I am a partner of Graubard Miller but write in my individual capacity to address proposed HRC rules relating to the Fair Chance Act. I represent both employers and senior executives in my law practice.

I am attaching for your consideration an article I have written regarding the new Fair Chance Act. The *New York Law Journal* published the article on Friday, January 8, 2016. Among other things, the article reviews the public policy underlying the FCA, the scope of the Act, the interplay between the FCA and other criminal law statutes, exemptions from FCA coverage, and the HRC Legal Enforcement Guidance that gives rise to HRC's proposed rules.

The public policy underlying the Act is commendable. However, the HRC Guidance and its proposed rules create certain undue risks and burdens for employers. Also, in at least one material respect, the rules are unfair to prospective employees who have no criminal record.

The proposed rules interpret the Act to isolate a conditional offer of employment in a manner that effectively precludes an employer thereafter from making an adverse employment decision based on legitimate concerns it had prior to making a conditional offer.

Proposed Rule 9(b) recites: "There will be a rebuttable presumption that an employer was motivated by an applicant's or employee's criminal history if it revokes a conditional offer of employment without following the Fair Chance Process." The rule then provides the presumption may be rebutted only for limited reasons recited in Rule 9(b)(i).

HRC's presumptions, best practices, and procedural requirements place considerable weight on employers that may elect to make an early adverse employment decision rather than extend a conditional offer. Employers may now do so for reasons having nothing to do with a candidate's criminal background.

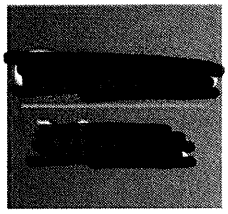
In the current economic environment, large numbers of individuals have been unemployed for extended periods of time. Whether such individuals are candidates seeking employment at fast food franchises or are 59-year-old senior executives who also have no criminal record, Rule 9(b) creates a problem.

Given the burdens and exposures the new rules impose, employers may choose to end the interview process early based on, for example, subjective reactions to resume or employment application gaps. Employers may do this since, without subjecting themselves to undue risk, they would be unable to withdraw a conditional offer based on reasons fully legitimate prior to making a conditional offer that do not fit into the narrow revocation grounds recited in Rule 9(b)(i).

A prospective employee who has no criminal record but does have resume gaps may well find himself or herself unable to reach the next step in the employment process because of the new Rule.

Respectfully submitted,

Lawrence Bernfeld



Lawrence D. Bernfeld

[redacted]

Visit our website at http://www.graubard.com

LEGAL ACTION CENTER

SUBMITTED VIA EMAIL

March 21, 2016

New York City Commission on Human Rights
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policy@cchr.nyc.gov

RE: New York City Fair Chance Act Proposed Rules

To Whom It May Concern:

The Legal Action Center is the only non-profit law and policy organization in the United States whose sole mission is to fight discrimination against people with histories of addiction, HIV/AIDS, or criminal records, and to advocate for sound public policies in these areas.

The Legal Action Center applauds the efforts of the New York City Commission on Human Rights to provide meaningful employment opportunities to New Yorkers with criminal records through its rigorous implementation and enforcement of the Fair Chance Act. The Act helps all New Yorkers – employers, customers, and employees – by giving applicants and current employees the chance to be considered on their full professional record rather than risk rejection before their professional qualifications are even considered.

Comments in Response to the Proposed Rules:
The Legal Action Center strongly supports the comments submitted by the Coalition of Reentry Advocates along with other organizations that are committed to ensuring correct and full implementation of the Fair Chance Act. The Legal Action Center would like to make the following additional suggestions aimed at making the Proposed Rule even clearer:

Section 2-01 Definitions

- We recommend that the definition of "**criminal background check**" include internet searches and searches of private databases as well as searches of public records so that it is clear that any such search may constitute a criminal background check. We therefore suggest modifying "searches public records" in subsection 2 of the definition to "searches records, the internet, or databases."

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- We recommend that the rules provide more specificity on how the number of employees is counted to determine that someone is an "**employer**" with "four or more persons in their employ." The rules should state that independent contractors count as an employee for purposes of determining the total number of people employed as the Fair Chance Act already does. It would be helpful for the rules to provide additional detail as well, for example stating that out-of-state employees constitute persons in the employ of an employer.

Section 2-04(5) Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action:

- LAC recommends that the rules clarify that **Section 2-04(5)(a)(iii)** only prohibits employers changing the duties and responsibilities of a position for the purpose of denying a position based on an applicant's or employee's conviction history. The prohibition would not extend to changes made in order to support the applicant's or employee's hiring. For example, if an employer properly followed the Fair Chance Process and accurately concluded that the duties of a position were inconsistent with the individual's conviction history but that changes to the position would allow for the hiring or retention of the individual, it would then be permissible for the employer to make those changes. The employee or applicant could still challenge the employer's analysis of their qualifications and whether it was actually necessary to change the duties of the position. If the employer's analysis was proper, however, making changes to support the hiring or retention of the individual would be permissible.

- We recommend that **Section 2-04(5)(b)(iii)(3)** refer to a "written copy of the inquiry" rather than just "the inquiry." The timing of the inquiry could be interpreted to be when the employer initially inquired about criminal background, rather than when the employer provided a written copy of background information obtained. The latter is clearly the intended meaning. The subsection would then read, "The time period begins when the applicant or employee receives both the Fair Chance Notice and the written copy of the inquiry."

- The first clause of **Section 2-04(5)(c)(i)(1)** uses the term criminal history when it seems to refer to conviction history. **Section 2-04(5)(c)(i)(2)** uses the term conviction history when it seems to refer to criminal history.

Conclusion:

The Legal Action Center looks forward to the Commission's continued education and enforcement efforts surrounding the Fair Chance Act. We hope that the above comments will be useful in further elucidating the proposed regulations implementing the Act.

Thank you for your consideration.

Sincerely,

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March 21, 2016

BY EMAIL (policy@cchr.nyc.gov)

Dana Sussman
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New York City Commission on Human Rights
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Re: Comments on the New York City Commission On Human Rights proposed rules re: the Fair Chance Act, New York City Local Law No. 63 (2015)

Dear Ms. Sussman:

We write to provide comments for the Commission's consideration on the proposed amended rules referenced above (the "Proposed Rules"), set forth in title 47 of the Rules of the City of New York. The Proposed Rules published by the New York City Commission on Human Rights (the "Commission") are intended to establish definitions and criteria concerning compliance with the New York City Fair Chance Act, New York City Local Law No. 63 (2015) (the "Fair Chance Act"). We write to raise the Commission's awareness of ambiguities in the Proposed Rules which, if clarified, will further facilitate employers' compliance with the Fair Chance Act. Areas of comment include (1) application of the Fair Chance Act to pending arrests; (2) detrimental impact on applicants if employers are prohibited from disclosing background check requirements during the application process; and (3) vague terms and guidance that impair employers' ability to comply with the Fair Chance Act.

1. Application of the Proposed Rules to Pending Criminal Cases

First, we are concerned with the Proposed Rules' apparent application of the Fair Chance Act to *pending* criminal cases. Specifically, pending criminal cases are referred to numerous

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times in the Proposed Rules, including in the definition section[1] and throughout the Criminal Background Check Process section.[2] The origin of the statutory authority for the inclusion of pending cases is unclear. The title of Section 753 of the New York Correction Law is "Factors to be considered concerning *a previous criminal conviction*; presumption." (emphasis added). We are not aware of any authority found in this section or any other section of Article 23-A of the New York Corrections Law ("Article 23-A") that would support the application of Article 23-A to "pending cases" or recent but not yet adjudicated arrests. Indeed, Section 751 of Article 23-A, titled "Applicability," specifies that "[t]he provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, *who has previously been convicted* of one or more criminal offenses in this state or in any other state . . . ." (emphasis added). Moreover, in the list of Article 23-A factors included in the Proposed Rules, we note the words "pending case" or "pending criminal case" were added to factors 5 and 6. Notably, these words, and even the concept of a pending case, are conspicuously absent from Section 753 of Article 23-A, where the factors are codified. There, these two requests refer only to the age and seriousness of the offense. There are simply no references to pending cases in the Correction Law, and therefore the application of the Proposed Rules to pending criminal cases appears inconsistent with the text and legislative intent of the law to which they refer.

2. Detrimental Impact on Applicants If Employers Are Prohibited from Disclosing Background Check Requirements During Application Process

Second, there is an ambiguity concerning when employers can notify applicants that a background check may be required for certain positions. Section 8-107(11-a)(a) of the New York City Human Rights Law ("NYCHRL") provides only that it shall be an unlawful discriminatory practice for an employer to (1) declare, print or circulate any "solicitation, advertisement or publication" which expresses directly or indirectly any limitation on employment based on criminal history; or (2) make any "inquiry or statement" related to the criminal records "of any person who is in the process of applying for employment" until after extending a conditional offer of employment. Thus, the NYCHRL bars employers from including broad language in the initial solicitation, advertisement or publication concerning the use of criminal information when making employment decisions, and employers are further barred from asking about the criminal history of a *specific individual during the application process until a conditional offer is made.*

However, the Proposed Rules broadly expand these limitations. The Proposed Rules specify that job applications that refer generally to the use of criminal history for certain

[1] See Proposed Rules, Section 2.01 (including or referencing pending criminal cases in the definitions of "Article 23-A factors," "Criminal history" "Direct relationship," and "Fair Chance Process").

[2] Amending Section 2-04 of the Rules of the City of New York in multiple ways with respect to pending arrests, including prohibiting employers from having employment applications that contain a question about an applicant's pending criminal case, specifically delineating when these inquiries can be made after providing a conditional offer, and detailing how an employer may act on information concerning pending criminal cases.

positions, such as a "background check required" statement, is a per se violation of the Fair Chance Act. A plain reading of the Proposed Rules suggests this would be true even if the application complies with the NYCHRL and does not at any point inquire or ask a specific candidate for any information about that specific individual's criminal background history. The authority on which the Commission relies in expanding the Act in this manner is unclear. We have identified no language in the Fair Chance Act or any other New York City or state law that would bar an employer from simply stating on a job application, without inquiring into any specific candidate's criminal history, that a criminal background inquiry may be conducted for certain positions after the provision of a conditional offer.

We understand the Commission's concern that broad references to background checks in an employer's initial advertisements, solicitations or publications may deter qualified candidates from applying. However, once a candidate takes the affirmative step of completing a job application, advance notice that a particular position may require a background check would be helpful to the applicant. Further, it would avoid unfair surprise for candidates who have a criminal history. Without some type of disclaimer that a criminal background check may be used, such applicants would only learn very late in the application process, and after receiving a conditional offer, that a background check is required. Those individuals may feel misled by the employer and may lose valuable time in the job market, simply because of the employer's compliance with the Proposed Rules. Therefore, it is in both the candidate's and the employer's interests for employers to include a statement on employment applications that alerts candidates, without inquiring into their criminal history, of the possibility that a background check may be required for certain positions. In addition to not being supported by appropriate statutory authority, the Proposed Rules would do a disservice to the population they are designed to protect.

3. Vague Terms and Language That Impair Employers' Ability to Comply with the Proposed Rules

Finally, there are multiple sections in the Proposed Rules that are vague and ambiguous. First, the Proposed Rules state that after conducting the Article 23-A analysis, an employer must determine whether there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job.

- What criteria can an employer consider to determine when such a "direct relationship" exists?
    - The Proposed Rules define "direct relationship" to mean a finding that the criminal conduct underlying the conviction or pending arrest has a direct bearing on the candidate or employee's fitness to perform one or more of the duties or responsibilities of the position in question.
    - Although this definition is similar to the "business necessity" test laid out in EEOC guidance, it is not identical. See EEOC Enforcement Guidance

on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act of 1964, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

- Was the "direct relationship" language in the Proposed Rules intended to mirror the EEOC test?
- Is an employer required under the Proposed Rules to conduct a separate analysis specifically into the direct relationship between a candidate and the position in addition to its obligations to comply with the EEOC's guidance?

As the Proposed Rules are drafted, these pertinent questions are left unanswered and employers lack guidance on how to actually comply with the Proposed Rules.

Second, there is no guidance in the Proposed Rules advising employers on when a risk is an "unreasonable risk," such that the employer may take an adverse employment action. The Proposed Rules do allow an employer to take such an action if the employer first determines that there is an "unreasonable risk" of harm to property, individuals in the workplace, or the general public.

- What types of risk are "unreasonable" and what is the standard for determining reasonableness?
  - Would drug convictions ever pose an unreasonable risk? If so, with regard to what types of positions?
  - The same question arises with respect to convictions for violent crimes. Are there any types of crimes that pose an unreasonable risk in all professional workplaces? If not, are there crimes that only relate to certain positions?
  - Finally, is an employer's good faith judgment sufficient or is there a separate objective standard that the Commission will apply?
  - The Proposed Rules are silent on these questions.

The ambiguities outlined above demonstrate the difficulties facing employers who endeavor to comply with the Fair Chance Act and the Commission's Rules. Until these questions are answered, employers will lack the insight necessary to ensure their compliance. For these reasons, we ask the Commission to review the Proposed Rules and revise them accordingly.

Respectfully submitted,

Larry L. Turner

napbs
National Association of Professional Background Screeners
The Voice of Screening Professionals

Carmelyn P. Malalis, Chairperson & Commissioner
New York City Commission on Human Rights
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RE: New York City Fair Chance Act Proposed Rule Amendments

Dear Chairwoman Malalis,

On behalf of the National Association of Professional Background Screeners (NAPBS), whose more than 850 members include New York City residents and businesses, we write to submit comments in response to the proposed rule amendments regarding the Fair Chance Act. As a nonprofit organization consisting of small and large background companies engaged in the background screening profession, NAPBS has been dedicated to providing the public with safe places to live and work since 2003. The NAPBS member companies range from Fortune 100 companies to small, local businesses, and conduct millions of employment-related background checks each year. Its members help employers, staffing agencies and nonprofit organizations make more informed decisions regarding the suitability of potential employees, contractors and volunteers. The proposed rule amendments as drafted pose severe compliance challenges for employers operating within the city.

Comment 1: Creation of *Per Se* Violations

Under the proposed rule amendments, there are several ways an employer could commit a *per se* violation of the rules, including: 1) An employment application that requires an applicant to provide permission for a background check or to provide information regarding criminal history and 2) Using any standard form across multiple jurisdictions that includes a criminal history question regardless of if the form specifies NYC applicants should not respond.

These proposed amendments represent a first of its kind legal requirement. We are not aware of any other ban the box law in the country at the city, county or state level that creates any level of liability for employers who use a single employment application across jurisdictions. Instead, many employers who hire in multiple jurisdictions that have differing ban the box laws use a single employment application that may have particular jurisdiction-specific addendums or a notice that individuals in specific jurisdictions should not complete the information. Requiring employers to use a different employment application or form for hiring in NYC creates a significant compliance hurdle that could result in penalties of $500-$10,000 (and beyond).

For employers that still provide applications via paper, these amendments create the possibility that a simple human error – with no ill will or malicious intent – could result in significant monetary penalties without any harm needing to have taken place. Further, many employers have applicants complete such forms electronically. Requiring these employers to institute a separate form or update any existing forms will cost money and will take a notable period of time. At the least, the rules should account for a grace period to allow employers to take action.

Comment 2: Criminal Background Check Process

The proposed rule amendments mandate that employers shall not include in any materials (advertisements, employment applications, online job postings, etc.) any statement[1] that expresses a limitation or specification such as "background check required." Further, employers would be prohibited from asserting that individuals with a criminal history or certain criminal convictions will not be hired or considered. Additionally, employers may not search for any terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison", or search websites that purport to offer that information for the purpose of obtaining criminal history.

Similar to our comments above, these requirements represent one of the first instances we've seen in any law in the country. Typically ban the box or fair chance laws require or allow employers to inform candidates that a background check may or will be performed at any point in the process. In fact, in two cities within New York – Buffalo and Rochester – the respective ban the box ordinances *require* employers to inform candidates that a background check will be performed if no interview is conducted as part of the hiring process.[2] Additionally, even though there are exemptions in terms of the Act's requirements for employers where a federal, state or local law requires background checks or disqualification of individuals with particular criminal convictions, it appears that exemption is narrowly tailored and may make protected employers more vulnerable to additional inquiries or investigation.

Further, it is unclear if the provision prohibiting employers from searching for the specified terms or websites are barred from doing so at any point in the hiring process or just prior to extending a conditional offer of employment. If it is the former, it stands to reason that employers who are not using a third party, such as a Consumer Reporting Agency (CRA), to complete the background check do not have appropriate resources at their disposal to conduct a criminal history search.

Comment 3: Article 23-A Analysis

As part of the Article 23-A analysis requirements under the proposed rule amendments, if an employer, after weighing the required factors, cannot determine that either the direct relationship exemption or the unreasonable risk exemption applies, then the employer may not revoke the conditional offer or take any adverse employment action.

This proposed rule amendment can potentially cripple employers from making an employment decision using their own best judgment and instincts. Employment decisions are not always based solely on one single factor such as criminal history. Rather, most often employment decisions are made after analyzing the totality of the circumstances, including whether the individual is a good fit culturally, has the required experience to meet the demands of the position, etc. Even though an employer may have determined this individual is right for the company and have extended a conditional offer, it does not

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[1] The proposed rule amendments define "Statement" as "any communications made, orally or in writing, to the applicant or employee for the purpose of obtaining criminal history, including, without limitation, stating that a background check is required for a position."

[2] Buffalo, New York: Chapter 154, Article V, "Fair Employment Screening." §154-27B. "...If an employer does not conduct an interview, that employer must inform the applicant whether a criminal background check will be conducted before employment is to begin." Rochester, New York: Chapter 63, Article II, "Fair employment screening." §63-14B. "If an employer does not conduct an interview, that employer must inform the applicant whether a criminal background check will be conducted before employment is to begin."

mean that something could not arise during this time period that would give an employer pause as to whether they did make the right hiring decision or not. Providing individuals with a criminal history with a fair chance at employment via this law is no doubt a laudable goal. However, it is also important to recognize the responsibilities employers have to create safe environments for staff and customers, and the cost that employers incur after making an unproductive hire that does not contribute positively to the company. Therefore, employers should be afforded more leeway when making an important decision that could impact their business, profitability, reputation, staff and customers.

Comment 4: Fair Chance Process

As outlined in the proposed rule amendments, an employer must provide a complete and accurate copy of each piece of information relied on to determine if an applicant or employee has a conviction history or pending criminal case. This includes copies of reports from CRAs, print outs from the internet and public records. What is unclear from the proposed rule amendments is if the public records themselves are required to be produced from the employer when the employer is using a CRA to complete the criminal background check. If that is required, this represents a significant departure in process. Typically CRAs do not provide the actual public record documentation to employers. Rather, after conducting research, CRAs determine what information is actually reportable under applicable law, and only that specific case information is included on the consumer report visible to the employer. There are several reasons for this to occur including the fact that many court records may have extraneous information, may include information regarding protected classes (such as age or race) or may include information the employer normally would not have access to such as multiple charges that did not result in convictions.

Additionally, the proposed rule amendments require the employer to hold the position open for three business days and to allow the applicant to dispute information with a CRA if a CRA was used to prepare the background report. The three business day requirement extends beyond the Fair Credit Reporting Act which does not specify any set period of time an employer must wait to fill a position. Further, the FCRA already requires CRAs to field reinvestigation requests (i.e., disputes) and resolve these issues within 30 days. Most disputes typically are resolved much more expediently, but what is unclear under the proposed rule amendments is if the employer must hold the position open during that entire dispute window.

Comment 5: Early Resolution of Commission-Initiated Complaints For *Per Se* Violations

Early resolution (i.e., an expedited settlement option) allows companies who commit *per se* violations to admit liability and receive a penalty versus engaging in litigation. Setting aside our previous comments about the *per se* violations generally, there are some concerning exceptions in the proposed rule amendments as it relates to early resolution.

Specifically, the proposed rule amendments indicate that an early resolution may not be in the public interest if the respondent works with vulnerable communities or if the Commission has reason to believe that discrimination is rampant in the respondent's industry.

With regard to employers that work with vulnerable communities, typically many of those employers may have legal requirements to conduct criminal history checks and exclude individuals with particular criminal convictions. This is prevalent in the healthcare and education industries, for example. Regardless of if there is a legal requirement to conduct a background check, employers that serve the

vulnerable populations have a heightened duty to err on the side of caution when hiring individuals that come into contact with any vulnerable individual. Therefore, the proposed exception to the early resolution rule appears to make these employers more susceptible to costly penalties and timely litigation simply because they are exercising appropriate due diligence to ensure those they care for are safe and protected from possible harm.

Regarding the Commission's belief that discrimination may be rampant in a particular industry, how is this determined? Each industry is bound to have a small handful of bad actors that are not representative of the majority of businesses that comprise said industry. Does the Commission track rates of discrimination in each industry? Are there particular industries that will be more of a target than others? This proposed rule amendment has the potential to nullify the entire point of the early resolution procedure proposed.

Further, the penalties associated with early resolution specify amounts for employers with up to 50 employees. Why are employers with more than 50 employees not eligible for the early resolution process? Additionally, an employer can be penalized multiple times during the same investigation. The example provided is a $500 penalty to a smaller employer who published a discriminatory advertisement and then an additional $500 penalty to that same employer who used an employment application that violated the rules. It stands to reason that an investigation and subsequent penalties should be all-inclusive rather than piecemeal. Typically if an employer is having trouble complying with one portion that will not be the sole violation and they may just need further education. Not every violation is born from malicious intent and harshly penalizing employers multiple times for a first violation seems punitive.

We hope that the Commission will take these points into consideration and alter the proposed rule amendments as necessary. NAPBS and its members are prepared to discuss any questions you may have and looks forward to working with you to improve this legislation as it moves forward.

Sincerely,

Melissa L. Sorenson
Executive Director
National Association of Professional Background Screeners

NATIONAL EMPLOYMENT LAW PROJECT

Christine L. Owens
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March 17, 2016

Dana Sussman
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Via E-mail: policy@cchr.nyc.gov

RE: Proposed Rules to Amend Title 47 of the Rules of the City of New York, Related to the Fair Chance Act

Thank you for the opportunity to submit comments on the Commission on Human Rights' proposed rules to implement the Fair Chance Act.

The National Employment Law Project (NELP) is a non-profit law and policy organization with more than 45 years of experience advocating for the employment and labor rights of the nation's workers. NELP fights for policies to create good jobs, expand access to work, and strengthen protections and support for low-wage workers and the unemployed.

One of NELP's key programs focuses on fair hiring policies that reduce barriers to employment for people with arrest and conviction records. NELP has worked closely with advocates and policymakers throughout the country, including New York City, to ensure that fair hiring policies contain the strongest protections possible for job-seekers, and that the laws are vigorously enforced.

NELP commends the Commission for its strong proposed rules to implement the robust Fair Chance Act, a model in many respects for other cities and states. Some of the most effective features of the Fair Chance Act and the proposed rules are:

- Delaying the inquiry into criminal history until the **conditional offer stage**. Doing so makes job application violations more straightforward to investigate. Waiting until the final hiring stage clarifies the rationale for an employer's adverse decision, which facilitates enforcement.
- Providing **clear guidance for employers** on what factors they may consider when evaluating a job applicant's criminal record, and how they must communicate an adverse employment action to an applicant. Doing so helps employers focus only on factors relevant to the job, and consider the applicant as an individual, not merely as someone with a record.
- Providing a **tiered penalty structure** that takes into account employer size and past violations of the law.
- Clarifying that **exemptions** to the Fair Chance Act are **narrow**, and that only federal, state and local laws that *require*, not laws that simply *authorize*, background checks

NATIONAL EMPLOYMENT LAW PROJECT

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are exempted. This distinction, as well as the **guidance for licensing agencies** in Section 8 of the proposed rules, should help open opportunities for jobseekers in fields where licensing or certification are required.

NELP's research has documented many of challenges that workers throughout the country face, including wage theft, employment discrimination due to a criminal record, and employer retaliation against vulnerable workers. We have consolidated our findings into a series of best practices recommendations to ensure strong enforcement of worker protection laws, in the context of fair hiring as well as other labor standards.[1]

In addition to the strong elements included in the Fair Chance Act and the proposed rules, we suggest the following provisions be considered for incorporation into the final rules wherever possible.

- Define strong penalties that provide **incentives for complainants**, such as directing some portions of the penalty funds or damages to complainants, to encourage jobseekers to come forward. The proposed rules could specify what damages might be available to successful complainants, and under what circumstances. This is especially important because effective enforcement relies heavily on applicants and workers coming forward and filing complaints.
- Adopt additional remedies that apply specifically to **employers with City contracts**. For example, a remedy of recission of City contracts with employers that continue to violate the Fair Chance Act would acknowledge the benefits that City contractors receive through their dealings with the City, and their obligations to follow City law.
- Clarify that the law applies to **independent contractors** as well as employees. The Fair Chance Act and proposed rules helpfully explain how the law applies to temporary help firms. The rules could also make clear in the definitions section that the Fair Chance Act applies to employers who hire independent contractors, not just employees.
- The **complaint process** should be accessible and transparent, and ensure **anonymity and protection from retaliation.** The proposed rules should clarify the complaint process from the point of view of a jobseeker who wishes to report violations of the Fair Chance Act. Specifically, the rules should outline the protections that jobseekers can expect if they decide to come forward, to protect their anonymity and to ensure that they do not experience retaliation for coming forward.

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[1] See NELP publications "Best Practices in Fair-Chance Enforcement: Ensuring Work Opportunity for People with Convictions" (June 2015, http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/) and "The Top 5 Enforcement Tools for Local Minimum Wage Laws, (December 2015, http://www.nelp.org/publication/the-top-5-enforcement-tools-for-local-minimum-wage-laws/).

NATIONAL EMPLOYMENT LAW PROJECT

Christine L. Owens
Executive Director

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317 17th Avenue South
Seattle, WA 98144
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- Make clear that the Commission will leverage **community resources and relationships**. The language of the Fair Chance Act calls for the Commission to engage in outreach and education efforts; an effective outreach and education strategy would include providing regular trainings for community-based leaders and service providers on all the laws within the Commission's purview using a "train the trainers" framework. Armed with this information, these trained individuals serve as a trusted source of information for jobseekers. Local community groups have deep local ties and skills in popular education that are critical to connecting with hard-to-reach jobseekers. In addition, these trainings facilitate connections between community-based organizations and agency staff, which promotes transparency and reciprocity.
- **Track complaints and document compliance**. The rules should describe the processes and procedures the Commission will implement to document the complaints received, including demographic information, the type of complaint, industry, and method and time spent to resolve the complaint. The Commission should identify opportunities to collect information on compliance through other enforcement activities. For example, if the Commission conducts any site visits or conducts surveys for other laws within the Commission's purview, we recommend it take advantage of these opportunities to gauge compliance around the Fair Chance Act as well.
- Require that **employers retain** all documentation and forms related to their consideration of applicants with criminal records for a specified period of time. If, during the course of an investigation, an employer does not produce the documentation they are required to keep, there should be a presumption that the employer was in violation of the law unless it can prove otherwise. A requirement for employers to retain documentation would aid the Commission in enforcement, and provide an opportunity to survey compliance of employers. For example, the agency that enforces the San Francisco Fair Chance Ordinance conducts a yearly survey of employers to assess compliance, in combination with monitoring and compliance for other ordinances that the agency enforces.
- Lay out the requirements and frequency of the Commission making reports of its investigations and enforcement public. The Commission should produce an **annual compliance report, available to the public**, to allow policymakers, advocates and jobseekers to assess how the law is working and what adjustments may be helpful to strengthen effectiveness. Additionally, the Commission should adopt rules that create compliance work groups with community members to identify ongoing issues with the law, as both Seattle and San Francisco have done.

NATIONAL EMPLOYMENT LAW PROJECT

Christine L. Owens
Executive Director

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Thank you for your consideration of our comments and for your commitment to protecting the rights and increasing employment opportunities for New Yorkers with records.

Sincerely,

Nayantara Mehta
Senior Staff Attorney

National Employment Opportunity Network (NEON)

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March 14th, 2016

Dana Sussman
Special Counsel to the Office of the Chairperson
New York Commission on Human Rights
P.O. Box 2023
New York, NY 10272

Dear Ms. Sussman:

The National Employment Opportunities Network ("NEON") is pleased to submit these comments with respect to the rules proposed on February 12, 2016, relative to the Fair Chance Act (the "Proposed Rules"). NEON is an association of companies that advise operating companies with respect to claiming Federal and state employment related tax benefits, and our comments will relate solely to the interaction between the Federal Work Opportunity Tax Credit (WOTC) and the Fair Chance Act.

NEON is grateful for the opportunity we had previously to discuss this matter with officials of the Commission on Human Rights and for modifications that were made to the draft proposed rules with respect to WOTC prior to their issuance. Nonetheless, the proposed rules even as modified are in conflict with WOTC and its purpose: to encourage employers to hire certain stigmatized and disadvantaged individuals, including ex-felons.

Congress enacted WOTC twenty years ago as the successor to the Targeted Jobs Credit and the rules are found in section 51 of the Internal Revenue Code of 1986. In order for an employer to claim WOTC with respect to a job applicant, the employer must take steps to determine prior to hiring that the applicant is a member of one of nine statutorily defined "targeted groups," one of which is ex-felons. The reason for requiring employers to know that an applicant qualifies for WOTC prior to the hiring decision is to make certain that employers fulfill the purpose of WOTC, to increase hiring in the targeted groups, including ex-felons. If employers were not required to make that determination prior to the hiring decision, WOTC would be an unwarranted windfall, a tax credit received for hiring someone that the employer did not know qualified for the credit.

As a result, WOTC provides that employers must make a determination that an applicant is described in one of the targeted groups and complete forms that are filed with and used by the state labor department to review that determination. In instances in which the state agency agrees with the employer's determination, a certificate is issued and the employer may claim the tax credit. In instances in which the state agency disagrees with the employer's determination, no certificate is issued and no tax credit can be claimed. As such, it is to the employer's advantage to hire WOTC eligible employees.

Pursuant to the WOTC, employers must request that applicants complete an IRS Form 8850 (copy attached) prior to hiring on which the applicant will specify under which category he or she qualifies. The ex-felon category is grouped together with six other categories on the Form, and as a result, applicants checking that box on the Form could be members of any of seven of the targeted groups. If Form 8850 was the only form that related to employers seeking to claim WOTC the language in Part 11 of the Proposed Rules (Employers seeking the Work Opportunity Credit) would be adequate; the employer does not know specifically whether the applicant is in the ex-felon category.

However, employers are also required to ask applicants to complete a US Department of Labor Form 9061, the Individual Characteristics Form – ICF – (copy attached), in order to obtain certification, and it is common to make that request together with the IRS Form 8850. The ICF is specific as to which category an applicant is described in and as such, this procedure would run afoul of the language in Part 11 of the Proposed Rules. We would point out that over whelming; both the 8850 and 9061 are filled out as part of an electronic job application which is reviewed by a third party. The employer is only informed electronically that the applicant is WOTC eligible, but not which category they are eligible in. This is because they could be certified in any one of a number of categories (SNAP, TANF, Veteran, ex-offender, etc). At that point in the process, employers are only interested in expanding the number of WOTC eligible applicants they are considering and not what category makes them eligible.

Since its enactment in 1996, NEON has worked with the Federal agencies that protect Americans against discrimination, most notably the Equal Employment Opportunity Commission (EEOC) and similar state agencies to make certain that WOTC and the procedures that must be followed to claim it are consistent with Federal and state non-discrimination laws.

In that regard, the EEOC on numerous occasions has confirmed in written guidance, some of which is attached, that completion of these forms prior to hiring is legal. In the case of Form 8850, the EEOC has ruled that: (1) the underlying statutes and rules with respect to the disability category and the category that requires an age disclosure are not violative of Federal law, including the Americans with Disabilities Act and the Age Discrimination in Employment Act; (2) none of the other WOTC categories relate to protected classes under Federal law; and (3) the purpose of WOTC is to encourage employers to hire the individuals in the targeted categories, not to put them at a disadvantage (in fact, to discriminate in their favor).

EEOC notes in its rulings that the Form 8850 is designed to lump a number of the targeted groups together and as such, employers do not know specifically which category an applicant is described in. With respect to the more specific DOL Form 9061, the EEOC does not find a violation of law because the information is asked pursuant to a Federal law or regulation which permits the question. (See for example the attached EEOC Guidance Letter dated April 29, 2004).

As the EEOC and the U.S. Department of Labor state in the various attachments, the Federal Law Defense is an established doctrine that permits employers to ask pre-employment questions where the question is "required or necessitated by another Federal law or regulation." (EEOC Guidance Letter Dated April 29, 2004 as attached). The EEOC and the US Department of Labor have also noted that while "[u]se of the IRS Form 8850 and the DOL Form 9061 does not expose employers to liability" under the non-discrimination laws, employers that use information gathered through these forms for the purpose of discriminating against individuals otherwise protected against discrimination would run afoul of the law.

As NEON has previously advised the Commission, other states and localities that have addressed the potential conflict between WOTC and so-called "ban the box" rules have adopted a far broader rule than the one in Part 11 of the Proposed Rules and that contains a single element that reflects the second element in Part 11, that the information being gathered is used only for the intended purposes of WOTC.

The Massachusetts guidance, which is attached, for example states that their commission on civil rights may "decline to authorize an investigation against a valid participant in the WOTC program" and that if such a participant is named in a ban-the box action, the employer should provide the Commission with the Form 8850 that was completed with respect to the job applicant. The State of Illinois adopted language stating that "[a]n inquiry made for the purpose of determining whether hiring an applicant will qualify an employer for a federal work opportunity tax credit pursuant to the Internal Revenue Code...will not constitute cause for further investigation of proceeding to an informal investigative conference."

Employment related inquiries in New York relative to WOTC are pursuant to Federal laws that authorize questions about certain applicant characteristics, including ex-felon status. And, notably, guidance issued by the US Department of Labor does not permit employers to exclude any WOTC category from the respective forms (See ETA Handbook No. 408, Chapter VII, Third Edition, and November 2002). As a result, rules that inhibit employer participation in WOTC in New York could harm potential job applicants in all of the targeted groups.

The goals of WOTC and the goals of the City of New York under the Fair Chance Act are the same, to encourage employers to hire members of certain targeted groups that are otherwise disadvantaged in the job markets, including ex-felons. NEON appreciates the efforts that have been made to this point in modifying the draft rules under the Fair Chance Act but urge the Commission to adopt as its WOTC related guidance a rule that reflects only the second part of the proposed rule in Part 11, exempting inquiries in which the information gathered is used solely for purposes of WOTC.

As the web page for the New York Department of Labor indicates, WOTC is an important hiring program in New York State that is responsible for the hiring of tens of thousands of individuals, including many veterans, each year who otherwise may never make the transition from a life of dependency on public assistance to the dignity of steady employment in the private sector.

We urge the Commission to adopt a rule that will strengthen, rather than discourage, WOTC in New York City including our shared goal of encouraging New York City employers to hire ex-felons.

Sincerely,

Carl Cohen
President, National Employment Opportunity Network

Form **8850**
(Rev. January 2013)
Department of the Treasury
Internal Revenue Service

Pre-Screening Notice and Certification Request for the Work Opportunity Credit

▶ Information about Form 8850 and its separate instructions is at *www.irs.gov/form8850.*

OMB No. 1545-1500

Job applicant: Fill in the lines below and check any boxes that apply. Complete only this side.

Your name _____ Social security number ▶ _____

Street address where you live _____

City or town, state, and ZIP code _____

County _____ Telephone number _____

If you are under age 40, enter your date of birth (month, day, year) _____

1 ☐ Check here if you received a conditional certification from the state workforce agency (SWA) or a participating local agency for the work opportunity credit.

2 ☐ Check here if **any** of the following statements apply to you.

- I am a member of a family that has received assistance from Temporary Assistance for Needy Families (TANF) for any 9 months during the past 18 months.
- I am a veteran and a member of a family that received Supplemental Nutrition Assistance Program (SNAP) benefits (food stamps) for at least a 3-month period during the past 15 months.
- I was referred here by a rehabilitation agency approved by the state, an employment network under the Ticket to Work program, or the Department of Veterans Affairs.
- I am at least age 18 but **not** age 40 or older and I am a member of a family that:
  - **a** Received SNAP benefits (food stamps) for the past 6 months, **or**
  - **b** Received SNAP benefits (food stamps) for at least 3 of the past 5 months, **but** is no longer eligible to receive them.
- During the past year, I was convicted of a felony or released from prison for a felony.
- I received supplemental security income (SSI) benefits for any month ending during the past 60 days.
- I am a veteran and I was unemployed for a period or periods totaling at least 4 weeks but less than 6 months during the past year.

3 ☐ Check here if you are a veteran and you were unemployed for a period or periods totaling at least 6 months during the past year.

4 ☐ Check here if you are a veteran entitled to compensation for a service-connected disability and you were discharged or released from active duty in the U.S. Armed Forces during the past year.

5 ☐ Check here if you are a veteran entitled to compensation for a service-connected disability and you were unemployed for a period or periods totaling at least 6 months during the past year.

6 ☐ Check here if you are a member of a family that:

- Received TANF payments for at least the past 18 months, **or**
- Received TANF payments for any 18 months beginning after August 5, 1997, **and** the earliest 18-month period beginning after August 5, 1997, ended during the past 2 years, **or**
- Stopped being eligible for TANF payments during the past 2 years because federal or state law limited the maximum time those payments could be made.

Signature—All Applicants Must Sign

Under penalties of perjury, I declare that I gave the above information to the employer on or before the day I was offered a job, and it is, to the best of my knowledge, true, correct, and complete.

Job applicant's signature ▶ **Date**

For Employer's Use Only

Employer's name _____ Telephone no. _____ EIN ▶ _____

Street address _____

City or town, state, and ZIP code _____

Person to contact, if different from above _____ Telephone no. _____

Street address _____

City or town, state, and ZIP code _____

If, based on the individual's age and home address, he or she is a member of group 4 or 6 (as described under Members of Targeted Groups in the separate instructions), enter that group number (4 or 6) . . . . . ▶ _____

Date applicant:

Gave information _____ Was offered job _____ Was hired _____ Started job _____

Under penalties of perjury, I declare that the applicant provided the information on this form on or before the day a job was offered to the applicant and that the information I have furnished is, to the best of my knowledge, true, correct, and complete. Based on the information the job applicant furnished on page 1, I believe the individual is a member of a targeted group. I hereby request a certification that the individual is a member of a targeted group.

Employer's signature ▶ **Title** **Date**

Privacy Act and Paperwork Reduction Act Notice

Section references are to the Internal Revenue Code.

Section 51(d)(13) permits a prospective employer to request the applicant to complete this form and give it to the prospective employer. The information will be used by the employer to complete the employer's federal tax return. Completion of this form is voluntary and may assist members of targeted groups in securing employment. Routine uses of this form include giving it to the state workforce agency (SWA), which will contact appropriate sources to confirm that the applicant is a member of a targeted group. This form may also be given to the Internal Revenue Service for administration of the Internal Revenue laws, to the Department of Justice for civil and criminal litigation, to the Department of Labor for oversight of the certifications performed by the SWA, and to cities, states, and the District of Columbia for use in administering their tax laws. We may also disclose this information to other countries under a tax treaty, to federal and state agencies to enforce federal nontax criminal laws, or to federal law enforcement and intelligence agencies to combat terrorism.

You are not required to provide the information requested on a form that is subject to the Paperwork Reduction Act unless the form displays a valid OMB control number. Books or records relating to a form or its instructions must be retained as long as their contents may become material in the administration of any Internal Revenue law. Generally, tax returns and return information are confidential, as required by section 6103.

The time needed to complete and file this form will vary depending on individual circumstances. The estimated average time is:

Recordkeeping . . 6 hr., 27 min.

Learning about the law or the form . . . . . 30 min.

Preparing and sending this form to the SWA . . . . . 37 min.

If you have comments concerning the accuracy of these time estimates or suggestions for making this form simpler, we would be happy to hear from you. You can write to the Internal Revenue Service, Tax Products Coordinating Committee, SE:W:CAR:MP:T:M:S, 1111 Constitution Ave. NW, IR-6526, Washington, DC 20224.

Do not send this form to this address. Instead, see *When and Where To File* in the separate instructions.

U.S. Department Labor
Employment and Training Administration

OMB No. 1205-0371
Expiration Date: August 31, 2018

Individual Characteristics Form (ICF)

Work Opportunity Tax Credit

1. Control No. (For Agency use only)	APPLICANT INFORMATION (See instructions on reverse)	2. Date Received (For Agency Use only)

EMPLOYER INFORMATION

3. Employer Name	4. Employer Address and Telephone	5. Employer Federal ID Number (EIN)

APPLICANT INFORMATION

6. Applicant Name (Last, First, MI)	7. Social Security Number	8. Have you worked for this employer before? Yes_____No _____ **If YES,** enter last date of employment:_____

APPLICANT CHARACTERISTICS FOR WOTC TARGET GROUP CERTIFICATION

9. Employment Start Date	10. Starting Wage	11. Position

12. Are you at least age 16, but under age 40? Yes____No ____
If YES, enter your *date of birth* _____

13. Are you a Veteran of the U.S. Armed Forces? Yes _ No ___
If NO, go to Box 14.
If YES, are you a member of a family that received Supplemental Nutrition Assistance Program (SNAP) benefits (Food Stamps) for at least 3 months during the 15 months before you were hired? Yes____No ____
If YES, enter name of *primary recipient* _____and *city and state* where benefits were received_____.
OR, are you a veteran entitled to compensation for a service-connected disability? Yes____No ____
If YES, were you discharged or released from active duty within a year before you were hired? Yes____No ____
OR, were you unemployed for a combined period of at least 6 months (whether or not consecutive) during the year before you were hired? Yes No

14. Are you a member of a family that received Supplemental Nutrition Assistance Program (SNAP) (formerly Food Stamps) benefits for the 6 months before you were hired? Yes____No _
OR, received SNAP benefits for at least a 3-month period within the last 5 months **But** you are no longer receiving them? Yes____No____
If YES to either question, enter name of *primary recipient*_____and *city and state* where benefits were received_____.

15. Were you referred to an employer by a Vocational Rehabilitation Agency approved by a State? Yes____No____
OR, by an Employment Network under the Ticket to Work Program? Yes____No____
OR, by the Department of Veterans Affairs? Yes____No____

16. Are you a member of a family that received TANF assistance for at least the last 18 months before you were hired? Yes_ No _
OR, are you a member of a family that received TANF benefits for **any** 18 months beginning after August 5, 1997, and the earliest 18-month period beginning after August 5, 1997, ended within 2 years before you were hired? Yes___No___
OR, did your family stop being eligible for TANF assistance within 2 years before you were hired because a Federal or state law limited the maximum time those payments could be made? Yes___No___
If NO, are you a member of a family that received TANF assistance for any 9 months during the 18-month period before you were hired? Yes_ No___
If YES, to any question, enter name of *primary recipient*_____and the *city and state* where benefits were received_____.

17. Were you convicted of a felony or released from prison after a felony conviction during the year before you were hired? Yes _No___
If YES, enter *date of conviction*_____and *date of release*_____.
Was this a Federal_____or a State conviction_____? (Check one)

18. Do you live in a Rural Renewal County or Empowerment Zone? Yes__ No __

19. Do you live in an Empowerment Zone and are at least age 16, but not yet 18, on your hiring date? Yes __No ___

20. Did you receive Supplemental Security Income (SSI) benefits for any month ending within 60 days before you were hired? Yes No__

21. Are you a veteran unemployed for a combined period of at least 6 months (whether or not consecutive) during the year before you were hired? Yes No__

22. Are you a veteran unemployed for a combined period of at least 4 weeks but less than 6 months (whether or not consecutive) during the year before you were hired? Yes No__

23. **Sources used to document eligibility:** (**Employers/Consultants:** List all documentation provided or forthcoming. **SWAs:** List all documentation used in determining target group eligibility and enter your initials and date when the determination was made.)

I certify that this information is true and correct to the best of my knowledge. I understand that the information above may be subject to verification.

24(a). Signature: (See instructions in Box 24.(b) for who signs this signature block)	**24. (b) Signatory Options:** Indicate with a ✓ mark who signed this form: ☐ Employer, ☐ Consultant, ☐ SWA, ☐ Participating Agency, ☐ Applicant, or ☐ Parent/Guardian (if applicant is a minor)	**25. Date:**

INSTRUCTIONS FOR COMPLETING THE INDIVIDUAL CHARACTERISTICS FORM (ICF), ETA 9061. This form is used together with IRS Form 8850 to help state workforce agencies (SWAs) determine eligibility for the Work Opportunity Tax Credit (WOTC) Program. The form may be completed, on behalf of the applicant, by: 1) the employer or employer representative, the SWA, a participating agency, or 2) the applicant directly (if a minor, the parent or guardian must sign the form) and signed (Box 24a.) by the individual completing the form. This form is required to be used, without modification, by all employers (or their representatives) seeking WOTC certification. Every certification request must include an IRS Form 8850 and an ETA Form 9061 or 9062, if a Conditional Certification was issued to the individual pre-certifying the new hire as "eligible" under the requested target group.

Boxes 1 and 2. **SWA.** For agency use only.

Boxes 3-5. **Employer Information.** Enter the name, address including ZIP code, telephone number, and employer Federal ID number (EIN) of the employer requesting the certification for the WOTC. Do not enter information pertaining to the employer's representative, if any.

Boxes 6-11. **Applicant Information.** Enter the applicant's name and social security number as they appear on the applicant's social security card. In Box 8, indicate whether the applicant previously worked for the employer, and if Yes, enter the last date or approximate last date of employment. This information will help the "48-hour" reviewer to, early in the verification process, eliminate requests for former employees and to issue denials to these type of requests, or certifications in the case of "qualifying rehires" during valid "breaks in employment" (see pages III-12 and III-13, Nov. 2002, Third Ed., ETA Handbook 408) during the first year of employment.

Boxes 12-22. **Applicant Characteristics.** Read questions carefully, answer each question, and provide additional information where requested.

On January 2, 2013, President Obama signed into law *the American Taxpayer Relief Act of 2012* retroactively authorizing the Empowerment Zones (EZs) and WOTC non-veteran groups from December 31, 2011 through December 31, 2013. This Act also authorized continuation of the VOW Act of 2011 expanded veterans and provisions through December 31, 2013. **Form Updates.** "Empowerment Zones" was added to Box 18 to capture data for Designated Community Residents who must reside in a Rural Renewal County or EZ to be determined eligible for WOTC certification. A new Box 19 was added to this form to capture information on the Summer Youth group activated when the EZs were reauthorized. Members of the Summer Youth group must reside in an EZ to be determined eligible for WOTC certification. Boxes 19-21 were renumbered and are now Boxes 20 - 22. Box 22 below became Box 23, Sources to Document Eligibility.

Box 23 **Sources to Document Eligibility.** The applicant or employer is requested to provide documentary evidence to substantiate the **YES answers** in Boxes 12 through 22. List or describe the documentary evidence that is attached to the ICF or that will be provided to the SWA. Indicate in parentheses next to each document listed whether it is attached (A) or forthcoming (F). Some examples of acceptable documentary evidence are provided below. A letter from the agency that administers a relevant program may be furnished specifically addressing the question to which the applicant answered YES. For example, if an applicant answers YES to either question in Box 14 and enters the name of the primary recipient and the city and state in which the benefits were received, the applicant could provide a letter from the appropriate SNAP (formerly Food Stamp) agency stating to whom SNAP benefits were paid, the months for which they were paid, and the names of the individuals included on the grant for each month. SWAs will use this box to document the sources used when verifying target group eligibility, followed by their initials and the date the determination was completed.

Examples of Documentary Evidence and Collateral Contacts. Employers/Consultants: You may check with your SWA to find out what other sources you can use to prove target group eligibility. (You are encouraged to provide copies of documentation or names of collateral contacts for each question for which you answered **YES.**)

QUESTION 12[2]

- Birth Certificate
- Driver's License
- School I.D. Card[1]
- Work Permit[1]
- Federal/State/Local Gov't I.D.[1]
- Copy of Hospital Record of Birth

QUESTION 13

- DD-214 or Discharge Papers
- Reserve Unit Contacts or Letters of Separation
- Letter issued only by the Department of Veterans Affairs (VA) on VA Letterhead or bearing the Agency Stamp, with signature, certifying Veteran status or that the Veteran has a service-connected disability.

QUESTIONS 14 & 16

- TANF/SNAP (Food Stamp) Benefit History
- Signed statement from Authorized Individual with a specific description of the months benefits that were received
- Case number identifier

QUESTION 15

- Vocational Rehabilitation Agency Contact
- Veterans Administration for Disabled Veterans
- Signed Letter of Separation or related document from authorized Individual on DVA letterhead or agency stamp with specific description of months benefits were received.
- **For SWAs:** To determine *Ticket Holder* (TH) eligibility, Fax page 1 of Form 8850 to MAXIMUS at: 703-683-1051 to verify if applicant: 1) is a TH, and 2) has an Individual Work Plan from an Employment Network.

QUESTION 17

- Parole Officer's Name or Statement
- Correction Institution Records
- Court Records Extracts

QUESTIONS 18 & 19

- To determine if a Designated Community Resident (DCR) lives in a Rural Renewal County, visit the site: www.usps.com. **Click on** *Find Zip Code*; **Enter & Submit** *Address/Zip Code*; **Click on** *Mailing Industry Information;* **Download and Print the Information,** then compare the county of the address to the list in the Instructions to IRS Form 8850.
- To determine if the DCR or a Summer Youth lives in an Empowerment Zone, check the Instructions to IRS Form 8850, or visit the U.S. Department of Housing and Urban Development's "locator" at: http://egis.hud.gov/ezrclocator/.

QUESTION 20

- SSI Record or Authorization
- SSI Contact
- Evidence of SSI Benefits

QUESTIONS 21 & 22

- Unemployment Insurance (UI) Claims Records
- UI Wage Records

Box 24(a). **Signature.** The person who completes the form signs the signature block.

Box 24(b). **Signatory Options.** Qualified individuals/entities which can sign the form instead of the applicant: (a) Employer, (b) Consultant, (c) SWA staff, (d) Participating Agency staff, (e) Applicant, or (f) Parent or guardian (If applicant is a minor, the parent or guardian must sign).

Box 25. **Date.** Enter the month, day and year when the form was completed.

(Cut along dotted line and keep in your files)

TO: THE JOB APPLICANT OR EMPLOYEE,

Privacy Act Statement: *The Internal Revenue Code of 1986, Section 51, as amended and its enacting legislation, P.L. 104-188, specify that the State Workforce Agencies are the "designated" agencies responsible for administering the WOTC certification procedures of this program. The information you have provided completing this form will be disclosed by your employer to the State Workforce Agency. Provision of this information is voluntary. However, the information is required for your employer to receive the federal tax credit. IF THE INFORMATION YOU PROVIDE IS ABOUT A MEMBER OF YOUR FAMILY, YOU SHOULD PROVIDE HIM/HER A COPY OF THIS NOTICE.*

---

1. Where a Federal/State/Local Gov't., School I.D. Card, or Work Permit does not contain age or birth date, another valid document must be obtained to verify an individual's age.

2. ESPL No. 05-98, dated 3/18/98, officially rescinded the authority to use Form I-9 as proof of age and residence. ***Therefore, the I-9 is not a valid piece of documentary evidence since May 1998.***

The U.S. Equal Employment Opportunity Commission

EEOC Office of Legal Counsel staff members wrote the following informal discussion letter in response to an inquiry from a member of the public. This letter is intended to provide an informal discussion of the noted issue and does not constitute an official opinion of the Commission.

ADA: TITLE VII: ADEA: WORK OPPORTUNITY TAX CREDIT

APRIL 29, 2004

Re: Federal Work Opportunity Tax Credit

This is in response to your request for information concerning the relationship between the federal equal employment opportunity (EEO) laws and the federal Work Opportunity Tax Credit (WOTC) program. You requested information for employers who may be concerned that completing the required WOTC forms will expose them to liability under the EEO laws. Asking the questions as required on the Internal Revenue Service (IRS) Form 8850 and the Department of Labor (DOL) Form 9061 will not expose employers to liability under the EEO laws. This letter explains the rationale for that conclusion.

Background

To qualify for the Work Opportunity Tax Credit, an employer must obtain information confirming that a job applicant is a member of a WOTC-targeted group before making an offer of employment. *See* 26 U.S.C. § 51(d)(12). The targeted groups under the WOTC have some overlap with groups protected by the federal EEO laws. For example, certain people with disabilities who are targeted by the WOTC also may be protected from employment discrimination by the Americans with Disabilities Act. Employers have asked whether the questions required by the WOTC program may be prohibited by the EEO laws, especially the Americans with Disabilities Act.

The Americans with Disabilities Act

Under Title I of the Americans with Disabilities Act (ADA), employers are barred from making pre-offer disability-related inquiries. 29 U.S.C. § 12112(d)(2)(A). As the EEOC has explained in its *ADA Enforcement Guidance: Pre-Employment Disability-Related Questions and Medical Examinations*, a disability-related inquiry is a question that is "*likely to elicit* information about a disability." *Enforcement Guidance* at 4 (emphasis in original). The *Guidance* further states, however, that "if there are many possible answers to a question and only some of those answers would contain disability-related information, that question is not 'disability-related.'" *Id.* Available at www.eeoc.gov.

IRS Form 8850 and DOL Form 9061

The IRS Form 8850 is structured to ask a broadly-framed question to job applicants about whether they are members of the WOTC-targeted groups. As written, the Form 8850 asks generally if the applicant is a member of *any* targeted group, one of which is "vocational rehabilitation referral." A "yes" or "no" answer to this general question does not indicate to which of the groups the applicant belongs. Thus, if asked exactly as posed on the Form 8850, this inquiry is not a "disability-related inquiry" for purposes of the ADA and therefore is not prohibited by the ADA before an offer of employment.

The DOL 9061 form also does not violate the ADA, but the reason is more complicated. Although the rehabilitation services inquiry on Form 9061 is considered a "disability-related inquiry" under the ADA, it is required by another federal law and therefore would not violate the ADA.

DOL's Form 9061 includes separate questions about the job applicant's membership in each of the WOTC-targeted groups. One of these questions asks whether the applicant "is receiving or has received Rehabilitation Services through a State Rehabilitation Services program or the Veterans Administration." Applicants must respond "yes" if this is the basis for their WOTC status. Under the ADA, this specific question is likely to elicit information about disability and therefore is considered a "disability-related inquiry" that would be prohibited by the ADA for job applicants.

However, for purposes of the WOTC, employers are protected from liability if they ask this question to job applicants. The EEOC's ADA regulation states, in pertinent part, that "[i]t may be a defense to a charge of discrimination under this part that a challenged action is required or necessitated by another Federal law or regulation, ..." 29 C.F.R. § 1630.15(e). In its 1992 *Technical Assistance Manual on the Employment Provisions of the Americans with Disabilities Act*, the EEOC stated that predecessor statutes to the WOTC, which DOL administered, necessitated pre-offer disability-related inquiries about job applicant eligibility status and that "[t]hese inquiries would not violate the ADA." *Technical Assistance Manual* at V-9. Because the WOTC is the same as the predecessor statutes with regard to such inquiries, and because DOL has determined that employers should determine into which of the eligibility categories each applicant fits before extending a job offer, use of the DOL Form 9061 for job applicants does not violate the ADA. This ADA defense also would be available to an employer using a non-Federal form that posed the same rehabilitation services inquiry as the Form 9061 for the purpose of determining applicant eligibility for the WOTC.

Recognition that the rehabilitation services inquiry on DOL Form 9061 or a similar private sector form falls within the other Federal laws defense does not, however, extend ADA protection to employers who misuse the information that these forms provide. An employer using a form that includes, among other things, a rehabilitation services inquiry must understand that it may be obtaining disability-related information along with the WOTC information. Such information may not be used in a manner that is adverse to the applicant.

Age Discrimination and Title VII

Use of the IRS Form 8850 and the DOL Form 9061 does not expose employers to liability under other EEO laws. The requests on Form 8850 and Form 9061 for the birth date of an individual under the age of 25, does not violate the Age Discrimination in Employment Act (ADEA), 29 U.S.C. § 621, et seq. The ADEA regulation includes a specific exemption from "all prohibitions of the Act" for programs "carried out by the public employment services of the several States, designed exclusively . . . to encourage the employment of [various groups including] youth." 29 C.F.R. § 1627.16.

In addition, the use of Form 8850 and Form 9061 does not put the employer in the position of violating Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, et seq. Title VII does not expressly prohibit pre-employment inquiries which disclose an applicant's race, color or national origin. In any event, Form 8850 and Form 9061 do not ask whether an individual belongs to a particular Title VII protected group.

We hope this information is helpful to you. Please note that this is not an official opinion of the Equal Employment Opportunity Commission. If you have any questions or would like to discuss this or any related matter in more detail, you may telephone _____, Assistant Legal Counsel at _____.

Sincerely,

Peggy R. Mastroianni

Associate Legal Counsel

MCAD Fact Sheet
Criminal Offender Record Information Administrative Procedure Reforms

November 2010

On August 6, 2010, Governor Deval Patrick signed into law Chapter 256 of the Acts of 2010, "An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release" ("CORI Reform"). Effective November 4, 2010, the Act prevents employers from seeking disclosure of job applicants' criminal record information prior to the interview stage of the hiring process.[1] This law is subject to two limited exceptions discussed below. The law, codified at G.L. c. 151B, § 4(9½) (www.malegislature.gov/Laws/SessionLaws/Acts/2010/Chapter256), is enforced by the Massachusetts Commission Against Discrimination (MCAD).

In addition to this new subsection, the MCAD will continue to retain enforcement authority over the existing Massachusetts Criminal Records Statute, G.L. c. 151B, § 4(9), which prohibits employers from asking prospective or current employees to furnish certain criminal information on a written application or in response to an oral inquiry. Moreover, Section 4(9) prohibits an employer from taking an adverse employment action against an applicant or employee because of criminal history information the employer obtained unlawfully (www.malegislature.gov/Laws/GeneralLaws/PartI/TitleXXI/Chapter151B/Section4).

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Under the newly revised criminal offender record laws, an employer may not:

Prior to the interview, ask a job applicant to provide any information about his/her criminal history on a written application unless the employer or the position falls within a statutory exception. G.L. c. 151B, § 4(9½).

Prior to the interview, ask an applicant whether he or she has been convicted of a felony or a misdemeanor on a written application, unless the employer or the position falls within a statutory exception. G.L. c. 151B, § 4(9½).[2]

Ask an applicant to obtain a copy of his or her CORI record for the employer. G.L. c. 6, § 172;[3]

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[1] This Fact Sheet applies only to those sections of the CORI Reform law that go into effect on November 4, 2010 and are enforced by the MCAD.

[2] This is a departure from existing law that allowed an employer to ask about felony and certain misdemeanor convictions.

Ask an applicant or current employee, in writing or orally, about a prior arrest, detention, or disposition that did not result in a conviction. G.L. c. 151B, § 4(9);

Ask an applicant or current employee, in writing or orally, about a prior first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace. G.L. c. 151B, § 4(9);

Ask an applicant or current employee, in writing or orally, about a conviction of a misdemeanor where the date of the conviction predates the inquiry by more than 5 years. G.L. c. 151B, § 4(9);

Ask an applicant or current employee, in writing or orally, about sealed records or juvenile offenses.[4]

Frequently Asked Questions

Q1. ***What employers are affected by the CORI laws?***

A1. Employers who employ six or more persons are subject to the provisions of G.L. c. 151B. Public employers are included regardless of the number of people employed.

Q2. ***Does this law apply to temporary employment agencies?***

A2. If the employer and the temporary employment agency are found to be "joint employers," the temporary employment agency as well as the employer are subject to the provisions of G.L. c. 151B, §§ 4(9), (9½). See Burlamachi v. Dupont Merck, 22 MDLR 35, 39 (2000), aff'd, 24 MDLR 9 (2002); Angela Stanley v. The Gillette Co., 2 MDLR 1203 (1980).

Q3. ***When an employer uses workers placed by a temporary agency, who are later converted to regular full-time positions with the employer, will an employment application provided by the employer upon the conversion to regular full-time status be considered an "initial" written application?***

A3. The temporary employee is "applying" for permanent placement with the employer. Therefore, all written applications for that employment must be in compliance with G.L. c. 151B, §§ 4(9), 4(9½).

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[3] This law is enforced by the Criminal History Systems Board (CHSB), which could sanction employers for any violations. G.L. c. 6, §168. However, a violation of G.L. c. 6, §168, could be used as evidence in a case involving a violation of G.L. c. 151B, §§4(9) or (9 ½).

[4] MCAD and Hanson v. Mass. Dep't of Social Services, 28 MDLR 42, 43 (2006) (Full Commission decision affirming that juvenile offenses fall within the scope of G.L. c. 151B, § 4(9)).

Q4. ***Are the prohibitions set forth in G.L. c. 151B, §§ 4(9) and 4(9½) applicable to in-state employers only?***

A4. Any employer that does business in Massachusetts and takes applications in Massachusetts is subject to G.L. c. 151B, §§ 4(9), 4(9½). The Commission will consider other scenarios on a case-by-case basis.

Q5. ***Can a national or international employer use a standard application with a disclaimer for Massachusetts applicants?***

A5. National and international employers may use standard application forms if the form contains explicit instructions that the employer is prohibited from obtaining criminal history information from the employee (unless one of the exceptions set forth in G.L. c. 151B, § 4(9½) applies) and the employer properly disclaims. The employer's disclaimer must be clear and unambiguous, in boldface type and placed and printed to attract the reader's attention. For example:

MASSACHUSETTS APPLICANTS ONLY:
Under Massachusetts law, an employer is prohibited from making written, pre-employment inquiries of an applicant about his or her criminal history. MASSACHUSETTS APPLICANTS SHOULD NOT RESPOND TO ANY OF THE QUESTIONS SEEKING CRIMINAL RECORD INFORMATION.

Q6. ***May an employer inquire orally about the applicant's criminal history during the interview?***

A6. This depends on the specific information the employer seeks from the applicant. G.L. c. 151B, § 4(9½) prohibits employers from seeking criminal history information by written application, and therefore does not apply. G.L. c. 151B, § 4(9), however, restricts employers from making certain written and oral inquiries directly to an applicant or employee. Specifically, G.L. c. 151B, § 4(9) prohibits employers from asking orally or in writing about:

An arrest that did not result in a conviction;
A criminal detention or disposition that did not result in a conviction;
A first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
A conviction for a misdemeanor where the date of the conviction predates the inquiry by more than 5 years; and
Sealed records and juvenile offenses.

During an interview or thereafter, an employer can ask about convictions so long as *the employer does not ask about any offenses set forth in G.L. c. 151B, § 4(9).* (See above).

Q7. ***Are any employers excepted from compliance with G.L. c. 151B, § 4(9½)?***

A7. There are two exceptions to the blanket prohibition against asking an applicant or employee for criminal history information on a written application. An employer may ask about criminal convictions if:

1. The applicant is applying for a position where federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses, or
2. The employer or an affiliate is subject by federal or state law or regulation not to employ persons in 1 or more positions who have been convicted of 1 or more types of criminal offenses.

A "regulation" will only create a mandatory or presumptive disqualification if it was promulgated in accordance with G.L. c. 30A, for state regulations, and 5 U.S.C. §§ 551 et seq., for federal regulations. The Commission considers an employer to be mandatorily disqualified if a properly promulgated statute or regulation specifically bars the employer from hiring an applicant with a particular criminal conviction. For example, if a properly promulgated regulation specifically prohibits an employer from hiring an employee convicted of a felony, the employer falls into the first exception, and may make a pre-interview inquiry in writing about a felony conviction. By way of further example, the Executive Offices of Health and Human Services' ("EOHHS") CORI regulations, 101 CMR 15.00 et seq., do not create mandatory or presumptive disqualifications. While the EOHHS Secretary or agency Commissioner or their designees have five days to disapprove a hiring authority's decision to hire a candidate who has been convicted of or has any pending Table A crimes, there is no mandatory or presumptive disqualification. See 101 CMR 15.09(3)(a).

The second exception would apply, for example, to banks, their parents and subsidiaries, which are required by federal law to make inquiries about whether a job applicant has been convicted of a crime that involves dishonesty, breach of trust or money laundering. 12 U.S.C. §1829. Covered institutions are exempted from G.L. c. 151B, § 4(9½) for inquiring about these types of criminal offenses.

The MCAD will assess each fact pattern on a case-by-case basis. It is advisable to seek legal counsel as to whether a specific employer falls into one of the two exceptions, or to contact the applicable governmental entity that enforces the statute or regulation.

Q8. ***What kinds of pre-employment forms fall within the scope of G.L. c. 151B, § 4(9½)?***

A8. Consistent with the legislative intent behind CORI Reform[5], the MCAD will presume that a written application or form requesting criminal background information prior to an interview is part of the "initial written application."

[5] In promulgating this law, the Massachusetts Legislature intended to give prospective employees the opportunity to meet employers before disclosing their criminal histories, thereby reducing barriers to employment applicants with a criminal history face. See Summary of Conference Committee Final Report, S. 220 and H. 4712 (July 30, 2010).

Q9. ***How does the new law, G.L. c. 151B, § 4(9½), affect an applicant with disability whose disability renders him or her unable to complete a written application?***

A9. Where an applicant self-identifies as disabled and seeks a modification to the application process such that the application will be completed orally rather than in writing, employers should refrain from seeking criminal background information until the time of the interview. Unless the employer falls into one of the two statutory exceptions, the MCAD will consider any inquiry (including an oral one) prior to the interview that seeks prohibited criminal record information in the modified or adjusted application process to be in violation of G.L. c. 151B, § 4(9½) and/or G.L. c. 151B, § 4(16).

Q10. ***Will the Commission consider cases based on the theory that consideration of criminal records disparately impacts a particular protected class?***

A10. In appropriate cases, the Commission may review whether the use and consideration of criminal records as a criterion for hiring has a discriminatory impact on a particular protected class.

Q11. ***How do G.L. c. 151B, §§ 4(9) and 4(9½) affect employers who participate in the Work Opportunity Tax Credit (WOTC) program?***

A11. In appropriate cases, the MCAD may decline to authorize an investigation against a valid participant of the WOTC program. If an employer is a participant in the WOTC program and is named in a criminal offender records claim, the employer should provide the MCAD with a copy of the employer's IRS Form 8850 ("Pre-Screening Notice and Certification Requirement for the Work Opportunity Credit").

Migdail, Evan

From: Waters, John M. <John.M.Waters@Illinois.gov>
Sent: Tuesday, May 12, 2015 2:00 PM
To: Migdail, Evan
Subject: RE: Ban The Box

ILLINOIS

They're still in the rule making process:

Section 340.200 Filing of a Complaint and Service

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c) Complaints shall be reviewed by the Department to determine whether there is cause for investigation. An inquiry made for the purpose of determining whether hiring an applicant will qualify an employer for a federal work opportunity tax credit pursuant to the Internal Revenue Code, or an inquiry made by a governmental entity for the purpose of assisting an individual in identifying and overcoming a potential barrier to employment, will not constitute cause for further investigation or proceeding to an informal investigative conference.

****

From: Migdail, Evan [mailto:Evan.Migdail@dlapiper.com]
Sent: Tuesday, May 05, 2015 8:29 AM
To: Waters, John M.
Subject: RE: Ban The Box

John –

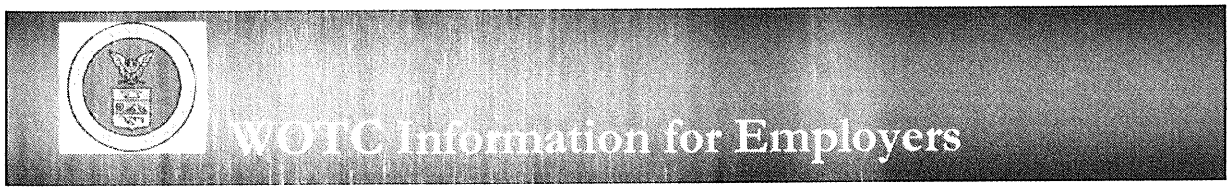
I have has a great many inquiries from my WOTC user companies as to whether Illinois is going to issue any guidance on how the State's new ban-the-box law interacts with WOTC. We spoke about this some months ago – are there any developments I can report back to my clients? Thank you.

From: Waters, John M. [mailto:John.M.Waters@Illinois.gov]
Sent: Tuesday, January 20, 2015 6:26 PM
To: Migdail, Evan
Subject: RE: Ban The Box

Thank you for your email Mr. Waters,

We agree with the position that the Work Opportunity Tax Credit (WOTC) initiative is not in conflict with the recent Ban the Box (BTB) legislation passed in Chicago.

Both the intent of BTB and the WOTC run parallel in their goal of encouraging the employment of individuals with significant barriers to securing employment. While BTB legislation focuses on helping individuals with a criminal history find employment, the WOTC target applicant group for which an employer can receive tax credit is much wider, extending beyond convicted felons to include veterans and recipients of government aid. It is important to note that not all applicants with a criminal history will allow the employer to take advantage of the WOTC since the tax credit is



FREQUENTLY ASKED QUESTIONS (FAQs)

I. Screening Job Applicants and New Hires

As an employer, we do not want to be perceived as discriminating by offering jobs to people based on whether they receive welfare or not. Is it allowable to screen individuals? Some job seekers are concerned about having to answer the personal questions on the Individual Characteristics Form. How can we be assured that we can ask these questions during an interview, and remain EEOC compliant?

The U.S. Equal Employment Opportunity Commission (EEOC) has issued letters from 1996 through 2010 with specific language that explains how all WOTC participating employers have a "Federal laws defense." This means they are protected from EEOC violations when making the inquiries necessary to hire members of the targeted groups under the WOTC program. However, they may not use the information gained for purposes other than the WOTC application.

The EEOC letters issued have asserted that the WOTC program offers members of the target groups certain benefits – namely, employment opportunity and work experience to develop job skills. Further, the EEOC has determined that the inquiries needed to ascertain each new hire's individual characteristics do not pertain to any of the protected groups, so employers are not violating equal opportunity standards or laws. For example, employers are asking about vocational rehabilitation services, but not whether applicants have disabilities, when they are obtaining information on the Individual Characteristics Form (ICF).

Additionally, the information is being secured for federally-approved forms for WOTC program use only. The only way an employer can request a certification to qualify for the tax credit to which they are entitled is by using those forms. Therefore, any employer participating in the WOTC program is protected under EEOC regulations and provisions against any discriminatory claims or lawsuits for asking the Congressionally-mandated questions on WOTC screening and application forms. Searchable EEOC Informal Discussion Letters are indexed here: http://www.eeoc.gov/eeoc/foia/letters/index.cfm.

Can states mandate that a date of birth be submitted for every new hire in their online application systems? This would mean requiring employers to ask for each new hire's date of birth, and include it on each electronic application submitted.

No, the date of birth (DOB) is only required for those target groups whose statutory definitions mandate a specific age range (age 18 – 39) to meet eligibility. Those target groups are: 1) Summer Youth, 2) Supplemental Nutrition Assistance Program (SNAP) Recipient, and 3) Designated Community Residents (DCRs). Per IRS Announcement 96-116, the DOB field on the IRS Form 8850 is only required to be filled in and submitted to the state workforce agency (SWA) if the new hire is under the age of 40.

The U.S. Equal Employment Opportunity Commission (EEOC) has weighed in to support the IRS Form 8850 being used during the hiring process, due to this limitation of capturing birth dates only when the individual is under age 40, as this age is not a protected group. Collecting the data only when the individual is under age 40 ensures employers remain in EEOC compliance. To determine their age, an employer may first ask, if the new hire is under the age of 40. If eligible for an age-specific category, and if the new hire answers "yes" to the "under 40 question," then an employer may capture an applicant's date of birth on the application form. Otherwise, employers should not ask for the DOB, just as they would not inquire about other personal information. For more information, see http://www.eeoc.gov/eeoc/foia/letters/2010/ada-titlevii-adea_work_tax_irs_eta_form.html.

In addition, the Government Paperwork Elimination Act, October 21, 1998, issued by OMB regulates government agency business with automated systems. The OMB directive regarding the implementation of electronic signatures contained in the article entitled, "Implementation of the Government Paperwork Elimination Act," sets forth that, when submitting a form with an electronic signature, agencies cannot require more information be submitted than is collected on the form. Therefore, states should ensure that their automated application systems are programmed to not require the DOB for any target groups other than the three requiring age verification.

II. Determining Characteristics of Qualifying New Hires

In looking at where our new hires reside, how can we find out which geographic areas fall into an Empowerment Zone? Where are these zones located?

Addresses can be searched to see whether or not they fall within an EZ using the U.S. Department of Housing and Urban Development's (HUDs) online tool called the EZ/RC Address Locator at http://egis.hud.gov/ezrclocator/. If users require assistance in using the EZ/RC Address Locator mapping tool, then they can send requests via email to EGIS@hud.gov. For more information, please refer to the U.S. Housing and Urban Development's (HUDs) Frequently Asked Questions on the EZ program at http://portal.hud.gov/hudportal/documents/huddoc?id=19170_taxincentivesqa.pdf.

What is the definition of "member of a family receiving assistance" in the TANF program? How do you define "family" for determining a veteran's eligibility as a

member of a family receiving SNAP, or for determining eligibility for a SNAP recipient?

Definitions of "family" and "family members" of food stamp recipients depend on the definitions used in each of these programs. In the Supplemental Nutrition Assistance Program (SNAP), food stamp eligibility is based on the household concept. Benefits are issued to a household, which could be, but is not necessarily the same as, a family unit. States have considerable discretion in definitions used for the Temporary Assistance for Needy Families program. For WOTC purposes, the term "family" is operationalized by state social services agencies as being the same as the "benefit household."

For clarification of the definitions applicable in your state, please contact the social services agency administering the programs, and rely on their authority for verification assistance. For the current SNAP and TANF categories, that agency can provide data to show which family members are defined as the designated "benefit family." The agency's records will identify the family unit, its members with benefit eligibility, and those receiving benefits. If the new hire is a member of this benefit family, then this suffices for WOTC eligibility.

Can relatives or part owners qualify for WOTC? How do you define "relative" for the purpose of determining a qualifying new hire?

The hiring of certain individuals does not qualify the employer for the WOTC. Among those non-qualifying employees are relatives and majority owners of the business. The Internal Revenue Service (IRS) has strict rules on nepotism. No WOTC tax credit can be claimed for wages paid to relatives employed by a taxpayer-employer.

"Relative" is defined in terms of specifying the nature of the relationship and determining the principle household the relative resided in for the tax year. Per the Internal Revenue Code at 26 U.S. Code §152, a "relative" for tax credit purposes is an individual who bears one of the following types of relationship to the employer:

- A child or a descendant of a child,
- A brother, sister, stepbrother, or stepsister,
- The father or mother, or an ancestor of either,
- A stepfather or stepmother,
- A son or daughter of a brother or sister of the taxpayer,
- A brother or sister of the father or mother of the taxpayer, or
- A son-in-law, daughter-in-law, father-in-law, mother-in-law, brother-in-law, or sister-in-law.

Also excluded is an employee who is a dependent of the employer, who lives in his/her home, and is a member of the employer's household. So, a qualified relative might also be considered an individual (other than a spouse) who has the same principal place of abode as the taxpayer, and counts as a member of the taxpayer's household.

A new hire's wages are also not qualifying for the tax credit, if the employee bears any of the relationships described above, or is an individual who owns, directly or indirectly, more than 50 percent of the value of the outstanding stock of the corporation employing him or her, or is an individual who owns, directly or indirectly, more than 50 percent of the capital and profits interests in the business.

Also, in terms of more distant relatives, the intent of the WOTC legislation was to help individuals with significant barriers to employment obtain work. If a distant relative could have been employed through their connections with the employer without the incentive of the tax credit, as the public might perceive, then taking advantage of the tax credit could be viewed as not meeting the intent of the law, and could be perceived as unethical at a minimum.

NEW YORK CITY BAR

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March 21, 2016

Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights
P.O. Box 2023
New York, NY 10272

Dear Ms. Sussman:

The Civil Rights Committee of the New York City Bar Association submits this comment in response to the New York City Commission on Human Rights' Notice of Public Hearing and Opportunity to Comment on Proposed Rules amending title 47 of the Rules of the City of New York. We write to urge the Commission to adopt the proposed rules, which will provide important guidance for employers and implementation mechanisms for Local Law No. 63 of 2015, the Fair Chance Act ("FCA"). The Bar supports the Commission's efforts to clarify the law by issuing substantive regulations. These proposed regulations will improve the implementation of the FCA and clarify ambiguities in the statute.

The New York City Bar Association is among the nation's oldest and largest bar associations. Through its more than 160 committees, the Association promotes reforms in the law and seeks to improve the administration of justice. The Civil Rights Committee is directly concerned with how communities of color are disparately impacted by the criminal justice system, including by the use of histories of convictions as a barrier to employment.

The Civil Rights Committee of the New York City Bar Association supported the FCA as an important step towards eliminating barriers to employment of the formerly incarcerated, which harm minority communities, individuals returning home and their families, and the city as a whole. Criminal record checks in the employment process have a disparate impact on people of color. Studies and data consistently demonstrate that African Americans and Latinos are more likely to be arrested, convicted, and sentenced than whites.[1] African American ex-offenders also pay a

[1] "Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System," The Sentencing Project, (August 2013, p.3), *available at* http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf.

significantly higher penalty for having a criminal record in comparison to otherwise similar whites[2]; and the Bureau of Labor Statistics finds that overall unemployment among African Americans has consistently been twice that of white workers.[3] Moreover, it is well established that employment substantially reduces the rate of recidivism.[4] Thus, the employment of the formerly incarcerated also benefits society at large.

The FCA prohibits employers from inquiring into applicants' criminal histories until later in the hiring process where such information would be less likely to lead to unlawful discrimination. The statute also mandates an enhanced process when an employer acts on the negative results of a criminal background check. The proposed rules will facilitate implementation of the FCA by providing clear definitions and procedures for employers, as well as mechanisms for swiftly resolving violations regarding unlawful discrimination on the basis of criminal history against job applicants and monetary penalties for such violations.

The proposed rules clarify several provisions of the FCA, including when employers are subject to the procedures of the FCA and what type of questions and statements relating to criminal history that are prohibited under the FCA. The rules also establish clear guidelines that employers must follow to comply with the FCA, describe *per se* violations of the rules, and create a discretionary mechanism for the New York City Commission on Human Rights ("the Commission") to respond to *per se* violations with an expedited resolution process and monetary penalties.

These rules will encourage voluntary compliance with the FCA by providing clear guidance to employers. The proposed rules delineate the steps and procedures that an employer must follow in its hiring practices to comply with the FCA. The proposed regulations §§ 204(1)-(7) give detailed guidance for an employer on how to comply with the FCA. These regulations give clear instructions on what an employer can and cannot do regarding making inquiries about and acting on criminal histories. These regulations will help employers—especially small employers who cannot afford legal and technical assistance—voluntarily comply with the FCA.

However, the Civil Rights Committee also supports the recommendations made by the Coalition of Reentry Advocates ("CoRA")[5] that the rules clarify that employers must affirmatively ask for any additional information needed to conduct a thorough Article 23-A analysis as the first step in the

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[2] Devah Pager and Bruce Western, *Investigating Prisoner Reentry: The Impact of Conviction Status on the Employment Prospects of Young Men*, Oct. 2009, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/228584.pdf.

[3] *Labor Force Characteristics by Race and Ethnicity: 2013*, U.S. Bureau of Labor Statistics Aug. 2014, *available at* http://www.bls.gov/cps/cpsrace2013.pdf.

[4] *See* Jeffrey D. Morenoff, David J. Harding, *Final Technical Report: Neighborhoods, Recidivism, and Employment Among Returning Prisoners*, Nov. 2011, *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/236436.pdf.

[5] CoRA members include The Bronx Defenders, Center for Community Alternatives, College and Community Fellowship, Community Service Society, The Fortune Society, JustLeadershipUSA, Legal Action Center, The Legal Aid Bureau of Buffalo, Inc., MFY Legal Services, Open Hands Legal Services, The Prisoner Reentry Institute at John Jay College, The Sex Workers Project at the Urban Justice Center and Youth Represent. CoRA also partners with the Legal Aid Society, Legal Services NYC and Legal Assistance of Western New York, Inc.

Fair Chance Process. Moreover, the proposed rules should be modified so as not to suggest that applicants or employees are solely responsible for demonstrating any errors, discrepancies or misrepresentations on background checks to employers.

The regulations clarify many of the important statutory terms in ways that are consistent with the legislative intent and that will facilitate implementation of the law. The proposed rules will also provide additional definitions for several terms in the FCA. The Civil Rights Committee supports the following recommendations made by CoRA with respect to these definitions:

- The definition of the terms "**applicant**" and "**conditional offer**" should reflect that current employees may be considered for job changes that are not definitively "positive," such as transfers or lateral position changes. It is just as important to avoid discrimination in these employment decisions. We therefore recommend that the word "positive" and "positively" be deleted from these definitions.

- "**Conviction history**" should include unsealed violations (or their analogues) in other states, just as such history currently includes unsealed violation convictions in New York. Applicants with out-of-state unsealed violations should receive the same legal protections as applicants with unsealed violations from New York State.

- The definition of the term **"criminal history"** should refer to "convictions" rather than "criminal convictions," so as to make clear that individuals with unsealed violation convictions have the same legal protections as individuals with misdemeanor or felony convictions.

- The list of "**non-conviction**" outcomes should include juvenile delinquency findings and pardons. Juvenile delinquency cases by definition are not convictions, but should be included on this list to ensure that such findings are not used as the basis for adverse employment actions.

Thank you for this opportunity to comment on these proposed rules. Enacting these rules, with the recommended modifications, will add clarity to the law and assist in its implementation. Therefore, the Civil Rights Committee of the New York City Bar Association Bar urges the New York City Council to support the proposed rules.

Sincerely,

Sebastian Riccardi
Chair, Civil Rights Committee

TO: Dana Sussman
Special Counsel
New York City Commission on Human Rights

From: Chris Neale, Director – New York City Workforce Development Board
NYC Mayor's Office Of Workforce Development

DATE: March 21, 2016

SUBJECT: Comments On Proposed Rules Regarding New York City Commission On Human Rights Establishment Of Definitions And Criteria Concerning The Fair Chance Act – Title 47 RCNY

The New York City Department of Small Business Services (SBS) and the Mayor's Office of Workforce Development (WKDEV) submit the following comments regarding the proposed rules.

Section 8-107(10)(b) of the City's Human Rights Law ("Fair Chance Act") makes it unlawful for a person to make any inquiry about an applicant for employment's arrest or conviction record until after the person has deemed the applicant otherwise qualified and decided to extend a conditional offer of employment. The definition of "person" in Section 8-102 includes governmental agencies and corporations. Section 8-107(e) broadens the definition of person to include employment agencies. Section 8-102 defines "employment agency" as "any person undertaking to procure employees or opportunities to work."

WKDEV and SBS serve as the lead City agencies administering the approximately $45 million in annual federal adult Workforce Innovation and Opportunity Act (WIOA) funding for the purpose of managing the City's workforce system and providing employment and jobseeker

services to City residents through the operation of Workforce1 Career Centers (WF1CCs) throughout the five boroughs. WF1CCs are operated by service providers through contracts procured by SBS that provide various core and intensive employment services to City residents and connect those individuals to employment opportunities with various potential employers.

WKDEV and SBS are subject to oversight by both the New York State Department of Labor (NYSDOL) and the United States Department of Labor (USDOL). Both NYSDOL and USDOL have indicated that pursuant to WIOA Section 116 (b)(3)(A)(v)(II)(bb) (also at 29 USC 3141(b)(3)(A)(v)(II)(bb)), SBS, through its WF1CC contracted service providers, are required, for the purpose of monitoring State and Local performance measures, to collect certain demographic information concerning WF1CC customers including offender status. Additionally, NYSDOL has issued Technical Advisory 10-3.1 which clearly requires the collection of offender status data of WF1CC customers. However, NYSDOL Technical Advisories do not appear to have the force of law and it is not clear that Section 116(b)(3)(A)(v)(II)(bb) as constructed constitutes a superseding statute that would serve as an exemption to the City's Fair Chance Act.

Additionally, City agencies provide critical services specifically designed to assist individuals with criminal backgrounds in overcoming barriers faced by ex-offender status in obtaining employment. As written, the Fair Chance Act would prohibit City agencies and its contractors and subcontractors in the course of providing such services from asking about criminal backgrounds, thus hampering the very purpose of the services being provided.

Accordingly, in order to protect the City and its service providers from the potential penalties prescribed in the Fair Chance Law, as well as to ensure that the City does not jeopardize any of the millions of dollars in federal funding, WKDEV and SBS request that the rules provide an exception to the Fair Chance Act prohibition on inquiring about offender status from applicants for potential employment. More specifically, WKDEV and SBS request an exception for the purpose of a local government agency or its contractors and subcontractors in the course of complying with data collection requirements of federal or state laws, rules, regulations or advisories and/or in the course of providing employment and training programs

and services designed to assist individuals with criminal backgrounds. Such an exception would narrowly target only public programs collecting data or providing services designed to directly assist such individuals in obtaining employment.

Jennifer D. Kelley | Executive Director

NYSA
NEW YORK STAFFING ASSOCIATION

Comments by the New York Staffing Association

on the proposed rules implementing the Fair Chance Act.

The New York Staffing Association represents the Temporary Help industry in New York. We appreciated CM Williams' recognition that our industry was deserving of special provisions within this legislation because of the unique way the industry operates. We have reviewed the proposed regulations and present below some suggested changes which follow along the lines of CM Williams' recognition of the need for special rules due to the industry's unique operational challenges.

1. Definition of "Article 23-A Factors" in Section 2-01.

    a. The Rules appear to require the application of the NY Correction Law Article 23-A factors not only to convictions, but also "pending cases." It is unclear how this would be possible considering that the Article-23 factors, by their terms, solely relate to existing convictions – and not to pending cases. We urge that the Rules make clear that the Article 23-A factors need not (and can not) be applied to "pending cases."

    b. Furthermore, it remains unclear the degree to which employers may or may not inquire into pending cases. The Commission on Human Rights' own enforcement guidance says: "nor does either law [*i.e., the City or State Human Rights Law*] prohibit basing an employment decision on a pending criminal proceeding." We urge that the Rules clearly state the Article 23-A factors do not apply to pending cases.

2. Definition of "Business Day" in Section 2-01. This definition excludes Saturdays, Sundays, and legal holidays. However, many temporary employees work (and businesses operate) on these days. If the employee would be scheduled to work on a weekend or holiday it's unclear why these days should not be considered a "business day." Therefore, we urge that the Rules define "Business Day" to also include any day on which the candidate is or would have been scheduled to work.

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3. Definition of "Conditional Offer of Employment" in Section 2-01. The list of acceptable post-offer conduct set forth therein should also include medical exams permitted by the New York State Human Rights Law and/or New York City Human Rights Law (not only under the ADA). Moreover, the list should include the requirement to complete a Form I-9, which, by federal law, may only be after a conditional offer of employment is extended and accepted by the applicant. Finally, the list should also expressly include reference checks, which the overwhelming majority of employers perform after a conditional offer of employment has been extended. Simply put, it would be legally and operationally impossible for employers to complete the foregoing tasks prior to extending the conditional job offer.

4. Definition of "Non-Conviction" in Section 2-01. This definition requires employers to determine if a criminal disposition in another state would be "comparable to a 'non-conviction' under New York law." It's unclear how employers could possibly know this without hiring criminal law experts or lawyers across the country, which would be burdensome and costly, and simply unworkable, and therefore we ask that this requirement be removed.

5. Section 2-04(1) Relating to *Per Se* Violations.

   a. This section provides that, with respect to multi-jurisdiction applications, "Disclaimers or other language indicating that applicants should not answer specific questions ... do not shield an employer from liability." This interpretation of the law would be arbitrary to the extent that the Commission would give weight to an employer's direction to provide criminal background information, but then for some reason give no weight to the same employer's direction on the same form for NYC employees to not provide the information. There is also no support in the law itself for this interpretation since, by its terms, the application would expressly notify NYC applicants to not provide criminal background information – and therefore there would have been no impermissible request or inquiry. Moreover, from a public policy standpoint, this section makes little sense; it will needlessly result in companies such as temporary help firms that do business in multiple jurisdictions having to create separate applications for NYC applicants. Such result is wholly unnecessary, as NYC applicants can easily read and follow directions not to answer specific criminal-related questions.

   b. In Section 2-04(1)(b) the word "applications" should be defined as paperwork or other materials provided *prior* to extending a conditional offer of employment – consents and requests for disclosures or other information provided after the conditional offer should not constitute an "application" within the meaning of this section. Accordingly, the text "prior to making a conditional offer of employment" should be added to the end of this Section 2-04(1)(b).

   c. In Section 2-04(1)(e)(3) the Rules should clarify that, with respect to temporary help firms, this requirement solely requires that the candidate must remain in the general candidate

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d. pool for three business days. We believe that this clarification also needs to be applied to and inserted in Section 2-04(5)(b)(iii) (2).

e. Section 2-04(1)(e) should be modified to clarify that employers need not provide a notice or a copy of the Article 23-A analysis, etc., after determining that the applicant is suitable for employment.

6. Section 2-04(5)(a)(ii) Relating to Withdrawing a Conditional Offer of Employment. The term "certificate of good conduct" should be carefully defined and guidance should be provided as to how employers may evaluate the certificate. Most employers are not familiar with the concept of "certificate of good conduct" or term itself, and we are unaware of any generally accepted definition, which may lend itself to abuse. For instance, under what circumstances could employers reject such a "certificate"? Alternatively, we suggest this requirement be removed.

7. Section 2-04(5)(a)(iii) Relating to Changing of Job Responsibilities. This section should make clear that employers are permitted to change the job responsibilities after having duly completed all the steps required by the Fair Chance Act process (for example, if an alternative position might be suitable).

8. Section 2-04(6)(b) Relating to Temporary Help Firms. A temporary help firm should be permitted to consider the minimum skills required for a specific job assignment (as opposed to the firm's general applicant pool) in the event the temporary help firm is recruiting candidates for placement at a specific job assignment.

9. Section 2-04(9)(b) Relating to Enforcement and Penalties.

   a. This section completely changes the burden of proof applicable in discrimination cases under the New York City Human Rights Law. Under these proposed rules if an employer revokes a conditional offer it will be "presumed" to be discrimination (unless the revocation is due to one of the limited enumerated exceptions). In our view, like any other discrimination claimant (*e.g.*, race discrimination, gender discrimination, etc.), the plaintiff should still be required to carry the proof that his or her criminal history was in fact the basis for the employer's revocation of the job offer. The proposed guilty until proven innocent standard turns conventional practice on its head, and there is no reason to depart from the well-established burden of proof standard associated with all other discrimination claims. We therefore request that this presumption be removed from the regulations.

   b. With respect to an employer revoking an offer based upon "information the employer could not have reasonably known before the conditional offer," we believe the Rules

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should provide a non-exclusive list of examples, such as if the candidate cannot complete the Form I-9 or E-Verify process.

10. Section 2-04(9)(c) Relating to Enforcement and Penalties. This section requires that employers "admit liability" before entering into certain Early Resolution settlements. That requirement would often defeat the fundamental purpose of settlement (to not have an adverse determination or admission) and would only encourage employers fully litigate these cases. Also this section appears to exclude employers with 50 or more employees from participating in the Early Resolution process, which is especially unfair considering that larger employers have more hiring volume and more mid-level management, and thus there is a greater opportunity for inadvertently violating the FCA. Therefore we request that the Rules do not include: (i) the requirement to "admit liability" before completing the Early Resolution process; and (ii) the exclusion of larger employers from participating in the Early Resolution process.

If you would like to discuss any of these points in further detail, please do not hesitate to contact us.

Thank you.

Respectfully submitted,

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March 21, 2016

By Email to policy@cchr.nyc.gov

Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights
P.O. Box 2023
New York, NY 10272

Re: Comment on Proposed Rules regarding the Fair Chance Act

Dear Ms. Sussman:

The proposed rules purport to require that an employer conduct an analysis pursuant to Article 23-A of the New York Correction Law ("Article 23-A") prior to taking adverse action on the basis of an applicant's or employee's pending criminal case. Such a requirement is impractical and also is not supported by the text of the Fair Chance Act, Article 23-A or the New York State Human Rights Law. Employers should not be required to attempt to conduct an Article 23-A analysis in order to take action on the basis of an applicant's or employee's pending criminal case.

Article 11(a) of the Administrative Code of the City of New York (the "Code") provides that it is an unlawful discriminatory practice to deny employment to an applicant or act adversely upon an employee by reason of an arrest when such denial or adverse action is in violation of the New York State Human Rights law (i.e., subdivision 16 of section 296 of article 15 of the New York state executive law). Under the latter law, a denial of employment or other adverse employment action is a violation only if it relates to "any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual." (emphasis added) Accordingly, an employer does not commit an unlawful discriminatory practice under Article 11(a) of the Code if it denies employment or takes other adverse employment action on the basis of a pending arrest or criminal accusation.

Article 11-a(b) of the Code provides that, after extending an applicant a conditional offer of employment, an employer can inquire about an applicant's arrest or conviction record but cannot take adverse action on the basis of such inquiry unless it first:

- Provides a written copy of the inquiry;
- Performs an analysis under Article 23-A and provides a copy of such analysis; and
- Allows the applicant a reasonable time to respond (of not less than 3 business days) while holding the position open.

With respect to a pending arrest (as opposed to a conviction), an employer can provide a written copy of the inquiry and allow a reasonable time to respond, but this provision cannot and should not be read to require an Article 23-A analysis with respect to a pending arrest. Article 23-A applies only to convictions and, in order to take adverse employment action, requires a finding (after taking into account the listed factors) either (1) that there is direct relationship between the offenses for which the individual has been convicted and the specific employment sought; or (2) that the granting or continuation of employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public. Article 23-A does not cover pending arrests, and thus Article 11-a(b) of the Code should not be read to require an Article 23-A analysis in respect of pending arrests.

Moreover, it is not clear how an Article 23-A analysis could be conducted in respect of pending arrests as this would require an employer to assume that an individual is guilty of the offenses of which they have been accused and to attempt to assess the relationship between the offenses and the position and/or the threat posed by the individual without there having been a formal determination of the individual's guilt.

In addition, while employers sometimes may wish to take adverse action based on the nature of the crimes for which an applicant or employee has been arrested or accused, other times the adverse action is not based on the nature of the allegations but rather on the uncertainty resulting from the pending nature of the case and, specifically, the fact that an individual may be (or become) unavailable for work if he/she either is jailed pending trial or subsequently convicted and sentenced to a period of incarceration. Accordingly, even offenses that, following a period of incarceration, might not be disqualifying under Article 23-A have the potential to be hugely disruptive while charges are still pending. Employers simply should not be required to hire an individual while criminal charges are pending against him/her and to expend resources in onboarding and training such individual when there is a reasonable probability that such individual will or may become unavailable for work within a short period of time if the criminal charges are not resolved in his/her favor.

In sum, the requirement set forth in the proposed rules that an employer conduct an Article 23-A analysis prior to taking adverse employment action against an applicant or employee based on a pending arrest is inconsistent with the plain language of the Code, Article 23-A and the New York State Human Rights Law. Moreover, such a requirement would be unworkable for employers. The proposed rules should be revised to make clear that an Article 23-A analysis continues to be required only in respect of convictions.

Respectfully submitted,

Michelle Gyves

Michelle A. Gyves

cc: Katharine H. Parker

Transcript from the Public Hearing on March 21, 2016

COMMISSION OF HUMAN RIGHTS HEARING
----------X
In the Matter of

NEW YORK CITY COMMISSION OF HUMAN RIGHTS

HEARING ON PROPOSED RULES ON THE FAIR CHANCE ACT
----------X

DATE: March 21, 2016

TIME: 1:03 P.M.

HEARING in the above-referenced matter, at the above date and time, held on the Second Floor Auditorium, 125 Worth Street, New York, New York 10013, before Jamie Willis, a Notary Public of the State of New York.

A P P E A R A N C E S:

NEW YORK CITY COMMISSION ON HUMAN RIGHTS
100 Gold Street, Suite 4600
New York, New York 10038
BY: DANA SUSSMAN, ESQ.,
Special Counsel to Commissioner
LAUREN ELFANT, Policy Counsel

ALSO PRESENT:
MELISSA AADER, ESQ
NICOLE SALK, ESQ.
WILLIAM MACK, ESQ.
SABASTIAN SOLOMON
EMILY HOFFMAN, ESQ.
KATE WEGNER-GOLDSTEIN, ESQ.
KAREN PARKIS, ESQ.
LAWRENCE BERNFELD, ESQ.

* * *

CCHR HEARING

LAUREN ELFANT: Good afternoon, everyone. We're going to get started. My name is Lauren Elfant. I'm policy counsel at the Commission on Human Rights and this is Dana Sussman. She's special counsel to the commission. I've been designated as the hearing officer for the public hearing on proposed rules on the Fair Chance Act, which were promulgated by the Commission on Human Rights. The hearing is being held in the second-floor auditorium of 125 Worth Street. It is now 1:04, Monday March 21st, 2016, and I am hereby convening on this proposed rule.

These proposed rules were published in the City record of February 17th, 2016. Copies of the published notice and rules are available on the Commission of Human Rights Web site. They're also available on the New York City Rules Web site, and there are copies here

up front if you would like them now. Sections 905 and 1043 of the New York City Charter authorized to adopt these rules.

This hearing affords the public the opportunity to comment on all aspects of the rules the Commission has proposed. The Commission will carefully review all testimony and written comments received at the hearing and will give due weight and consideration to all adequately substantiated proposals and recommendations that are submitted for the record at this hearing.

To ensure that everyone seeking to testify will have the opportunity to do so, I will follow these simple ground rules:

Signing in and order of appearance: Anyone seeking to testify must complete a registration card so you can be correctly identified in the hearing record.

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Witnesses will be called to testify in the order that they have signed in, with a few modifications because of special requests that have been made. Witnesses will be called to testify generally though in the order they signed in. Anyone who does not appear when his or her name is called will be deemed to have passed over the opportunity to testify. Persons who are passed over will be called at the end to see if they are here. Persons who do not appear, must then sign in again, if they still wish to testify and have missed the time when their names were called. Please clearly state and spell your name for the record when you testify.

There will be a time limit on testimony. Each witness will have a maximum of three minutes to testify. We'll be keeping and time and to be fair to everyone who's seeking to testify, I will strictly apply the

three-minute limit to every speaker. If your comments take longer than three minutes, synthesize your oral testimony and leave a written copy or send us a copy of your written testimony.

For the written testimony, unlike the time limit on the oral testimony, there is no limit to the number of pages you can submit as written comments or documents for the record. The written submission will be made part of the record as exhibits presented with your testimony.

Restrooms, for anyone who needs them, are located if you go to the end of this hall to the left or to the right and there are signs there. Please make sure everyone has their cell phones off or turn them to vibrate.

Thank you very much. So at this point, we're going to get

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started and I'm going to call the first witness.

The first witness is Melissa Aader from the Legal Aid Society.

MELISSA AADER: Afternoon. My name is Melissa Aader M-E-L-L-I-S-S-A A-D-E-R. I am a staff attorney and equal justice works fellow in the employment law unit of the Legal Aid Society. The Legal Aid Society is the oldest and largest legal services provider for low-income individuals in the United States. Our criminal practice is the primary defender in the State court system representing individuals in 210,000 criminal cases per year and our employment law unit is part of the civil practice and provides legal services to approximately 2,000 individuals each year. My fellowship focuses entirely on criminal records discrimination.

The Legal Aid Society strongly supports the Commission's proposed

rules. We particularly are enthusiastic about the rules' coverage of current employees who are arrested or constricted while currently employed. The Legal Aid Society represents many individuals who are fired or suspended when they are arrested while they are employed. They are fired or suspended often without individualized analysis and automatic suspension and the suspension or termination results in them losing a job, being unable to support their family and often losing their home.

We support the Commission's requirement of the individualized analysis, because it will allow individuals to keep their jobs potentially and to avoid homelessness.

We support many other portions of the Commission's rules, but we have a few suggested modifications

that I'm going to get to. The most important one from Legal Aid's perspective is that Subsection (11)(A-E) of the Human Rights Law, exempts for actions taken by employers pursuant to other laws. It does not, we believe, exempt entire positions or the entire employment process related to those positions. In particular, we believe that it exempts the performance of background checks for employment purposes, where required by law, and actions that are necessary to ensure the disqualification of someone whose conviction is a mandatory bar from them being employed.

Second, we suggest that the Commission modify the rules slightly to require the employer to ask for rehabilitation evidence and other information before conducting the Article 23-A analysis, so that the Article 23-A analysis can be thorough

and complete and provide a full opportunity for the applicant to discuss their rehabilitation.

We also have some suggestions regarding the definition section. We urge the Commission to certify that the definition of criminal history include unsealed violation convictions. That temporary health firms must abide by the Fair Chance process if they want to take adverse action against current employees based on their criminal history, just like all other employers. And that actions that are illegal if taken by an employer, are also illegal if taken by employment agencies.

Additional suggested modifications are in our written testimony, but I want to conclude by saying that the Legal Aid Society again strongly supports the Commission's proposed rules and to thank you for the opportunity to

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testify.

LAUREN ELFANT: Thank you.

DANA SUSSMAN: Thank you. The next person testifying will be Lawrence Bernfeld.

Okay. Then the next person will by John McCarthy.

JOHN McCARTHY: I submitted comments. I'm not going to testify.

LAUREN ELFANT: Nicole Salk from Brooklyn Legal Services.

NICOLE SALK: Good afternoon. I'm going to be extremely brief. I'm going to introduce myself and organization. My name is Nicole Salk. I work at Brooklyn Legal Services. We are part of Legal Services NYC, which is a Citywide program that fights poverty and seeks racial, social and economic justice. I'm going to be very brief.

Basically, we are partnering with the Coalition of Reentry Advocates, CORA, who's going to be

testifying later on, and we have signed on to their comments and agree with everything that they're putting forward. We just wanted to take the opportunity and say thank you for codifying these rules. This is incredibly important to our clients, so many of whom face discrimination because of their criminal histories, and this is a crucial, crucial thing that you're doing and we want to thank for that. That's all I'm going to say. Thank you.

LAUREN ELFANT: Thanks so much. William Mack.

WILLIAM MACK: Hello. My name is William Mack M-A-C-K. I'm an attorney at Greenberg Traurig. I would like to thank the Commission for this opportunity to be heard today. My firm represents Enterprise Rent-A-Car. Enterprise is the largest rental car company in North America. Through its brands;

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Enterprise Rent-A-Car, National Rental Car, Alamo, they have more than 7,200 location worldwide. Within New York, they have 42 locations, 11,000 rental cars and employs 900 people.

In any given month, Enterprise averages 3- or 4,000 vehicle moves. That is moving one car from one location to another. In addition, Enterprise operates a shuttle for picking up and dropping off people from the airport and perhaps you've heard of the "we'll pick you up policy." They also will go to your house or your auto body shop and pick you up. In order to do that, they hire people who drive. They seek to hire safe drivers for the protection of not only the public, but their customers and employees.

Thus, they face a special dilemma that Enterprise and perhaps some other transportation or delivery

companies face; the ability to operate a vehicle is essential for performance of the job. However, the way the proposed rules are currently written, looking into somebody's driving history is prohibited, because it may turn up a criminal conviction.

While Enterprise supports the intent of the rules, they believe the Commission should amend the rules to establish certain definitions and criteria with respect to vehicle operations. To be clear, they're not seeking to run criminal background checks prior to making conditional offers. They just would like to make inquiries as to an individual's driving history prior to moving further in the process.

We've outlined some very specific suggestions in our written testimony, which I've submitted. In addition, upon making such an

inquiry, we believe we should be able to disqualify or reject a candidate based on that driving history. Again, the current guidelines would prohibit that but that creates a situation where we've strung a candidate along longer than either of us would like to.

In sum, I'll wrap up there, because the operation of a motor vehicle is essential to many of the jobs at Enterprise, more than or over 90 percent of the jobs. We believe we should be able to make inquires as to a candidate's driving history prior to making a conditional offer.

We would be happy to discuss this further. My contact information is in the file. Please, reach out to us.

DANA SUSSMAN: Thank you.

LAUREN ELFANT: Thank you. The next person testifying will be Sebastian Solomon from Community

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Service Society.

SEBASTIAN SOLOMON: Hi. Good afternoon. My name is Sebastian Solomon. I am the director of the New York State Policy of Legal Action Center and the Cochair the Coalition of Reentry Advocates, also known as CORA. CORA is a Statewide coalition of 17 advocate organizations, whose members work to change laws and policies to ensure that people who have had contact with the criminal justice system have a fair chance to seek full participation in their communities.

Since establishing in 2005, CORA has primarily focused on legislative and administrative reforms that would remove barriers for employment for individuals with convictions.

CORA strongly supports the New York City Commission on Human Rights' work to provide meaningful employment

opportunities to New Yorkers with criminal records through its rigorous implementation and enforcement of the Fair Chance Act.

The act, one of the strongest and most independent of its sanctification, helps all New Yorkers by giving applicants and current employees the chance to be considered on their merits, rather than risk rejection because their professional qualifications are not being considered.

Employing individuals with conviction histories, not only helps them provide for themselves and their families, it broadens the workforce to include people with different backgrounds and experiences. Thereby strengthening the fabric of our City.

CORA has reviewed the proposed Fair Chance Act's rules and believes that in some instances, they unintentionally opt to save rather

than clarify. Our written comments, which have also been supported by a number of legal advocacy, healthcare and workforce training organizations, who are not CORA members, provide the more competent discussion than time permits here, as to the comments submitted by some of member groups.

In my comments, I will discuss two portions of the rules that need further clarification. First, Section 2.04 paragraph 5. Once an employer had made a conditional offer and an applicant has indicated that she or he has a criminal conviction history, the employer should be immediately obligated to request from the applicant information required for the employer to perform the required analysis of that conviction history under correction of the law, Article 23-A." Specifically, the employer should be required to request an applicant's evidence of

rehabilitation and his or her certificates of relief from disability for good conduct, so that the employer can perform the 23-A analysis with all necessary information. The proposed regulations do not make clear that this step is required. They must be clarified so that they do.

Second, Section 2.04, paragraph 7. CORA recommends that the proposed rules clarify the prevention to the act coverage -- this was discussed by Legal Aid -- are narrow. The Fair Chance Act states that those sections of the act dealing with arrest and conviction records employer inquiries shall not apply to any actions taken by an employer or agent thereof pursuant to any State, Federal or local rule law that requires criminal background checks for employment purposes or bars employment based on criminal history.

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The plain language of the statute makes clear that only actions taken pursuant to other State, Federal or local law are exempt, not the entire process relating to such a position. In order words, an employer may advise that a background check is required by law for the position and that by law individuals with certain convictions are ineligible for the position and shall be permitted to act if the applicant has a conviction. But, if the applicant has a conviction that does not legally disqualify him or her from the position, we believe the employer may not take adverse employment action based on such conviction, without conducting the Fair Chance conference discussed, AC-117. We ask the rules to be edited to make this more clear.

For more detail on these points and for our further suggestions,

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please refer to the written testimony. Thank you for the opportunity to testify.

DANA SUSSMAN: Thank you.

LAUREN ELFANT: Thank you. Next we have Emily Hoffman.

EMILY HOFFMAN: My name is Emily Hoffman. E-M-I-L-Y H-O-F-F-M-A-N. I am a legal fellow at the Community Service Society or CSS, and I'm testifying on behalf of CSS. CSS applauds the City Counsel's passage of the Fair Chance and the Human Rights Commission's work to implement and enforce it.

CSS works to bring material improvement to the lives of low-income New Yorkers for almost 175 years. Improving employment discrimination against individuals with a criminal history is critical for our mission. Studies have shown that criminal records, even minor ones, are a larger impediment to

obtaining a job than any other employment-related stigma. Removing barriers from employment for people with records is vital to their individual well-being, as well as to the City's economic health.

CSS's legal department has thoroughly examined the Human Rights Commission's proposed Fair Chance Act regulations, and overall, we think that they clearly explain and implement the act. We recommend the following changes to make them even stronger.

First, it is crucial that the final rules emphasize an extension to the Fair Chance Act. While it is true that for certain types of jobs, the protection provided by the act does not apply to certain parts of the hiring process already directly regulated by existing laws. The final rules should clearly state that even for these types of regulated

jobs, the Fair Chance Act does apply to the parts of the hiring process that are not directly regulated by other existing laws.

Second, the rules should make absolutely clear that after performing a criminal background check on an applicant or employee, unless an employer immediately decides to hire the applicant or promote the employee, the employer is obligated to promptly solicit evidence of rehabilitation and changed circumstances from the individual. It is essential to the integrity of the Fair Chance Act and correction (sic) Article 23-A that employers collect this information before performing the required Article 23-A analysis so that it is fair and complete.

The rules should also make clear that whatever assessment employers come to after their initial

analysis of the factors, they are not meant to mean a final decision. If they have reservations about hiring the applicant or retaining the employee, you must wait until after the applicant or employee has been given the opportunity to respond with more information before making a final decision.

Third, the rule should clearly instruct the employers that they are prohibited from relying on information about an applicant's or employee's conviction history that they inadvertently obtained before making a conditional job offer. Though employers should not by held liable for obtaining this information, they should certainly be held liable for using it against an applicant.

At the same time, some applicants with records should be interviewed and allowed to speak

about the conviction history in order to explain face-to-face to their potential employer how their past circumstances have changed and how they have been rehabilitated.

As long as applicants are aware of their rights, they should be permitted to disclose this information and employers should be allowed to hear it. Any employer's concerns about the information disclosed in the interview, should be detailed in a Fair Chance Act notice to the applicant.

Finally, while we understand that the Commission does not have enforcement jurisdiction over public employers, many of these agencies are subject to the Fair Chance Act and must abide as much as any private employer. The Commission should continue to work with the City and State agencies that have positions subject to the act in order to ensure

these employers' full compliance.

Again, CSS thanks you for your work to make the Fair Chance Act a powerful new implement to the City Human Rights Law, and we look forward to working with you in enforcing it.

DANA SUSSMAN: Thank you.

LAUREN ELFANT: Next, we have Kate Wegner-Goldstein from Legal Action Center.

KATE WEGNER-GOLDSTEIN: Good afternoon. I'm Kate Wegner-Goldstein from Legal Action Center. I'm senior staff attorney there. Legal Action Center is the only nonprofit law and policy organization whose sole mission is to fight discrimination against people with addictions, HIV/AIDS or criminal records, and to advocate for them the public policies in their areas.

We appreciate the opportunity to comment on the proposed rules and applaud the Commission for its

efforts in enforcing and educating people regarding the Fair Chance Act. We have submitted in more detail written comments and I will submit those to you for your consideration. Thank you.

LAUREN ELFANT: Thank you.

DANA SUSSMAN: So we have no other folks signed up to testify. Does anyone else want to -- we'll wait a few more minutes for folks to arrive, but if anyone else would like to testify or submit comments, please, go ahead.

KAREN PARKIS: I wasn't planning on testifying, but why not? Hello. I'm Karen Parkis. I'm a supervising attorney at Brooklyn Defender Services. Brooklyn Defender Services is a multi-defender agency that does criminal, family, immigration, defense, along with civil legal support and social work for 45,000 clients a year. We thank

the New York City Commission on Human Rights for proposing the opportunity to testify today. We belief the legislation is incredibly communicative with tremendous potential to level the employment playing field for our clients.

Since its enactment, we have already seen its impact on employer hiring processes and the opportunity for our clients to be fairly considered for job opportunities. As an illustration, I would like a share a case example.

Crystal was arrested for an alleged altercation between her and a neighbor in a NYCHA housing complex. She was charged with a misdemeanor assault based on allegations that were exaggerated and a misrepresentation of what actually had occurred. Crystal's defense attorney was confident that the case would ultimately get dismissed, but

because of typical court delays, she knew that would take some time. Several weeks after Crystal's arraignment and arrest, she was brought in for an interview for the MTA. She was very worried that the pending case would impact her employment, a job she had wanted for quite some time. However, because the MTA is following the new requirements created by the Fair Chance Act, Crystal was not asked about her arrest or conviction history during the initial interview. Rather, she was only assessed based on her qualifications. She performed well and received a conditional offer. She was then invited for a final round, including a criminal history check. However, before that came around, her defense attorney was able to resolve her case with immediate sealing. She has now been working as a train operator for three

weeks. If not for this act, she may have missed that opportunity.

We commend the New York City Commission on Human Rights for proposing the rules to facilitate uniform and fair application of the Fair Chance Act. We have signed on to the written comments submitted by the Coalition of Reentry Advocates, CORA. We belief the rules will significantly inform compliance. We want to emphasize here today that regular and targeted training for employers and employees alike is necessary to ensure the Fair Chance Act reaches its potential, and we trust that your Commission will work hard to make sure that all defense lawyers are aware and so are clients who don't have advocates; individuals who don't have advocates are aware of the work being done to have equal rights to these protections.

I have a number of specific

recommendations without going into too much detail because I do have written comments. I will just highlight that we really appreciate clarifications in the application of the Fair Chance Act to people with pending cases as specifically, adjournment in contemplation of dismissal are considered pending cases. And before clients -- we had to advise them of that when they were taking pleas the fact that they will be protected by the Fair Chance Act is very important.

Similarly, the application to current employees. We meet people when they are currently employed and upon arrest, sometimes the first arrest they've ever had in their lives, and that really often are suspended from their employment, and the fact that will have protections towards unfair adverse actions by their employer by the Fair Chance Act

is incredibly significant.

Additionally, a comment already made by several individuals regarding the narrowing of the amount of exemptions. Agencies that do have State- or local-mandated criminal background checks, that it does not apply to all stages of their employment. A significant portion of our employed clients do work for agencies that do have background checks disqualifying convictions upon initial employment, but we believe the language of the law does not mean that they are employed and are arrested in the course of their employment, that agency should not have to extend the Fair Chance Act process to them as well. And the rest you can read in my written testimony. Thank you for this opportunity.

LAUREN ELFANT: Thank you.

DANA SUSSMAN: Thank you. Any

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other last-minute additions? Just as a reminder, if you have not already submitted your written testimony you may do so by the end of the day today to policy@CCHR.NYC.GOV, and we will review all written testimony and the oral testimony today as we finalize the rules over the next several months.

LAUREN ELFANT: And everything will be published on our Web site shortly. The comments and the transcript from today's hearing.

So thank you, everyone, for coming to testify. It's now 1:32 P.M.

(Whereupon, a brief recess was taken.)

DANA SUSSMAN: It is now 1:40 P.M. and we are reopening the record for further testimony with Lawrence Bernfeld. Please state your name and spell it for the record.

LAWRENCE BERNFELD: Lawrence

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L-A-W-R-E-N-C-E B-E-R-N-F-E-L-D. I am an attorney member of Graubard Miller. We're located in midtown Manhattan. However I'm here today speaking in my individual capacity. On January 8th, 2016, the New York Law Journal published an opinion column that I wrote regarding the New Fair Chance Act and the HRC legal enforcement guidance. Certain proposed rules do not encourage employers to pursue applicants who have gaps in their employment history. Regulations that discourage employers from doing so unfairly penalize persons in a difficult economy who have been unemployed for a time and who have never been convicted of a crime.

In my practice, I represent both employers and senior employees, but the point I'm making here applies as well whether it's a 59-year-old senior executive whose been

unemployed for a year or a young man out of school looking for his initial job. The Commission may want to consider certain changes to create a more nuanced balance to encourage employers to make conditional employment offers in light of the risks and burdens that the regulations do impose upon employers.

First, I believe it's not necessary to create a presumption holding that employers who make conditional employment offers no longer have good-faith basis to reject an applicant thereafter for any reason other than criminal background. The employment process frequently involves a series of subtle decisions. It is unfair to those who have been unemployed for a period of time to change that calculus and remand in favor of an unemployed person with a prior criminal conviction over an

unemployed person with no convictions.

Second, instructing penalties against employers, the Commission should ask themselves whether it is fair that a second violation would count against an employer before the Commission has concluded that en employer has engaged in a first violation. This could readily occur since there's a timeline between when the Commission concludes there's a violation and what an employer has done. You do not want to make employers unwilling to go that extra mile, since there are many different ways it can and cannot decide whether to pursue an applicant through the employment process.

Third, the Commission should make clear that any settlement of a claim of a prior litigant relating to an alleged breach of the Fair Chance Act, will close out the matter and

preclude additional Commission action. You want to encourage people to resolve their claims and don't want to leave open the possibility that it could be used against somebody or if an employer says, no, I can't, want to spend the time and effort doing this. I'm prepared -- if they made a mistake -- and prepared to settle this, you don't want the possibility to exist that the employer's going to say no. We're going to fight this. I don't think I did anything wrong, because I'm not going to subject myself to the possibility to additional action from the Commission if I deal with this matter directly with the perspective candidate.

Fourth, there are very substantial record-keeping obligations that the Fair Chance Act and the rules impose on employers. I would like you to ask yourself

whether, other than where the condition offer of employment was withdrawn, it is necessary to require employers to go through the burden of keeping these additional records. Again, this is in question of the nuance balance. Employers have the ability to look at a variety of factors in trying to make decisions and there's only so much a piece of legislation can do to determine how an employer will make that internal decision.

So I will respectfully ask you to consider these points since there are not two parties here, but three you have to take into account: The employer, the person with the prior criminal record, and the unemployed person who could lose opportunities if employers don't buy into this new procedure. Thank you.

(Continued on following page.)

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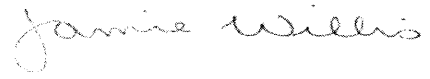
DANA SUSSMAN: Thank you very much. Any other witnesses to testify? Okay it is now 1:45 P.M. and we are closing the record. Thank you.

(Whereupon, at 1:45 P.M., the above matter concluded.)

I, JAMIE WILLIS, a Notary Public for and within the State of New York, do hereby certify that the above is a correct transcription of my stenographic notes.



JAMIE WILLIS