Aug. 30, 2024

The Honorable Annabel Palma
Chair and Commissioner
New York City Commission on Human Rights
22 Reade Street
New York, NY 10007

RE: SHRM Response to Proposed Rules on Employment Discrimination Based on Criminal History

Dear Chair Palma:

On behalf of SHRM, thank you for the opportunity to respond to the New York City Commission on Human Rights' (NYC CHR's) proposed amendments to rules currently governing employment discrimination based on criminal history. We believe these amendments are a significant step toward ensuring that individuals with criminal records are given a fair chance to contribute to the workforce and society.

As the trusted authority on all things work, SHRM is the foremost expert, researcher, advocate, and thought leader on issues and innovations impacting today's evolving workplaces. With nearly 340,000 members in 180 countries, SHRM touches the lives of more than 362 million workers and their families globally.

People with criminal records—especially the formerly incarcerated—face enormous employment barriers despite often being skilled, loyal, and eager to work. Frequently, employers deny them a fair opportunity and miss out on valuable workers due to deeply rooted biases and misconceptions. Employment challenges that leave individuals with a criminal record unemployed or underpaid cost the U.S. economy between $78 billion and $87 billion every year.

That is why, in 2019, SHRM launched the Getting Talent Back to Work initiative, calling on employers to change their recruiting practices to include applicants with criminal backgrounds. The following year, the SHRM Foundation introduced the Getting Talent Back to Work certificate program to provide actionable knowledge and tools that HR professionals, hiring managers, and business leaders need to attract, hire, and retain workers with criminal records. It also offers strategies to ensure all qualified applicants are considered for positions, allowing employers to review other factors, including criminal records, later in the hiring process.

According to the 2021 Getting Talent Back to Work Report authored by SHRM, the SHRM Foundation, and the Charles Koch Institute, 81% of business leaders and 85% of HR professionals believe workers with criminal records perform their jobs about the same as or better than workers without criminal records. Over half of HR professionals said they would be willing to hire individuals with criminal records, and nearly 70% of HR professionals are willing to work with individuals with criminal records.

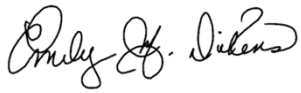
The proposed amendments by the NYC CHR to the rules governing employment discrimination based on criminal history are a crucial step in ensuring that these individuals are given a fair opportunity to demonstrate their skills, are given a more reasonable time frame to address their criminal history and are not unfairly disadvantaged in the hiring process. These amendments will allow individuals to fulfill their potential and more meaningfully contribute to their communities.

Additionally, the new protections for individuals with pending criminal cases, unsealed violations, and noncriminal offenses will help ensure that they are not unjustly excluded from employment opportunities.

We commend the NYC CHR for taking these important steps and look forward to continuing our collaboration to promote fair employment practices. SHRM stands ready to be a resource for the commission and other New York City policymakers to strengthen opportunities for city employers to recruit, hire, and retain formerly incarcerated workers.

Thank you for your commitment to public service.

Sincerely,



Emily M. Dickens, J.D.
Chief of Staff and Head of Government
Affairs for SHRM

Cc: New York City Commission on Human Rights Commissioners and Staff

youthrepresent
JUSTICE FROM COURTROOM TO COMMUNITY

September 5, 2024

New York City Commission on Human Rights
22 Reade Street
New York, NY 10007

Submitted via Email

Youth Represent respectfully submits the below written testimony concerning the Commission's proposal to amend its rules concerning prohibitions on employment discrimination based on criminal history.

Youth Represent is a legal services non-profit that provides reentry legal services and social services support to indigent young people between sixteen and twenty-six years of age in New York. Our mission is to use legal services, policy advocacy, peer education, and other tools to build power and opportunity for Black, Latiné, and other youth of color who are most harmed by the criminal legal system and other systems of oppression. We partner with dozens of community-based organizations across the five boroughs and have extensive knowledge about the needs of youth and emerging adults who are navigating the impact of criminal system involvement. Youth Represent is also a member of the Coalition of Reentry Advocates, a coalition of non-profit legal service providers and community organizations fighting to remove civil barriers and ending perpetual punishment for those with criminal legal system involvement.

The New York City Fair Chance Act and its Impact on Young People

Young people with criminal convictions face unique obstacles to obtaining employment–for example, lack of work experience due to age; as well as the ways in which

criminalization and incarceration impact their development and the opportunities available to them. When young people are prosecuted and incarcerated during their formative years, they deal with the repercussions of their detention or imprisonment long after their release. Many of our clients who are incarcerated as teenagers don't have diplomas or prior work experience. Some experienced excessive school discipline and suspension prior to arrest and incarceration. Upon their release, they have access to fewer resources than other individuals their age, who have completed schooling and were able to mature in a safer environment while building the networks and connections that lead to job opportunities. This dearth of resources makes it harder to overcome any negative perceptions held by employers, and makes recidivism more likely despite best efforts and intentions. These obstacles are compounded by the trauma of incarceration and separation from their loved ones at young ages.

The Fair Chance Act ("FCA") and the Commission's Legal Enforcement Guidance (the "Guidance") issued in 2022 have both been extremely important tools in our fight against discrimination our clients with criminal records face. The FCA stands for the truth that people with criminal convictions deserve to live full, dignified lives and that discrimination against people with criminal convictions hurts not only those individuals and their families, but also the public good.

Much of the substance of the Proposed Rule reflects the Commission's continued commitment to uplifting New Yorkers with criminal histories. If adopted, these changes would undeniably benefit our clients, most notably by incorporating the extension from 3 to 5 business days for an applicant to respond to a Fair Chance Employment Analysis of their criminal history, and by adding protections for people with certain types of cases, including pending criminal cases, unsealed violations, unsealed non-criminal offenses, and adjournments in contemplation of

dismissal in the Proposed Rule. These changes, among others, would ensure that all people with criminal histories–and especially those who are marginalized within that subgroup, such as young people–have a proper opportunity to access or retain employment for which they are suitable.

However, we have significant concerns about the presumably unintentional expansion of statutory exemptions to the FCA, and the omission of a requirement that employers actually consider an applicant or employee's response to the Fair Chance Notice. We suggest modifications to address both these issues. The other substantive modifications involve requests for additional clarity in various sections, such as defining intentional misrepresentations and providing more guidance on direct relationship and unreasonable risk exceptions. The remaining suggestions are minor edits to language for clarity and concision.

These suggestions are also included in an attached redline, and in totality, are aimed at ensuring that the Proposed Rule conforms more thoroughly to the text and spirit of the 2022 Guidance, resulting in increased clarity and effective enforcement of both the plain language and the spirit of the FCA. Thank you for considering this testimony.

Substantive Changes and Additions to the Proposed Rule

A. We request modification of proposed § 2-04(g), which could be read to make the FCA inapplicable to a large percentage of low-wage workers.

As provided in the attached redline of § 2-04(g), we request that sections (1), (6), (7), and (8) be combined and amended for clarity and to conform with the Guidance. Our proposed redraft ensures that the Commission does not unintentionally overrule the City Council by significantly expanding the statutory exemptions listed at N.Y.C. Admin. Code § 8-107(11-a)(g). The Proposed Rule's overly broad reading of the statutory exemptions deviates both from the plain language of N.Y.C. Admin. Code § 8-107(11-a)(g) and from the Guidance's precisely

correct interpretation of said statutory language. The Proposed Rule's overly broad interpretation of the exemptions, which seems unintentional, could prevent a large percentage of low-wage workers from accessing the benefits of the FCA.

Likely unintentionally, proposed §§ 2-04(g)(1), (6), (7), and (8) gut the existing protections of the Fair Chance Act. N.Y.C. Admin. Code § 8-107(11-a)(g)(3) states:

> This subdivision shall not apply to any actions taken by an employer or agent thereof: . . . Pursuant to any federal, state or local law requiring criminal background checks for employment purposes or barring employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

That is, the statutory text of the FCA only exempts those particular employer actions that are taken pursuant to a law requiring criminal background checks or barring employment based on criminal history. In contrast, the Commission's proposed § 2-04(g)(1), (6), (7), and (8) state that whenever an employer is subject to a law requiring a background check or barring employment based on criminal history, the employer is exempt from the substantive and procedural protections of the FCA. See Proposed § 2-04(g)(1), (6), (7), and (8) (stating that employers subject to relevant background check laws are exempt from the prohibitions on "making inquiries or statements" about criminal history and "denying employment . . . or taking adverse action" based on criminal history "without undertaking the Fair Chance Employment Process"). Although § 2-04(g)(1), (6), (7), and (8) contain some language suggesting that CCHR was attempting to maintain the narrowness of the statutory language (for example, 2-04(g)(7) and (8) state that the exemption applies only "to the extent that compliance with federal, state, or local law requires such action", and that employers are "required to undertake all other actions required by this chapter that are not in conflict with the requirement of the federal, state or local law that form the basis of this exemption"), the entirety of the language in § 2-04(g)(1), (6), (7),

and (8) is vague, confusing, and could be read by employers and judges to exempt entire industries from all aspects of the FCA.

As written, § 2-04(g)(1) and (8) could be read to permit employers who employ persons in positions where there is a mandatory exclusion imposed by law to be wholly exempt from the procedural and substantive protections of the FCA. An employer hiring for one of these positions could, under the Proposed Rule, inquire into whether the person ever received an adjournment in contemplation of dismissal ("ACD") or a disorderly conduct, a non-conviction, and form its denial in whole or in part on those dispositions–even where the ACD or non-conviction is not a mandatory bar. This exemption is far too broad.

The Guidance is instructive as to why the proposed formulation is incorrect. It provides the example of a licensed private investigator looking to hire an administrative assistant and who is prohibited by General Business Law § 81 from knowingly employing anyone who has been convicted of a felony or any of the offenses listed in General Business Law § 74(2), unless the mandatory bar is removed by sealing or a Certificate of Relief from Disabilities. In the Guidance, that employer is exempted from certain *per se* restrictions, such as being able to run a background check prior to a conditional offer in order to determine in advance of that offer whether they would be prohibited by law from hiring said applicant. However, as the Guidance explains in various helpful scenarios, the employer must follow the FCA where the applicant's background check does not reveal a conviction subject to mandatory exclusion. See Guidance, at 25-26. For example, in one scenario where the background check reveals a criminal history that is not subject to the legal bar but nevertheless concerns the employer, the employer must conduct the Fair Chance Employment Analysis, provide the applicant a copy of the criminal background check and the completed Fair Chance Notice, allow the applicant at least five business days to

respond, and communicate in writing if the employer ultimately declines to hire the applicant. See Guidance at 26. As written, however, the Proposed Rule at § 2-04(1)(b) and (8)(b) could be read to permit that same employer to bypass the FCA process completely and deny employment due to the fact that the position is subject to a law that imposes a mandatory bar.

Proposed § 2-04(7) is similarly overbroad and unintentionally disregards the Guidance. Many positions for low-wage workers in helping professions, such as home health aides, are subject to legally required background checks. Under the current language of N.Y.C. Admin. Code § 8-107(11-a)(g)(3), home health aides are entitled to most of the FCA protections because, again, the exemption applies only to employer actions that are taken pursuant to a law requiring a background check. For example, those employers that are required by Public Health Law § 2899-a(1) to request that the Department of Health run a background check are permitted to make such a request because that is an "action[] taken . . . pursuant to any state, federal or local law." If the Department of Health directs an employer to deny employment to the applicant, the employer may deny the applicant employment without providing a copy of the Fair Chance Act Notice because the denial of employment is an "action[] taken . . . pursuant to any state, federal or local law" (specifically, pursuant to Executive Law § 845-b(5)(h)). However, the FCA as currently written protects applicants in situations where an employer takes an action that is not specifically mandated by state, federal or local law. For example, if the Department of Health approves the applicant to work for an employer, that employer may not deny the applicant employment based on their conviction record unless the employer provides them with a copy of their background check inquiry and the Fair Chance Act Notice, gives them a reasonable period to respond, and considers their response pursuant to Article 23-A of the Correction Law – because if the Department of Health approved the applicant to work, the job denial would not be

an "action[] taken . . . pursuant to any state, federal or local law." This example is helpfully illustrated in the Guidance, as well. See Guidance, at 24.

Unfortunately, the proposed language of § 2-04(g)(7) could be read to remove all FCA protections for workers in certain industries because they seek to work in "Positions for Which a Criminal Background Check is Legally Required." This language change between the FCA and the Proposed Rule is likely unintentional, but the consequences could be enormous. Thousands of low-wage workers in New York City who work in industries in which a background check is required by law could lose the FCA protections that the Commission works so hard to uplift and enforce. If employers or judges interpret § 2-04(g)(7) to remove FCA protections for entire industries, the FCA will lose much of its value. The exemption will swallow the rule, and low-wage workers in New York City will return to the state they were in before the FCA's enactment in 2015.

Our redraft of proposed § 2-04(g)(1), (6), (7), and (8), attached to this testimony, newly amended as § 2-04(g)(5) and (6), clarifies the exemptions and properly anchors them to employer actions, rather than employment sectors or positions. The redraft primarily uses language taken directly from the 2022 Guidance. In amended § 2-04(g)(5), employers (such as home health agencies) that are required by law to conduct a background check, are instructed on whether or how to follow the FCA in the event that, as often happens, the law does not require them to deny employment. In amended § 2-04(g)(6), the redraft identifies which employer actions are exempted in scenarios where, as was the case for the licensed private investigator mentioned above, the employer is prohibited from hiring someone who was convicted of an automatically disqualifying crime. Further, in redrafted subdivision (6), because the mandatory disqualifying conviction exempts the employer from engaging in the Fair Chance Process, we

have added paragraph (d), which would permit applicants to notify employers of an error on their background report and show that they do not have a legally mandated exclusion. Once that action is satisfied, the employer must either hire the applicant or continue the Fair Chance Process if it wishes to deny employment based on the results of the applicant's background check that are not otherwise a mandatory exclusion.

The redrafted subdivisions also provide that a mistake of law is not a defense to a charge of a violation of either section (paragraph (d) of redrafted subdivision (5) and paragraph (e) of redrafted subdivision (6)). We believe that our formulation better clarifies the language that is currently in CCHR's Proposed Rule: "When an employer, employment agency or their agency relies on a mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a)." Further, we have made this language a freestanding paragraph for clarity and emphasis.

Additionally, instead of pulling out the self-regulatory organization language as a freestanding exemption, as provided for in proposed § 2-04(g)(6), and subjecting it to the same problems as subdivisions (1), (7), and (8), as it is currently written, we have included the exemption within our redrafted § 2-04(g)(5) and (6) to state, "For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended." This language and structure is identical to the language and structure of N.Y.C. Admin. Code § 8-107(11-a)(g)(3).

Lastly, § 2-04(g)(2)(ii) and (iv) of CCHR's Proposed Rule permit denial of employment or adverse action based on certain convictions or adjudications for civilian positions within law enforcement (i.e., positions other than police or peace officers); however, these sections, too, are

overbroad. The Guidance states that "Other positions at law enforcement agencies, including civilian positions, are protected from discrimination based on an [adjournment in contemplation of dismissal] or a favorable outcome under Criminal Procedure Law § 160.50 [N.Y.C. Admin. Code § 8-107(11)(a); N.Y. Exec. law § 296(16)], but are not protected against inquiries or adverse actions based on a conviction, youthful offender adjudication, or pending case, and are not entitled to the Fair Chance Process before adverse action is taken based on such cases." See Guidance, at 26-27. The Guidance makes clear, as does the cited law included therein, that law enforcement employers may consider many, but not all, criminal cases when hiring for civilian positions. For that reason, we request that section (ii) be corrected to state, "denying employment to an applicant based on the applicant's unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e)," is not prohibited, rather than the Proposed Rule's overbroad statement that denial may be based on the applicant's "arrest or conviction record." We mimic the same language in section (iv) for purposes of taking adverse employment actions against an employee.

B. We request an addition to proposed § 2-04(a)(5) to address what we believe is an unintentional omission that severely weakens FCA protections.

We request an addition to proposed rule § 2-04(a)(5) as follows: "(vi) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant." Proposed Rule § 2-04(a)(5)(i)-(v) as written falls short of what it is intended to do, specifically require the employer to genuinely consider how the employee or applicant's Fair Chance Notice Response impacts the employer's initial

Fair Chance Employment Analysis. Without the suggested addition, employers are free to appear to conduct a Fair Chance Employment Analysis but abstain from the crucial step of actually considering the information submitted in the Fair Chance Notice Response.

We regularly find that employers provide a Fair Chance Notice to an applicant or employee, but fail to consider the individual's response and simply terminate them after the 5 day waiting period. Making it a per se violation to fail to follow the steps outlined in Rule § 2-04(a)(5)(i)-(v), but omitting our suggested addition that also makes it a per se violation to fail to properly consider the Fair Chance Notice Response would unintentionally defeat the purpose of the Fair Chance Process. Under CCHR's Proposed Rule, employers may appear to have completed the Fair Chance Process once they give the employee or applicant a reasonable period of at least five business days to respond to the Fair Chance Notice. However, failure to consider the employee or applicant's Fair Chance Notice Response addressing the employer's concerns and providing additional information about any of the relevant fair chance factors - which may include correction of a background check error - should also be a per se violation.

Once again, the Guidance is instructive as to why this suggested addition is appropriate and would be a helpful clarification for employers. The Guidance states, "After receiving additional information from an applicant, an employer must examine whether the new information changes the employer's Fair Chance Analysis." See Guidance, at 19. The legislative intent behind the Fair Chance Act is for employers to be mandated to actually consider Fair Chance Notice Responses. Our suggested language making it a per se violation to fail to consider the Fair Chance Notice Response puts employers on notice that they must meaningfully examine whether the new information changes the employer's original Fair Chance Analysis.

Applicants, especially young applicants, may be deterred from responding to future Fair Chance Act Notices from other employers if past employers have not even considered their response. This doubly undermines the intent of the statute and makes it even more important that this omission be fixed.

C. We request additional guidance for employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).

We request that the Proposed Rule provide further and more accurate instruction to employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).

Attorneys at Youth Represent regularly represent individuals who are denied employment simply due to the *type* of conviction they have, without any consideration of the Fair Chance Act Factors for their specific situation. This is especially true for young people with sex offense convictions or violent felony convictions.

For example, one of our clients was denied employment at a department store due to a sex offense conviction they received as a teenager, almost 8 years ago. Their offense did not occur in the workplace and was their sole criminal contact, and they submitted significant proof of their rehabilitation, including completion of an intensive sex offender counseling program and multiple short stints of employment. This client has shared that repeatedly being denied employment due to a conviction has led them to feel incredibly demoralized and impacted their mental health and self-esteem. Unfortunately, due to the lack of guidance on what qualifies as an unreasonable risk, we find it hard to advocate with employers who simply do not want to take any risk by hiring someone with a criminal record with certain offenses.

The FCA's strong protections are meaningless if people with certain types of convictions can be categorically denied employment. Adding increased guidance on the narrow circumstances where a risk might be legitimately unreasonable would be extremely helpful to people like this young person. Moreover, it would ensure that the spirit of the FCA is not undermined through this exception.

First, we request that in providing instructions regarding the direct relationship exception, the Proposed Rule be modified to state that the "employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and the specific duties necessarily related to the job." This modified rule is grounded in the plain language of Article 23-A and case law. See N.Y. Correct. Law § 750(3) ("'Direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."); Marra v. City of White Plains, 467 N.Y.S.2d 865, 869 (2d Dep't 1983) ("A direct relationship can be found where the applicant's prior conviction was for an offense related to the industry or occupation at issue . . . or the elements inherent in the nature of the criminal offense would have a direct impact on the applicant's ability to perform the duties necessarily related to the license or employment sought."). The modified rule is also more accurate than the version of the rule proposed by CCHR, which states that the employer must merely draw "some connection" – no matter how indirect – between the conduct and the job, and need not consider whether the offense is related to the necessary duties of the job.

Second, we request that in describing the unreasonable risk exception, CCHR add the following clarifying instructions: "An employer cannot simply presume that an unreasonable risk

exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk." These instructions echo CCHR's Legal Enforcement Guidance and stem from relevant case law. See Guidance, at 15 ("To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant fair chance factors combine to create an unreasonable risk to people or property."); Matter of Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 613 (1988) ("Undoubtedly, when the employer or agency relies on the unreasonable risk exception, the eight factors contained in section 753(1) should be considered and applied to determine if in fact an unreasonable risk exists. The employer or agency may not assume that the exception applies and then consider the factors to determine whether the employment should be offered or the license should nevertheless be granted."). The instructions also provide needed clarity for employers by explaining that consideration of all the factors means that employers shall not create a categorical bar for serious offenses or for any particular type of offense.

D. We request the addition of the "Intentional Misrepresentation" definition into § 2-01, the definitions section, and request the modification of proposed § 2-04(e)(3)(ii) to incorporate explanation to and guidance for employers when faced with applicants' or employees' incorrect representation of their criminal record.

Explicitly defining the conduct that qualifies as an intentional misrepresentation protects both applicants and employers and is consistent with both the spirit and the plain language of the

FCA. We request that the following definition be added to § 2-01: "'Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive." This definition would provide increased clarity to employers, and it uses almost the same language as the Guidance. See Guidance, at 19.

But, simply adding a definition is not enough. We further propose expanding § 2-04(e)(3)(ii) to include more specific guidance for employers to ensure that applicants who simply misremember or misstate their criminal history without intention to deceive are not discriminated against. The language we suggest below is drawn almost entirely from the Guidance. See Guidance, at 19-20.

There are a number of circumstances where a misrepresentation may occur without the intent to deceive. In our professional experiences, it is extremely common for applicants of all ages to not fully remember or understand their own criminal history. This rings exceptionally true for young people.

Additionally, as attorneys who have practiced in criminal court, we know that criminal court is fast-paced and lacks mechanisms to ensure that litigants clearly understand the proceedings and outcomes. Judges, prosecutors and defense attorneys alike use legal terminology and acronyms that can be confusing and opaque to lay people. A plea and sentencing can all occur in a less than two-minute appearance. For young people, it can be extremely difficult and intimidating to ask questions even of their own appointed attorneys. This difficulty is compounded by the realities of language barriers and learning disabilities.

Most people also do not have free or accessible ways of obtaining their criminal histories. Furthermore, even when people are able to obtain their certified rapsheets, they may find them

littered with errors and incorrect information.[1] Other times, we find that applicants with multiple convictions often choose to list the most recent or most serious conviction, understanding that the employer will run a background check and be able to see additional contacts. Some applicants might wrongly believe their cases were sealed.

For example, a Youth Represent attorney represented a client who had one felony and multiple misdemeanor drug-related convictions in the span of a few years. When completing a background check consent form after receiving a conditional offer, he listed "felony drug case" and the year of the most recent conviction, and consented to the background check, understanding that the employer would see all of his older cases. The private employer denied him employment due to misrepresentation, because he did not list all of the cases, dates and counties in which he was convicted.

To protect applicants who are simply attempting to obtain gainful employment while navigating the stigma of their convictions, the proposed rules should provide further guidance to employers so they can understand the narrow circumstances where an applicant should be denied employment for intentional misrepresentation.

As indicated in the attached redline of § 2-04(e)(3)(ii), the rules should first make clear that an employer who is considering taking adverse action due to a misrepresentation must properly consider the applicant or employee's response (after giving the applicant or employee at least five days to respond). But the applicant or employee's right to explain the misrepresentation is meaningless if the rules do not also make clear that the employer must meaningfully consider the employee's response. Thus, we also propose adding a statement that the employer shall "properly consider[] the applicant or employee's response prior to taking any adverse action. If

[1] The proliferation of errors on certified criminal histories is well documented. See, e.g., The Rap-Sheet Trap: Mistaken Arrest Records Haunt Millions, *City Limits*, Mar. 3, 2015 at https://citylimits.org/2015/03/03/the-rap-sheet-trap-mistaken-arrest-records-haunt-millions/

the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing." See Guidance at 19 ("If the applicant credibly demonstrates either that the information provided was not a misrepresentation or that a misrepresentation was unintentional, the employer is required to perform the Fair Chance Analysis before taking adverse action against the applicant.")

Next, we request that the rules restate the definition of intentional misrepresentation, and note that "[m]ere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation." The Guidance is instructive and provides helpful examples of discrepancies that might occur unintentionally. See Guidance, at 19-20. We request that the rules incorporate the examples listed in the Guidance, as well as common situations we have confronted as advocates, by stating that "[s]uch discrepancies can arise if, for example:

a) the applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) the applicant believed the conviction was sealed;
c) the applicant confused the charge initially filed against them with the one for which they were convicted;
d) because of an error in the criminal history record; or
e) the applicant disclosed their most serious or most recent conviction, but not all of their convictions."

Finally, the rules should remind employers that it is their burden to demonstrate that a misrepresentation was intentional if the purported misrepresentation serves as the basis for denying employment to the applicant. To do this, we request the addition of the following language from the Guidance: "It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Process violate

the NYCHRL." See Guidance, at 20.

These recommended additions do not change the existing legislative scheme; they simply provide additional clarity and consistency for both employers and applicants.[2]

E. We request the modification of § 2-04(e)(2)(iv)(B) to make clear that employers must make a final decision within a reasonable period of time, and that the presumed reasonable period of time is not to exceed five business days.

We request that § 2-04(e)(2)(iv)(B) state that the employer, employment agency, or agent thereof must relay its decision in writing "within a reasonable period of time." We also request that that same paragraph state, "There is a rebuttable presumption that a reasonable time will not exceed five business days." The first proposed addition is identical to the language in the Guidance. See Guidance, at 19 ("If, after communicating with an applicant, the employer decides not to hire them, it must relay that decision to the applicant in writing within a reasonable period of time."). The second proposed addition uses the identical rebuttable presumption that is in § 2-04(e)(1)(vii) of CCHR's Proposed Rule ("There is a rebuttable presumption that a reasonable time will not exceed five business days."). This addition is essential so that workers are not indefinitely waiting for a final decision from an employer, leading to devastating uncertainty and instability. There is no reason why an employer should need weeks or months to make a final decision after having received a response to the Fair Chance Notice – and if there truly is a reason, the employer can rebut the five-day presumption by explaining why it needs more time.

Minor Modifications

A. We also request the following minor modifications:

[2] Although this is outside the scope of this Proposed Rule, CoRA would support the elimination of requirements to self-report one's criminal history altogether. Requiring people with convictions to recite their conviction history for employment is a belittling test of honesty and memory that people without criminal convictions do not have to go through, and is rendered unnecessary when an applicant consents to a background check.

a) We request the "Article 23-A factors" definition in § 2-01 add the clause "or release from incarceration" to further clarify that the time since the end of an applicant's carceral term, much like the time since arrest or conviction, is not the relevant time period employers need to consider under Article 23-A.

b) We request a clarifying edit to the definition of Fair Chance Employment Analysis in § 2-01 of the Proposed Rule. Currently, subdivision two of the definition states that the Fair Chance Employment Analysis refers to the steps for evaluating "An applicant's pending cases that occurred prior to their application for employment or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." Our requested edit is for subdivision two to state, "An applicant's pending cases that occurred *prior to becoming an employee* or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." This minor edit would ensure that individuals who have pending employment applications when they get arrested are not excluded from Fair Chance protections.

c) We request a clarifying edit to the definition of Pending case in § 2-01 of the Proposed Rule. The current proposed definition hinges the status of a pending criminal case on whether it has been "adjudicated to a verdict." Instead, we request clearer language that doesn't introduce new, confusing terminology. Specifically, we request the definition be amended to state that "A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined in section 1.20(13) of the criminal procedure law or been

dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case."

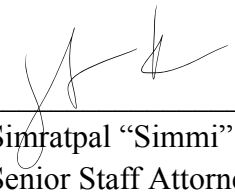
d) We request a clarifying edit to § 2-04(a)(2) of the Proposed Rule. We ask that the rule be modified to state, "Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check." As written, the inclusion of two consecutive "prior to" clauses in the Proposed Rule invites confusion. By one interpretation, the text as written could prohibit employers from asking about an applicant's conviction history prior to a conditional offer *unless* the employer requested authorization to run a background check. As that is not the law, we request that our edit be accepted.

e) We request that § 2-04(f) replace the permissive "may not" to "shall not" to better enforce the prohibition against temporary help firms aiding and abetting employer discrimination. The Guidance states, "As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences." See Guidance, at 23. As per that section of the Guidance, the imperative "shall not" is the appropriate language.

Conclusion

Thank you for the opportunity to comment on the Proposed Rule and for considering this testimony. We, along with advocates around New York City who defend the rights of criminalized people every day, strongly believe these suggested additions and changes will provide necessary guidance to employers, applicants and legal actors, and prevent discrimination against people with criminal convictions.

Respectfully submitted,



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Section 4. Section 2-01 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

For purposes of this chapter,

[*Article 23-A analysis.* "Article 23-A analysis" refers to the process required under subdivisions 9, 10, 11, and 11-a of Section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.]

Article 23-A factors. "Article 23-A factors" refers to the following factors that employers, employment agencies, or their agents must consider concerning applicants' and employees' pre-employment conviction histories under [Section] § 753 of Article 23-A of the New York [correction law] Correction Law:

1. that New York public policy encourages the licensure and employment of people with criminal records;
2. the specific duties and responsibilities necessarily related to the prospective job;
3. the bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
4. the time that has elapsed since the occurrence of the criminal offense that led to the applicant's or employee's criminal conviction, not the time since arrest, ~~or~~ conviction, or release from incarceration;
5. the age of the applicant or employee when the criminal offense that led to their conviction occurred;
6. the seriousness of the applicant's or employee's conviction;
7. any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
8. the legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

. . .

Fair Chance Employment Analysis. "Fair Chance Employment Analysis" refers to the steps for evaluating:

1. An applicant's or employee's convictions that occurred prior to the start of their employment using the Article 23-A factors; or

2. An applicant's pending cases that occurred prior to becoming an employee ~~their application for employment~~ or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors.

. . .

Intentional Misrepresentation. "Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive.

. . .

Pending case. A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined by section 1.20(13) of the criminal procedure law been ~~adjudicated to a verdict~~ or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case.

Section 6. Section 2-04 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-04 Prohibitions on Discrimination Based on Criminal History

47 RCNY §§ 2-04(a) through 2-04(g) relate to prohibitions on discrimination in employment only. 47 RCNY § 2-04(h) relates to prohibitions on discrimination in licensing only. 47 RCNY § 2-04(i) relates to enforcement of violations of the Human Rights Law under this section in employment and licensing.

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

(1) [Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing,] Prior to a conditional offer, expressing any [limitation or specification in employment] limitations or specifications regarding criminal history, including asserting that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered. This includes [, but is not limited to, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."] unsolicited statements about criminal background checks. Solicitations, advertisements, and publications may include affirmative encouragement for individuals with criminal records to apply.

(2) [Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer] ~~Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or pending cases prior to requesting authorization to perform a background check or criminal history check whether on an application or otherwise.~~ Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check.

(3) [Making any] Prior to a conditional offer, [statement] statements or [inquiry] inquiries or actions seeking to discover information relating to [the] an applicant's [pending arrest or] criminal history [conviction] whether oral or in writing [before a conditional offer of employment is extended]. This includes conducting any investigation into an applicant's criminal history, including but not limited to the use of publicly available records or the Internet for the purpose of learning about an applicant's criminal history, whether such investigations are conducted by an employer, employment agency, or their agent or for an employer, employment agency, or their agent by a third party. This also includes searching for terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" in connection with an applicant, or searching websites that purport to provide information

regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history information about an applicant.

(4) Using [within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability] forms or applications that contain a disclaimer, note exceptions, or note that applicants can skip certain questions related to criminal history are prohibited unless the specific language is required by any other federal, state or local law.

(5) Failing to [comply with requirements of § 8-107(11-a) of the Human Rights Law,] undertake any of the following obligations when they are applicable:

(i) the requirement to request from the employee or applicant information relating to the relevant Fair Chance Employment Factors;

([1] ii) the requirement to provide the applicant or employee a written copy of any inquiry an employer, employment agency, or their agent conducted into the applicant's criminal history;

([2]iii) the requirement to share with the applicant or employee a written copy of the employer's, employment agency's, or their agent's [Article 23-A analysis] Fair Chance Employment Analysis;

[or] ([3]iv.) the requirement to hold the prospective position open for at least [three] five business days from the date of an applicant's receipt of both the inquiry and analysis; or

(v.) the requirement to allow the employee a reasonable time to respond, which shall be at least five business days from the date of the employee's receipt of both the inquiry and analysis, before taking an adverse action based on the employee's criminal history.

(vi.) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant.

. . . .

(e) *Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action*. Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's [or employee's] conviction history or pending case(s), the employer, employment agency, or agent thereof must

. . .

[(iv)] (v) After evaluating the factors in subdivision [(e)(1)(i)] (e)(1) of this section, an employer, employment agency, or agent thereof must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job, or (2) employing or continuing to employ the [applicant] person would involve an unreasonable risk to property or to the safety or

welfare of specific individuals or the general public.

(A) To claim the ["direct relationship exception,"] "direct relationship" exception, an employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and specific duties necessarily related to the job ~~draw some connection between the nature of the conduct that led to the [conviction(s)] conviction or pending case and the position~~. If a direct relationship exists, the employer, employment agency, or agent thereof must evaluate the [Article 23-A factors]relevant New York City Fair Chance Employment Factors, as that term is defined in 47 RCNY § 2-01, to determine whether the concerns presented by the relationship have been mitigated.

(B) To claim the ["unreasonable risk exception,"] "unreasonable risk" exception, an employer, employment agency, or agent thereof must consider and apply the [Article 23-A factors] relevant New York City Fair Chance Employment Factors~~, as that term is defined in 47 RCNY § 2-01,~~ to determine if an unreasonable risk exists. An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or to property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk.

. . . .

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

. . .

(B) If the employer, employment agency, or agent thereof reviews the additional information and makes a determination not to hire the [applicant] person or take an adverse employment action, the employer, employment agency, or agent thereof must relay that decision to the [applicant] person in writing within a reasonable period of time. There is a rebuttable presumption that a reasonable time will not exceed five business days.

. . . .

(3) *Errors, Discrepancies, and Misrepresentations.*

. . .

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

employer, employment agency, or agent thereof first provides the person with the information that led it to the determination that an intentional misrepresentation was made and gives the person a reasonable period of at least five business days to respond, ~~.~~ and properly considers the applicant's or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing.

A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive. Mere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation. Such discrepancies can arise if, for example:

a) The applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) The applicant confused the charge initially filed against them with the one for which they were convicted;
c) The applicant believed their conviction was sealed;
d) The applicant disclosed their most serious or most recent conviction but not all of their convictions; or
e) Because of an error in the criminal history record;

It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Employment Process violates the NYCHRL.

However, an employer, employment agency, or agent thereof may not take adverse action based on the person's failure to divulge information that the employer, employment agency, or agent thereof is prohibited from inquiring about or taking adverse action on pursuant to § 8-107(11) of the Code.

. . . .

(f) *Temporary Help Firms*

. . .

(4) A temporary help firm ~~may~~ shall not aid or abet an employer's discriminatory hiring practices. A temporary help firm ~~may~~ shall not determine which candidates to refer to an employer based on an employer's preference not to employ persons with a specific type of conviction or criminal history generally. A temporary help firm ~~may~~ shall not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

. . . .

(g) *Exemptions*. Consistent with N.Y.C. Local Law No. 85 (2005) and N.Y.C. Admin. Code § 8-130, all exemptions to coverage under the following section must be construed narrowly. Employers, employment agencies, or their agents who invoke an exemption to defend against liability have the burden of proving the exemption by a preponderance of the evidence.

~~(1) **Mandatory Forfeiture, Disability, or Bar to Employment Imposed by Law.** For applicants and employees where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct, employers, employment agencies, and their agents are not prohibited from:~~

~~(i) making inquiries or statements about an applicant's or employee's non-convictions, denying employment to an applicant, or taking adverse action against an employee based on the applicant's or employee's non-convictions as set forth in 47 RCNY §§2-04(a)(6) and (b); and~~

~~(ii) denying employment to an applicant or taking adverse employment action against an employee based on the applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process set forth in 47 RCNY §§ 2-04 (a)(5) and (e).~~

~~When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04 (a).~~

~~(2)~~ **(1) Police Officers and Peace Officers.** For police officer and peace officer positions, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's criminal history prior to making a conditional offer of employment, as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);

(ii) denying employment to an applicant based on the applicant's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §2-04(e);

(iii) making inquiries or statements about an employee's non-convictions, as set forth in 47 RCNY § 2-04(a) (6); and

(iv) taking adverse employment action against an employee based on the employee's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(3)~~ **(2) Positions with Law Enforcement Agencies Other than Police Officers and Peace Officers.** For non-police officer and non-peace officer positions with law enforcement agencies, as the term "law enforcement" is used in article 23-a of the correction law,
including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family justice of the administration for

children's services, the business integrity commission, and the district attorneys' offices, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways, as set forth in 47 RCNY §§ 2-04(b), (d), and (e):

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59;

(ii) denying employment to an applicant based on the applicant's ~~arrest or~~ unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e);

(iii) making inquiries or statements about a current employee's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways:

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59, except for those described in sections 1 and 2.a of the definition of "non-conviction"; and

(iv) taking adverse employment action against an employee based on the employee's unsealed conviction history, youthful offender adjudication, sealed convictions enumerated in section (2)(iii) of this subsection, or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(4)~~ **(3) Public Agencies Other than Law Enforcement Agencies Taking Adverse Action Against an Employee.** Where an employee of a public agency is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law, the public agency is permitted to take adverse employment action against an employee based on criminal convictions that occur during employment or pending cases that preceded or arose during employment without undertaking the Fair Chance Employment Process.

~~(5)~~ **(4) Specific Positions Listed by the New York City Department of Citywide Administrative Services** Certain positions are determined by the commissioner of citywide administrative services to involve law enforcement, be susceptible to bribery or

other corruption, or entail the provision of services to or safeguarding of persons who,

because of age, disability, infirmity or other condition, are vulnerable to abuse. With regard to such positions, which are listed in a calendar item on the department's website, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4)~~, (6),~~ and (b)-(d); and

(ii) denying employment to an applicant based on the applicant's conviction history or pending cases or taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

Notwithstanding the exemption set forth in section 2-04(g)(5) of this chapter, for such positions, employers, employment agencies, or their agents must provide a written copy of the employer's Fair Chance Employment Analysis to applicants who are denied employment or employees subject to an adverse employment action because of the applicant's or employee's conviction history or pending cases.

~~(6) **Certain Positions Regulated by Self-Regulatory Organizations as Defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as Amended.** Employers, employment agencies, and their agents in the financial services industry are exempt from the following prohibitions, to the extent that compliance with industry-specific rules and regulations promulgated by a self-regulatory organization require such actions:~~

~~(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

~~(ii) denying employment to an applicant based on an applicant's conviction history or arrest record without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5), and (e); and~~

~~(iii)taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

~~Non-regulated positions in self-regulatory organizations are not exempt under 47 RCNY § 2-04(g)(6).~~

~~(7)~~ **(5) Actions Taken Pursuant to Federal, State, or Local Law Requiring Criminal Background Checks. ~~Positions for Which a Criminal Background Check is Legally Required for~~ ~~Employment Purposes Pursuant to Federal, State, or Local Law.~~**

(a) Employers, employment agencies, and their agents required by law to perform a criminal background check~~s~~ may conduct the background check prior to a conditional offer; and ~~are exempt from the following prohibitions, to the extent that compliance with federal, state, or local law requires such actions:~~

(i) if the employer, employment agency, or their agent is required to deny employment to an applicant or take adverse employment action against an

employee based on the applicant's or employee's conviction or pending case for any of the specific offenses subject to the legally mandated exclusion regardless of whether they have received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct, then they may do so without undertaking the Fair Chance Employment Process, or

(ii) if the employer, employment agency, or their agent wishes to deny an applicant employment but is not required by law to deny employment because the applicant does not have a conviction for which they would be barred by federal, state, or local law, or because the applicant's excluded conviction can and has been removed by an executive pardon, certificate of relief from disabilities, or certificate of good conduct, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

~~(iii) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

(iv) making inquiries or statements related to an applicant's conviction history or pending cases until after extending a conditional offer of employment as set forth in 47 RCNY § 2-04(b); and

(v) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5), and (e).

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(7~~5~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. An employer employment agency, or their agent that is legally required to undertake a criminal background check of an applicant may conduct the background check prior to a conditional offer, but, if they are not required to reject the candidate, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

(d) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent erroneously believe their action is mandated by federal, state, or local law.

(e) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

~~(8)~~ **(6) Actions Taken Pursuant to Federal, State, or Local Law Requiring Barring Employment Based on Certain Criminal Histories. ~~Legally Mandated Exclusions from Employment Based on Certain Criminal~~ Histories.**

(a) Employers, employment agencies, and their agents required by law to exclude applicants with certain criminal histories ~~from certain positions~~ are exempt from the following actions ~~prohibitions, to the extent that compliance with federal, state, or local law requires such action~~:

(i) making inquiries or statements about an employee's or applicant's conviction ~~history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d); and~~ for any of the specific offenses subject to the legally mandated exclusion for which they have not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct;

(ii) conducting a criminal background check prior to making a conditional offer of employment; and

(iii) performing a Fair Chance Employment Analysis or providing a copy of the Fair Chance Notice when denying employment to an applicant or taking adverse employment action against an employee based on any conviction or pending case that is subject to the legally mandated exclusion.

~~(iv) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(~~86~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption.

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. ~~An employer that is legally required to exclude an applicant from~~

~~employment based on a specific criminal history may conduct the background check prior to a conditional offer. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).~~

(d) If an applicant identifies an error on the background report and can show that they do not have a conviction that is subject to a legally mandated exclusion, they should promptly notify the employer and the employer must then conduct the Fair Chance Employment Analysis based on the corrected background information.

(e) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent rely on a mandatory legal barrier in error.

(f) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

TESTIMONY

New York City Commission on Human Rights

Hearing on Proposed Amendments - In relation to CCHR's rules governing employment discrimination based on criminal history.

Presented by:
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September 5, 2024

Good morning. My name is K.B. White, and I am a member of the Coalition of Reentry Advocates and co-chair of its Employment and Licensing Committee. The Coalition of Reentry Advocates ("CoRA") is a New York State coalition of advocates working to change laws, policies, and practices to eliminate the perpetual punishment that flows from involvement with the criminal legal system.

We thank the Commission for the opportunity to provide testimony in support of its Proposed Rules and to recommend further amendments.

Organizational Information

CoRA began in 2005 as a group of advocates brainstorming ways to remove civil barriers, including barriers to employment and housing, for people with criminal legal system involvement across New York State. We formalized our structure in 2012 and adopted the name Coalition of Reentry Advocates in order to better achieve our goals of policy and legislative change. Now, almost two decades later, CoRA has grown to comprise approximately thirty member and partner organizations.

As a coalition of primarily non-profit legal service providers and community-based organizations, we fight for our clients in courtrooms, administrative hearings, legislatures, and city and state agencies. CoRA itself has no funding. Even so, we have had remarkable successes. In 2010, eight bills drafted or supported by CoRA were enacted into law, and another fourteen were enacted into law in 2019, marking two of our most prolific years at the state legislature. We have successfully persuaded various government agencies and the judiciary to create or amend their policies and practices in order to promote greater success for people with criminal legal system involvement.

CoRA meets regularly to advance its mission and problem-solve reentry issues that New Yorkers with criminal legal system involvement face. Our solutions include legislative change, trial advocacy strategies, and everything in between. Whether addressing intensely technical legal issues or advocating for the fundamental rights of people returning home, CoRA continues to work towards building a society that is just for everyone.

The experiences of people directly affected by unjust laws and policies drive CoRA's agenda and inform the work we do as a coalition. Accordingly, we seek to fulfill our mission of eradicating barriers to full community membership through a variety of activities, including identifying state and local laws that must be changed and drafting legislation; advocating to state and local administrative agencies, through written correspondence and meetings, to change administrative rules and policies; advocating to elected officials to develop a progressive legislative agenda that accords with our mission; providing information through written materials and presentations in various fora; providing technical assistance to policy-makers, elected officials, and other groups; collaborating on effective strategies regarding litigation in which our various coalition members are engaged; and supporting the litigation of other advocates and service providers through technical assistance and through filing amicus briefs.

CoRA Strongly Supports CCHR's Proposal

CoRA strongly supports CCHR's Proposed Rule. The Rule will aid in enforcement of the 2021 amendments to the Fair Chance Act, and in doing so will help fix unjust inequities that prevent New Yorkers from accessing employment. We particularly appreciate that CCHR's Proposed Rule largely hews to the Legal Enforcement Guidance ("Guidance") on the New York City Fair Chance Act ("FCA") that it promulgated on January 3, 2022. The Guidance has been

incredibly important to CoRA member organizations' ability to ensure that our clients are not unlawfully denied employment.

The movement toward a fair and equitable society necessitates the removal of barriers that disproportionately affect people with criminal histories, particularly in accessing employment opportunities. The FCA, enacted in 2015 and further strengthened by amendments in 2021, represents a pivotal step in this direction. By prohibiting employers from inquiring about an applicant's criminal record until after a conditional offer of employment has been made, the FCA has become a cornerstone of the city's efforts to combat criminal history discrimination. This legislation underscores New York City's policy position that people with criminal legal involvement should be evaluated for employment on their merits, like everyone else.

In 2022, this Commission issued comprehensive Guidance to clarify and enhance the enforcement of the FCA. This Guidance provided critical interpretations of the FCA, offering detailed explanations of the steps employers must take before withdrawing a conditional job offer based on an applicant's criminal history. The Commission emphasized that employers must conduct an individualized assessment, considering factors such as the nature of the offense, the time elapsed since the offense, and its relevance to the job in question. This approach aims to ensure that decisions are fair, consistent, and rooted in the principles of justice and rehabilitation.

The FCA and the Commission's 2022 guidance contribute to broader social and economic benefits by enabling more people to secure gainful employment. As a statewide coalition, CoRA member organizations can proudly attest to the significant positive impact of the FCA in New York City as compared to the lack of similar protections across the rest of New York State. We welcome this opportunity to express our support of the Commission's continued commitment to uplifting New Yorkers with criminal histories, in particular, by inscribing the

extension from three to five business days for an applicant to respond to a Fair Chance Employment Analysis of their criminal history, as well as adding protections for people with certain cases, including pending criminal cases, unsealed violations, unsealed non-criminal offenses, and adjournments in contemplation of dismissal. These changes, among others, ensure that people with criminal histories have a fuller opportunity to access or retain employment.

Below, please find an explanation of our suggested modifications to the Proposed Rule based on our years of practice under the Commission's Guidance. A redlined version of these changes is attached as well. All of our suggested modifications are grounded in the same principle: the Commission's Rule should more fully adhere to the principles and text set forth in the 2022 Guidance. This is particularly important with respect to the Rule's discussion of the exemptions to the FCA; the Proposed Rule's discussion of the FCA's exemptions deviates from the Guidance's discussion of the exemptions, and in so doing, undermines the FCA's purpose of promoting equal employment opportunities for individuals with arrest and conviction histories.

Suggested Modifications to the Proposed Rule

We ask the Commission to consider making the following changes to the Proposed Rule:

1) ***We request modification of proposed § 2-04(g), which could be read to make the FCA inapplicable to a large percentage of low-wage workers.***

As provided in the attached redline of § 2-04(g), we request that sections (1), (6), (7), and (8) be combined and amended for clarity and to conform with the Guidance. Our proposed redraft ensures that the Commission does not accidentally overrule the City Council by significantly expanding the statutory exemptions listed at N.Y.C. Admin. Code § 8-107(11-a)(g). The Proposed Rule's overly broad reading of the statutory exemptions deviates both from the plain language of N.Y.C. Admin. Code § 8-107(11-a)(g) and from the Guidance's precisely correct interpretation of said statutory language. The Proposed Rule's overly broad interpretation

of the exemptions, which seems unintentional, could prevent a large percentage of low-wage workers from accessing the benefits of the FCA.

Likely unintentionally, proposed §§ 2-04(g)(1), (6), (7), and (8) gut the existing protections of the FCA. N.Y.C. Admin. Code § 8-107(11-a)(g)(3) states:

> This subdivision shall not apply to any actions taken by an employer or agent thereof: . . . Pursuant to any federal, state or local law requiring criminal background checks for employment purposes or barring employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

That is, the statutory text of the FCA only exempts those particular employer actions that are taken pursuant to a law requiring criminal background checks or barring employment based on criminal history. In contrast, the Commission's proposed § 2-04(g)(1), (6), (7), and (8) state that whenever an employer is subject to a law requiring a background check or barring employment based on criminal history, the employer is exempt from the substantive and procedural protections of the FCA. See Proposed § 2-04(g)(1), (6), (7), and (8) (stating that employers subject to relevant background check laws are exempt from the prohibitions on "making inquiries or statements" about criminal history and "denying employment . . . or taking adverse action" based on criminal history "without undertaking the Fair Chance Employment Process"). Although § 2-04(g)(1), (6), (7), and (8) contain some language suggesting that CCHR was attempting to maintain the narrowness of the statutory language (for example, 2-04(g)(7) and (8) state that the exemption applies only "to the extent that compliance with federal, state, or local law requires such action", and that employers are "required to undertake all other actions required by this chapter that are not in conflict with the requirement of the federal, state or local law that form the basis of this exemption"), the entirety of the language in § 2-04(g)(1), (6), (7),

and (8) is vague, confusing, and could be read by employers and judges to exempt entire industries from all aspects of the FCA.

As written, § 2-04(g)(1) and (8) could be read to permit employers who employ persons in positions where there is a mandatory exclusion imposed by law to be wholly exempt from the procedural and substantive protections of the FCA. An employer hiring for one of these positions could, under the Proposed Rule, inquire into whether the person ever received an adjournment in contemplation of dismissal ("ACD") or a disorderly conduct, a non-conviction, and form its denial in whole or in part on those dispositions–even where the ACD or non-conviction is not a mandatory bar. This exemption is far too broad, albeit unintentionally so.

The Guidance is instructive as to why the proposed formulation is incorrect. It provides the example of a licensed private investigator looking to hire an administrative assistant and who is prohibited by General Business Law § 81 from knowingly employing anyone who has been convicted of a felony or any of the offenses listed in General Business Law § 74(2), unless the mandatory bar is removed by sealing or a Certificate of Relief from Disabilities. In the Guidance, that employer is exempted from certain *per se* restrictions, such as being able to run a background check prior to a conditional offer in order to determine in advance of that offer whether they would be prohibited by law from hiring said applicant. However, as the Guidance explains in various helpful scenarios, the employer must follow the FCA where the applicant's background check does not reveal a conviction subject to mandatory exclusion. See Guidance, at 25-26. For example, in one scenario where the background check reveals a criminal history that is not subject to the legal bar but nevertheless concerns the employer, the employer must conduct the Fair Chance Employment Analysis, provide the applicant a copy of the criminal background check and the completed Fair Chance Notice, allow the applicant at least five business days to

respond, and communicate in writing if the employer ultimately declines to hire the applicant. See Guidance at 26. As written, however, the Proposed Rule at § 2-04(1)(b) and (8)(b) could be read to permit that same employer to bypass the FCA process completely and deny employment due to the fact that the position is subject to a law that imposes a mandatory bar.

Proposed § 2-04(7) is similarly overbroad and unintentionally disregards the Guidance. Many positions for low-wage workers in helping professions, such as home health aides, are subject to legally required background checks. Under the current language of N.Y.C. Admin. Code § 8-107(11-a)(g)(3), home health aides are entitled to most of the FCA protections because, again, the exemption applies only to employer actions that are taken pursuant to a law requiring a background check. For example, those employers that are required by Public Health Law § 2899-a(1) to request that the Department of Health run a background check are permitted to make such a request because that is an "action[] taken . . . pursuant to any state, federal or local law." If the Department of Health directs an employer to deny employment to the applicant, the employer may deny the applicant employment without providing a copy of the Fair Chance Act Notice because the denial of employment is an "action[] taken . . . pursuant to any state, federal or local law" (specifically, pursuant to Executive Law § 845-b(5)(h)). However, the FCA as currently written protects applicants in situations where an employer takes an action that is not specifically mandated by state, federal or local law. For example, if the Department of Health approves the applicant to work for an employer, that employer may not deny the applicant employment based on their conviction record unless the employer provides them with a copy of their background check inquiry and the Fair Chance Act Notice, gives them a reasonable period to respond, and considers their response pursuant to Article 23-A of the Correction Law – because if the Department of Health approved the applicant to work, the job denial would not be

an "action[] taken . . . pursuant to any state, federal or local law." This example is helpfully illustrated in the Guidance, as well. See Guidance, at 24.

Unfortunately, the proposed language of § 2-04(g)(7) could be read to remove all FCA protections for workers in certain industries because they seek to work in "Positions for Which a Criminal Background Check is Legally Required." This language change between the FCA and the Proposed Rule is likely unintentional, but the consequences could be enormous. Thousands of low-wage workers in New York City who work in industries in which a background check is required by law could lose the FCA protections that the Commission works so hard to enforce. If employers or judges interpret § 2-04(g)(7) to remove FCA protections for entire industries, the FCA will lose its value. The exemption will swallow the rule, and low-wage workers in New York City will return to the state they were in before the FCA's enactment in 2015.

Our redraft of proposed § 2-04(g)(1), (6), (7), and (8), attached to this testimony, newly amended as § 2-04(g)(5) and (6), clarifies the exemptions and properly anchors them to employer actions, rather than employment sectors or positions. The redraft primarily uses language taken directly from the 2022 Guidance. In amended § 2-04(g)(5), employers (such as home health agencies) that are required by law to conduct a background check, are instructed on whether or how to follow the FCA in the event that, as often happens, the law does not require them to deny employment. In amended § 2-04(g)(6), the redraft identifies which employer actions are exempted in scenarios where, as was the case for the licensed private investigator mentioned above, the employer is prohibited from hiring someone who was convicted of an automatically disqualifying crime. Further, in redrafted subdivision (6), because the mandatory disqualifying conviction exempts the employer from engaging in the Fair Chance Process, we have added paragraph (d), which would permit applicants to notify employers of an error on their

background report and show that they do not have a legally mandated exclusion. Once that action is satisfied, the employer must either hire the applicant or continue the Fair Chance Process if it wishes to deny employment based on the results of the applicant's background check that are not otherwise a mandatory exclusion.

The redrafted subdivisions also provide that a mistake of law is not a defense to a charge of a violation of either section (paragraph (d) of redrafted subdivision (5) and paragraph (e) of redrafted subdivision (6)). We believe that our formulation better clarifies the language that is currently in CCHR's Proposed Rule: "When an employer, employment agency or their agency relies on a mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a)." Further, we have made this language a freestanding paragraph for clarity and emphasis.

Additionally, instead of pulling out the self-regulatory organization language as a freestanding exemption, as provided for in proposed § 2-04(g)(6), and subjecting it to the same problems as subdivisions (1), (7), and (8), as it is currently written, we have included the exemption within our redrafted § 2-04(g)(5) and (6) to state, "For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended." This language and structure is identical to the language and structure of N.Y.C. Admin. Code § 8-107(11-a)(g)(3).

Lastly, § 2-04(g)(2)(ii) and (iv) of CCHR's Proposed Rule permit denial of employment or adverse action based on certain convictions or adjudications for civilian positions within law enforcement (i.e., positions other than police or peace officers); however, these sections, too, are overbroad. The Guidance states that "Other positions at law enforcement agencies, including

civilian positions, are protected from discrimination based on an [adjournment in contemplation of dismissal] or a favorable outcome under Criminal Procedure Law § 160.50 [N.Y.C. Admin. Code § 8-107(11)(a); N.Y. Exec. law § 296(16)], but are not protected against inquiries or adverse actions based on a conviction, youthful offender adjudication, or pending case, and are not entitled to the Fair Chance Process before adverse action is taken based on such cases." See Guidance, at 26-27. The Guidance makes clear, as does the cited law included therein, that law enforcement employers may consider many, but not all, criminal cases when hiring for civilian positions. For that reason, we request that section (ii) be corrected to state, "denying employment to an applicant based on the applicant's unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e)," is not prohibited, rather than the Proposed Rule's overbroad statement that denial may be based on the applicant's "arrest or conviction record." We mimic the same language in section (iv) for purposes of taking adverse employment actions against an employee.

2) ***We request an addition to proposed § 2-04(a)(5) to address what we believe is an unintentional omission that severely weakens FCA protections.***

We request an addition to proposed rule § 2-04(a)(5) as follows: "(vi) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant." Proposed Rule § 2-04(a)(5)(i)-(v) as written falls short of what it is intended to do, specifically require the employer to genuinely consider how the employee or applicant's Fair Chance Notice Response impacts the employer's initial Fair Chance Employment Analysis. Without the suggested addition, employers are free to appear

to conduct a Fair Chance Employment Analysis but abstain from the crucial step of actually considering the information submitted in the Fair Chance Notice Response.

CoRA member organizations have several clients who have been adversely impacted by employers' failure to consider their Fair Chance Notice Response. For example, an attorney at a CoRA member organization recently submitted a timely Fair Chance Notice Response to an employer on behalf of her client. In response, the employer issued a final denial that stated that it had never received any additional information in response to the Fair Chance Notice. Another client of the same attorney was recently terminated after submitting a Fair Chance Notice Response that corrected an error on the employer's background check. We believe that making it a per se violation to fail to follow the steps outlined in Rule § 2-04(a)(5)(i)-(v), but omitting our suggested addition that also makes it a per se violation to fail to properly consider the Fair Chance Notice Response would unintentionally defeat the purpose of the Fair Chance Process. Under CCHR's Proposed Rule, employers may appear to have completed the Fair Chance Process once they give the employee or applicant a reasonable period of at least five business days to respond to the Fair Chance Notice. However, failure to consider the employee or applicant's Fair Chance Notice Response addressing the employer's concerns and providing additional information about any of the relevant fair chance factors - which may include correction of a background check error - should also be a per se violation.

Once again, the Guidance is instructive as to why this suggested addition is appropriate and would be a helpful clarification for employers. The Guidance states, "After receiving additional information from an applicant, an employer must examine whether the new information changes the employer's Fair Chance Analysis." See Guidance, at 19. The legislative intent behind the Fair Chance Act is for employers to be mandated to actually consider Fair

Chance Notice Responses. Our suggested language making it a per se violation to fail to consider the Fair Chance Notice Response puts employers on notice that they must meaningfully examine whether the new information changes the employer's original Fair Chance Analysis.

3) ***We request further instruction to employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).***

We request that the Proposed Rule provide further and more accurate instruction to employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).

First, we request that in providing instructions regarding the direct relationship exception, the Proposed Rule be modified to state that the "employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and the specific duties necessarily related to the job." This modified rule is grounded in the plain language of Article 23-A and case law. See N.Y. Correct. Law § 750(3) ("'Direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."); Marra v. City of White Plains, 467 N.Y.S.2d 865, 869 (2d Dep't 1983) ("A direct relationship can be found where the applicant's prior conviction was for an offense related to the industry or occupation at issue . . . or the elements inherent in the nature of the criminal offense would have a direct impact on the applicant's ability to perform the duties necessarily related to the license or employment sought."). The modified rule is also more accurate than the version of the rule proposed by CCHR, which states that the employer must merely draw "some connection" – no matter how indirect – between the conduct and the job, and need not consider whether the offense is related to the necessary duties of the job.

Second, we request that in describing the unreasonable risk exception, CCHR add the following clarifying instructions: "An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk." These instructions echo CCHR's Legal Enforcement Guidance and stem from relevant case law. See Guidance, at 15 ("To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant fair chance factors combine to create an unreasonable risk to people or property."); Matter of Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 613 (1988) ("Undoubtedly, when the employer or agency relies on the unreasonable risk exception, the eight factors contained in section 753(1) should be considered and applied to determine if in fact an unreasonable risk exists. The employer or agency may not assume that the exception applies and then consider the factors to determine whether the employment should be offered or the license should nevertheless be granted."). The instructions also provide needed clarity for employers by explaining that consideration of all the factors means that employers shall not create a categorical bar for serious offenses or for any particular type of offense.

4) ***We request the modification of § 2-04(e)(2)(iv)(B) to make clear that employers must make a final decision within a reasonable period of time, and that the presumed reasonable period of time is not to exceed five business days.***

We request that § 2-04(e)(2)(iv)(B) state that the employer, employment agency, or agent thereof must relay its decision in writing "within a reasonable period of time." We also request that that same paragraph state, "There is a rebuttable presumption that a reasonable time will not exceed five business days." The first proposed addition is identical to the language in the Guidance. See Guidance, at 19 ("If, after communicating with an applicant, the employer decides not to hire them, it must relay that decision to the applicant in writing within a reasonable period of time."). The second proposed addition uses the identical rebuttable presumption that is in § 2-04(e)(1)(vii) of CCHR's Proposed Rule ("There is a rebuttable presumption that a reasonable time will not exceed five business days.").

This addition is essential so that workers are not indefinitely waiting for a final decision from an employer. Various CoRA member organizations have clients who have responded to a Fair Chance Notice, only to wait weeks or months for a final decision (or only to receive a final decision after a legal services attorney contacts the employer). These weeks or months of unemployment can be devastating for a worker, and they are contrary to the purpose of the FCA. There is no reason why an employer should need weeks or months to make a final decision after having received a response to the Fair Chance Notice – and if there truly is a reason, the employer can rebut the five-day presumption by explaining why it needs more time.

5) ***We request the addition of the "Intentional Misrepresentation" definition into § 2-01, the definitions section, and request the modification of proposed § 2-04(e)(3)(ii) to incorporate explanation to and guidance for employers when faced with applicants' or employees' incorrect representation of their criminal record.***

Explicitly defining the conduct that qualifies as an intentional misrepresentation protects both applicants and employers and is consistent with both the spirit and the plain language of the FCA. We request that the following definition be added to § 2-01: "'Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history

or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive." This definition would provide increased clarity to employers, and it uses almost the same language as the Guidance. See Guidance, at 19.

But, simply adding a definition is not enough. We further propose expanding § 2-04(e)(3)(ii) to include more specific guidance for employers to ensure that applicants who simply misremember or misstate their criminal history without intention to deceive are not discriminated against. The language we suggest below is drawn almost entirely from the Guidance. See Guidance, at 19-20.

There are a number of circumstances where a misrepresentation may occur without the intent to deceive. In our professional experiences, it is extremely common for applicants of all ages to not fully remember or understand their own criminal history. As attorneys who have practiced in criminal court, we know that criminal court is convoluted and fast-paced. Judges, prosecutors and defense attorneys alike use legal terminology and acronyms that can be confusing and opaque. A plea and sentencing can all occur in a less than two-minute appearance. Applicants with multiple convictions often choose to list the most recent or most serious conviction, understanding that the employer will run a background check and be able to see additional contacts. Some applicants might wrongly believe their cases were sealed.

For example, an attorney at a CoRA member organization represented a client who had one felony and multiple misdemeanor drug-related convictions in the span of a few years. When completing a background check consent form after receiving a conditional offer, he listed "felony drug case" and the year of the most recent conviction, and consented to the background check, understanding that the employer would see all of his older cases. The private employer denied him employment due to misrepresentation, because he did not list all of the cases, dates and

counties in which he was convicted.

To protect applicants who are simply attempting to obtain gainful employment while navigating the stigma of their convictions, the proposed rules should provide further guidance to employers so they can understand the narrow circumstances where an applicant should be denied employment for intentional misrepresentation.

As indicated in the attached redline of § 2-04(e)(3)(ii), the rules should first make clear that an employer who is considering taking adverse action due to a misrepresentation must properly consider the applicant or employee's response (after giving the applicant or employee at least five days to respond). But the applicant or employee's right to explain the misrepresentation is meaningless if the rules do not also make clear that the employer must meaningfully consider the employee's response. Thus, we also propose adding a statement that the employer shall "properly consider[] the applicant or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing." See Guidance at 19 ("If the applicant credibly demonstrates either that the information provided was not a misrepresentation or that a misrepresentation was unintentional, the employer is required to perform the Fair Chance Analysis before taking adverse action against the applicant.")

Next, we request that the rules restate the definition of intentional misrepresentation, and note that "[m]ere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation." The Guidance is instructive and provides helpful examples of discrepancies that might occur unintentionally. See Guidance, at 19-20. We request that the rules incorporate the examples listed in the Guidance, as well as common situations we have confronted as

advocates, by stating that "[s]uch discrepancies can arise if, for example:

a) the applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) the applicant believed the conviction was sealed;
c) the applicant confused the charge initially filed against them with the one for which they were convicted;
d) because of an error in the criminal history record; or
e) the applicant disclosed their most serious or most recent conviction, but not all of their convictions."

Finally, the rules should remind employers that it is their burden to demonstrate that a misrepresentation was intentional if the misrepresentation serves as the basis for denying employment to the applicant. To do this, we request the addition of the following language from the Guidance: "It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Process violate the NYCHRL." See Guidance, at 20.

These recommended additions do not change the existing legislative scheme; they simply provide additional clarity and consistency for both employers and applicants.[1]

6) We request the following additional modifications:

a) We request the "Article 23-A factors" definition in § 2-01 add the clause "or release from incarceration" to further clarify that the time since the end of an applicant's carceral term, much like the time since arrest or conviction, is not the relevant time period employers need to consider under Article 23-A.

[1] Although this is outside the scope of this Proposed Rule, CoRA would support the elimination of requirements to self-report one's criminal history altogether. Requiring people with convictions to recite their conviction history for employment is a belittling test of honesty and memory that people without criminal convictions do not have to go through, and it is rendered unnecessary when an applicant consents to a background check.

b) We request a clarifying edit to the definition of Fair Chance Employment Analysis in § 2-01 of the Proposed Rule. Currently, subdivision two of the definition states that the Fair Chance Employment Analysis refers to the steps for evaluating "An applicant's pending cases that occurred prior to their application for employment or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." Our requested edit is for subdivision two to state, "An applicant's pending cases that occurred *prior to becoming an employee* or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." This minor edit would ensure that individuals who have pending employment applications when they get arrested are not excluded from Fair Chance protections.

c) We request a clarifying edit to the definition of Pending case in § 2-01 of the Proposed Rule. The current proposed definition hinges the status of a pending criminal case on whether it has been "adjudicated to a verdict." Instead, we request clearer language that doesn't introduce new, confusing terminology. Specifically, we request the definition be amended to state that "A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined in section 1.20(13) of the criminal procedure law or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer,

employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case."

d) We request a clarifying edit to § 2-04(a)(2) of the Proposed Rule. We ask that the rule be modified to state, "Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check." As written, the inclusion of two consecutive "prior to" clauses in the Proposed Rule invites confusion. By one interpretation, the text as written could prohibit employers from asking about an applicant's conviction history prior to a conditional offer *unless* the employer requested authorization to run a background check. As that is not the law, we request that our edit be accepted.

e) We request that § 2-04(f) replace the permissive "may not" to "shall not" to better enforce the prohibition against temporary help firms aiding and abetting employer discrimination. The Guidance states, "As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences." See Guidance, at 23. As per that section of the Guidance, the imperative "shall not" is the appropriate language.

Conclusion

We thank you for hearing our testimony today. We strongly support the Commission's proposed rule changes and believe that our recommended modifications will make the rule more effective. We are happy to answer any questions about these recommendations. We look forward

to continuing to work with the Commission to ensure that all New Yorkers have a meaningful opportunity to work and maintain financial stability.

Section 4. Section 2-01 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

For purposes of this chapter,

[*Article 23-A analysis.* "Article 23-A analysis" refers to the process required under subdivisions 9, 10, 11, and 11-a of Section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.]

Article 23-A factors. "Article 23-A factors" refers to the following factors that employers, employment agencies, or their agents must consider concerning applicants' and employees' pre-employment conviction histories under [Section] § 753 of Article 23-A of the New York [correction law] Correction Law:

1. that New York public policy encourages the licensure and employment of people with criminal records;
2. the specific duties and responsibilities necessarily related to the prospective job;
3. the bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
4. the time that has elapsed since the occurrence of the criminal offense that led to the applicant's or employee's criminal conviction, not the time since arrest, ~~or~~ conviction, or release from incarceration;
5. the age of the applicant or employee when the criminal offense that led to their conviction occurred;
6. the seriousness of the applicant's or employee's conviction;
7. any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
8. the legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

. . .

Fair Chance Employment Analysis. "Fair Chance Employment Analysis" refers to the steps for evaluating:

1. An applicant's or employee's convictions that occurred prior to the start of their employment using the Article 23-A factors; or

2. An applicant's pending cases that occurred prior to becoming an employee ~~their application for employment~~ or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors.

. . .

Intentional Misrepresentation. "Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive.

. . .

Pending case. A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined by section 1.20(13) of the criminal procedure law been ~~adjudicated to a verdict~~ or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case.

Section 6. Section 2-04 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-04 Prohibitions on Discrimination Based on Criminal History

47 RCNY §§ 2-04(a) through 2-04(g) relate to prohibitions on discrimination in employment only. 47 RCNY § 2-04(h) relates to prohibitions on discrimination in licensing only. 47 RCNY § 2-04(i) relates to enforcement of violations of the Human Rights Law under this section in employment and licensing.

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

(1) [Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing,] Prior to a conditional offer, expressing any [limitation or specification in employment] limitations or specifications regarding criminal history, including asserting that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered. This includes [, but is not limited to, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."] unsolicited statements about criminal background checks. Solicitations, advertisements, and publications may include affirmative encouragement for individuals with criminal records to apply.

(2) [Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer] ~~Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or pending cases prior to requesting authorization to perform a background check or criminal history check whether on an application or otherwise.~~ Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check.

(3) [Making any] Prior to a conditional offer, [statement] statements or [inquiry] inquiries or actions seeking to discover information relating to [the] an applicant's [pending arrest or] criminal history [conviction] whether oral or in writing [before a conditional offer of employment is extended]. This includes conducting any investigation into an applicant's criminal history, including but not limited to the use of publicly available records or the Internet for the purpose of learning about an applicant's criminal history, whether such investigations are conducted by an employer, employment agency, or their agent or for an employer, employment agency, or their agent by a third party. This also includes searching for terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" in connection with an applicant, or searching websites that purport to provide information

regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history information about an applicant.

(4) Using [within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability] forms or applications that contain a disclaimer, note exceptions, or note that applicants can skip certain questions related to criminal history are prohibited unless the specific language is required by any other federal, state or local law.

(5) Failing to [comply with requirements of § 8-107(11-a) of the Human Rights Law,] undertake any of the following obligations when they are applicable:

(i) the requirement to request from the employee or applicant information relating to the relevant Fair Chance Employment Factors;

([1] ii) the requirement to provide the applicant or employee a written copy of any inquiry an employer, employment agency, or their agent conducted into the applicant's criminal history;

([2]iii) the requirement to share with the applicant or employee a written copy of the employer's, employment agency's, or their agent's [Article 23-A analysis] Fair Chance Employment Analysis;

[or] ([3]iv.) the requirement to hold the prospective position open for at least [three] five business days from the date of an applicant's receipt of both the inquiry and analysis; or

(v.) the requirement to allow the employee a reasonable time to respond, which shall be at least five business days from the date of the employee's receipt of both the inquiry and analysis, before taking an adverse action based on the employee's criminal history.

(vi.) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant.

. . . .

(e) *Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action*. Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's [or employee's] conviction history or pending case(s), the employer, employment agency, or agent thereof must

. . .

[(iv)] (v) After evaluating the factors in subdivision [(e)(1)(i)] (e)(1) of this section, an employer, employment agency, or agent thereof must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job, or (2) employing or continuing to employ the [applicant] person would involve an unreasonable risk to property or to the safety or

welfare of specific individuals or the general public.

(A) To claim the ["direct relationship exception,"] "direct relationship" exception, an employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and specific duties necessarily related to the job ~~draw some connection between the nature of the conduct that led to the [conviction(s)] conviction or pending case and the position~~. If a direct relationship exists, the employer, employment agency, or agent thereof must evaluate the [Article 23-A factors]relevant New York City Fair Chance Employment Factors, as that term is defined in 47 RCNY § 2-01, to determine whether the concerns presented by the relationship have been mitigated.

(B) To claim the ["unreasonable risk exception,"] "unreasonable risk" exception, an employer, employment agency, or agent thereof must consider and apply the [Article 23-A factors] relevant New York City Fair Chance Employment Factors~~, as that term is defined in 47 RCNY § 2-01,~~ to determine if an unreasonable risk exists. An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or to property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk.

. . . .

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

. . .

(B) If the employer, employment agency, or agent thereof reviews the additional information and makes a determination not to hire the [applicant] person or take an adverse employment action, the employer, employment agency, or agent thereof must relay that decision to the [applicant] person in writing within a reasonable period of time. There is a rebuttable presumption that a reasonable time will not exceed five business days.

. . . .

(3) *Errors, Discrepancies, and Misrepresentations.*

. . .

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

employer, employment agency, or agent thereof first provides the person with the information that led it to the determination that an intentional misrepresentation was made and gives the person a reasonable period of at least five business days to respond, ~~.~~ and properly considers the applicant's or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing.

A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive. Mere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation. Such discrepancies can arise if, for example:

a) The applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) The applicant confused the charge initially filed against them with the one for which they were convicted;
c) The applicant believed their conviction was sealed;
d) The applicant disclosed their most serious or most recent conviction but not all of their convictions; or
e) Because of an error in the criminal history record;

It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Employment Process violates the NYCHRL.

However, an employer, employment agency, or agent thereof may not take adverse action based on the person's failure to divulge information that the employer, employment agency, or agent thereof is prohibited from inquiring about or taking adverse action on pursuant to § 8-107(11) of the Code.

. . . .

(f) *Temporary Help Firms*

. . .

(4) A temporary help firm ~~may~~ shall not aid or abet an employer's discriminatory hiring practices. A temporary help firm ~~may~~ shall not determine which candidates to refer to an employer based on an employer's preference not to employ persons with a specific type of conviction or criminal history generally. A temporary help firm ~~may~~ shall not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

. . . .

(g) *Exemptions*. Consistent with N.Y.C. Local Law No. 85 (2005) and N.Y.C. Admin. Code § 8-130, all exemptions to coverage under the following section must be construed narrowly. Employers, employment agencies, or their agents who invoke an exemption to defend against liability have the burden of proving the exemption by a preponderance of the evidence.

~~(1) **Mandatory Forfeiture, Disability, or Bar to Employment Imposed by Law.** For applicants and employees where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct, employers, employment agencies, and their agents are not prohibited from:~~

~~(i) making inquiries or statements about an applicant's or employee's non-convictions, denying employment to an applicant, or taking adverse action against an employee based on the applicant's or employee's non-convictions as set forth in 47 RCNY §§2-04(a)(6) and (b); and~~

~~(ii) denying employment to an applicant or taking adverse employment action against an employee based on the applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process set forth in 47 RCNY §§ 2-04 (a)(5) and (e).~~

~~When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04 (a).~~

~~(2)~~ **(1) Police Officers and Peace Officers.** For police officer and peace officer positions, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's criminal history prior to making a conditional offer of employment, as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);

(ii) denying employment to an applicant based on the applicant's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §2-04(e);

(iii) making inquiries or statements about an employee's non-convictions, as set forth in 47 RCNY § 2-04(a) (6); and

(iv) taking adverse employment action against an employee based on the employee's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(3)~~ **(2) Positions with Law Enforcement Agencies Other than Police Officers and Peace Officers.** For non-police officer and non-peace officer positions with law enforcement agencies, as the term "law enforcement" is used in article 23-a of the correction law,
including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family justice of the administration for

children's services, the business integrity commission, and the district attorneys' offices, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways, as set forth in 47 RCNY §§ 2-04(b), (d), and (e):

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59;

(ii) denying employment to an applicant based on the applicant's ~~arrest or~~ unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e);

(iii) making inquiries or statements about a current employee's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways:

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59, except for those described in sections 1 and 2.a of the definition of "non-conviction"; and

(iv) taking adverse employment action against an employee based on the employee's unsealed conviction history, youthful offender adjudication, sealed convictions enumerated in section (2)(iii) of this subsection, or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(4)~~ **(3) Public Agencies Other than Law Enforcement Agencies Taking Adverse Action Against an Employee.** Where an employee of a public agency is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law, the public agency is permitted to take adverse employment action against an employee based on criminal convictions that occur during employment or pending cases that preceded or arose during employment without undertaking the Fair Chance Employment Process.

~~(5)~~ **(4) Specific Positions Listed by the New York City Department of Citywide Administrative Services** Certain positions are determined by the commissioner of citywide administrative services to involve law enforcement, be susceptible to bribery or

other corruption, or entail the provision of services to or safeguarding of persons who,

because of age, disability, infirmity or other condition, are vulnerable to abuse. With regard to such positions, which are listed in a calendar item on the department's website, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4)~~, (6),~~ and (b)-(d); and

(ii) denying employment to an applicant based on the applicant's conviction history or pending cases or taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

Notwithstanding the exemption set forth in section 2-04(g)(5) of this chapter, for such positions, employers, employment agencies, or their agents must provide a written copy of the employer's Fair Chance Employment Analysis to applicants who are denied employment or employees subject to an adverse employment action because of the applicant's or employee's conviction history or pending cases.

~~(6) **Certain Positions Regulated by Self-Regulatory Organizations as Defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as Amended.** Employers, employment agencies, and their agents in the financial services industry are exempt from the following prohibitions, to the extent that compliance with industry-specific rules and regulations promulgated by a self-regulatory organization require such actions:~~

~~(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

~~(ii) denying employment to an applicant based on an applicant's conviction history or arrest record without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5), and (e); and~~

~~(iii)taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

~~Non-regulated positions in self-regulatory organizations are not exempt under 47 RCNY § 2-04(g)(6).~~

~~(7)~~ **(5) Actions Taken Pursuant to Federal, State, or Local Law Requiring Criminal Background Checks. ~~Positions for Which a Criminal Background Check is Legally Required for~~ ~~Employment Purposes Pursuant to Federal, State, or Local Law.~~**

(a) Employers, employment agencies, and their agents required by law to perform a criminal background check~~s~~ may conduct the background check prior to a conditional offer; and ~~are exempt from the following prohibitions, to the extent that compliance with federal, state, or local law requires such actions:~~

(i) if the employer, employment agency, or their agent is required to deny employment to an applicant or take adverse employment action against an

employee based on the applicant's or employee's conviction or pending case for any of the specific offenses subject to the legally mandated exclusion regardless of whether they have received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct, then they may do so without undertaking the Fair Chance Employment Process, or

(ii) if the employer, employment agency, or their agent wishes to deny an applicant employment but is not required by law to deny employment because the applicant does not have a conviction for which they would be barred by federal, state, or local law, or because the applicant's excluded conviction can and has been removed by an executive pardon, certificate of relief from disabilities, or certificate of good conduct, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

~~(iii) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

(iv) making inquiries or statements related to an applicant's conviction history or pending cases until after extending a conditional offer of employment as set forth in 47 RCNY § 2-04(b); and

(v) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5), and (e).

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(7~~5~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. An employer employment agency, or their agent that is legally required to undertake a criminal background check of an applicant may conduct the background check prior to a conditional offer, but, if they are not required to reject the candidate, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

(d) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent erroneously believe their action is mandated by federal, state, or local law.

(e) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

~~(8)~~ **(6) Actions Taken Pursuant to Federal, State, or Local Law Requiring Barring Employment Based on Certain Criminal Histories. ~~Legally Mandated Exclusions from Employment Based on Certain Criminal~~ Histories.**

(a) Employers, employment agencies, and their agents required by law to exclude applicants with certain criminal histories ~~from certain positions~~ are exempt from the following actions ~~prohibitions, to the extent that compliance with federal, state, or local law requires such action~~:

(i) making inquiries or statements about an employee's or applicant's conviction ~~history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d); and~~ for any of the specific offenses subject to the legally mandated exclusion for which they have not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct;

(ii) conducting a criminal background check prior to making a conditional offer of employment; and

(iii) performing a Fair Chance Employment Analysis or providing a copy of the Fair Chance Notice when denying employment to an applicant or taking adverse employment action against an employee based on any conviction or pending case that is subject to the legally mandated exclusion.

~~(iv) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(~~86~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption.

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. ~~An employer that is legally required to exclude an applicant from~~

~~employment based on a specific criminal history may conduct the background check prior to a conditional offer. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).~~

(d) If an applicant identifies an error on the background report and can show that they do not have a conviction that is subject to a legally mandated exclusion, they should promptly notify the employer and the employer must then conduct the Fair Chance Employment Analysis based on the corrected background information.

(e) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent rely on a mandatory legal barrier in error.

(f) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

THE LEGAL AID SOCIETY CRIMINAL DEFENSE

TESTIMONY

The NYC Commission on Human Rights

Hearing on Proposed Rules - In relation to amending rules governing employment discrimination based on criminal history

Presented by:
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Good morning. My name is Megumi Saito, and I am a staff attorney in the Worker Justice Project, an initiative of The Legal Aid Society's Criminal Defense Practice. The Worker Justice Project combats arrest and conviction related employment discrimination faced by justice-impacted New Yorkers. We thank the Commission for the opportunity to provide testimony in strong support of its proposed rules governing employment discrimination based on criminal history and to recommend further amendments to the rules.

Organizational Information

Since 1876, The Legal Aid Society has provided free legal services to New York City residents who are unable to afford private counsel. Our Civil, Criminal Defense, Juvenile Rights, and Pro Bono practices work tirelessly in and out of the courtroom to defend our clients and dismantle the hidden, systemic barriers that can prevent them from thriving in New York City. The Society's Criminal Defense Practice is at the forefront of public defense in New York City—playing a major role in shaping the practice of criminal defense and the criminal legal system. The Practice's expansive reach spans from our client representation in courts across all five boroughs of the city to our ongoing, active presence and partnerships in communities. As the primary public defender in NYC, we are committed to protecting the rights of historically and systemically marginalized people in society. We provide representation on trial and post-conviction litigation on close to 200,000 direct legal matters, while our class action litigation and policy reform work address unjust laws and policies.

The Worker Justice Project, founded in January 2019 as an initiative of the Society's Criminal Defense Practice, combats discrimination faced by workers with arrest or conviction records living in New York City. Every day employers and licensing agencies unfairly deny qualified individuals the opportunity to work because of pending charges, past convictions, and

even sealed or dismissed cases. This discrimination prevents countless New Yorkers from maintaining financial stability and supporting their families—and further disenfranchises people of color already subjected to discriminatory employment practices and the racist administration of criminal justice. In this way, criminal-related employment discrimination is a prime example of how this country perpetually punishes its most oppressed individuals and communities. The Worker Justice Project fights this discrimination through a bold and comprehensive approach. The Project advises Criminal Defense Practice staff on the employment consequences of criminal case dispositions in order to minimize harm to clients' job opportunities, and empowers workers with records to defend their rights. The Project also enforces the rights of workers who are unlawfully denied jobs or licenses because of arrest or conviction records by representing workers in administrative proceedings, pre-litigation advocacy, and affirmative litigation. The Project further impacts social change by providing legal services and Know Your Rights trainings to various community organizations. Finally, the Project challenges government policies that create barriers to employment and advocates for legislative solutions to effect systemic change.

Since 2019, the Worker Justice Project has provided legal services on approximately 7,500 matters for workers with criminal records. Our legislative advocacy helped lead to the enactment of new statutory protections at the State level that will benefit annually more than 80,000 New Yorkers with records. We also successfully advocated for the improvement of multiple administrative agency policies that will enable countless New Yorkers with records to access licensure and employment.

We Strongly Support CCHR's Proposal

The Society strongly supports CCHR's Proposed Rules. The Rules will aid in enforcement of the 2021 amendments to the Fair Chance Act, and in doing so will help fix unjust inequities that prevent New Yorkers from accessing employment. We particularly appreciate that CCHR's Proposed Rule largely hews to the Legal Enforcement Guidance ("Guidance") on the New York City Fair Chance Act ("FCA") that it promulgated on January 3, 2022. The Guidance has been incredibly important to our ability to ensure that our clients are not unlawfully denied employment.

The movement toward a fair and equitable society necessitates the removal of barriers that disproportionately affect people with criminal histories, particularly in accessing employment opportunities. The FCA, enacted in 2015 and further strengthened by amendments in 2021, represents a pivotal step in this direction. By prohibiting employers from inquiring about an applicant's criminal record until after a conditional offer of employment has been made, the FCA has become a cornerstone of the city's efforts to combat criminal history discrimination. This legislation underscores New York City's policy position that people with criminal legal involvement should be evaluated for employment on their merits, like everyone else.

In 2022, this Commission issued comprehensive Guidance to clarify and enhance the enforcement of the FCA. This Guidance provided critical interpretations of the FCA, offering detailed explanations of the steps employers must take before withdrawing a conditional job offer based on an applicant's criminal history. The Commission emphasized that employers must conduct an individualized assessment, considering factors such as the nature of the offense, the time elapsed since the offense, and its relevance to the job in question. This approach aims to ensure that decisions are fair, consistent, and rooted in the principles of justice and rehabilitation.

The FCA and the Commission's 2022 guidance contribute to broader social and economic benefits by enabling more people to secure gainful employment. As the primary public defender in New York City, The Society's Worker Justice Project applauds the far-reaching impact of the FCA in New York City – as compared to the lack of similar protections across the rest of New York State. The Worker Justice Project has helped enforce the FCA by directly representing and zealously advocating for low-income, marginalized New Yorkers. We welcome this opportunity to express our support of the Commission's continued commitment to uplifting New Yorkers with criminal histories, in particular, by inscribing the extension from three to five business days for an applicant to respond to a Fair Chance Employment Analysis of their criminal history, as well as adding protections for people with certain cases, including pending criminal cases, unsealed violations, unsealed non-criminal offenses, and adjournments in contemplation of dismissal. These changes, among others, ensure that people with criminal histories have a fuller opportunity to access or retain employment.

Below, please find an explanation of our suggested modifications to the Proposed Rule based on our years of practice under the Commission's Guidance. A redlined version of these changes is attached as well. All of our suggested modifications are grounded in the same principle: the Commission's Rule should more fully adhere to the principles and text set forth in the 2022 Guidance. This is particularly important with respect to the Rule's discussion of the exemptions to the FCA; the Proposed Rule's discussion of the FCA's exemptions deviates from the Guidance's discussion of the exemptions, and in so doing, undermines the FCA's purpose of promoting equal employment opportunities for individuals with arrest and conviction histories.

Suggested Modifications to the Proposed Rule

We ask the Commission to consider making the following changes to the Proposed Rule:

1) ***We request modification of proposed § 2-04(g), which could be read to make the FCA inapplicable to a large percentage of low-wage workers.***

As provided in the attached redline of § 2-04(g), we request that sections (1), (6), (7), and (8) be combined and amended for clarity and to conform with the Guidance. Our proposed redraft ensures that the Commission does not accidentally overrule the City Council by significantly expanding the statutory exemptions listed at N.Y.C. Admin. Code § 8-107(11-a)(g). The Proposed Rule's overly broad reading of the statutory exemptions deviates both from the plain language of N.Y.C. Admin. Code § 8-107(11-a)(g) and from the Guidance's precisely correct interpretation of said statutory language. The Proposed Rule's overly broad interpretation of the exemptions, which seems unintentional, could prevent a large percentage of low-wage workers from accessing the benefits of the FCA.

Likely unintentionally, proposed §§ 2-04(g)(1), (6), (7), and (8) gut the existing protections of the FCA. N.Y.C. Admin. Code § 8-107(11-a)(g)(3) states:

> This subdivision shall not apply to any actions taken by an employer or agent thereof: . . . Pursuant to any federal, state or local law requiring criminal background checks for employment purposes or barring employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

That is, the statutory text of the FCA only exempts those particular employer actions that are taken pursuant to a law requiring criminal background checks or barring employment based on criminal history. In contrast, the Commission's proposed § 2-04(g)(1), (6), (7), and (8) state that whenever an employer is subject to a law requiring a background check or barring employment based on criminal history, the employer is exempt from the substantive and procedural protections of the

FCA. See Proposed § 2-04(g)(1), (6), (7), and (8) (stating that employers subject to relevant background check laws are exempt from the prohibitions on "making inquiries or statements" about criminal history and "denying employment . . . or taking adverse action" based on criminal history "without undertaking the Fair Chance Employment Process"). Although § 2-04(g)(1), (6), (7), and (8) contain some language suggesting that CCHR was attempting to maintain the narrowness of the statutory language (for example, 2-04(g)(7) and (8) state that the exemption applies only "to the extent that compliance with federal, state, or local law requires such action", and that employers are "required to undertake all other actions required by this chapter that are not in conflict with the requirement of the federal, state or local law that form the basis of this exemption"), the entirety of the language in § 2-04(g)(1), (6), (7), and (8) is vague, confusing, and could be read by employers and judges to exempt entire industries from all aspects of the FCA.

As written, § 2-04(g)(1) and (8) could be read to permit employers who employ persons in positions where there is a mandatory exclusion imposed by law to be wholly exempt from the procedural and substantive protections of the FCA. An employer hiring for one of these positions could, under the Proposed Rule, inquire into whether the person ever received an adjournment in contemplation of dismissal ("ACD") or a disorderly conduct, a non-conviction, and form its denial in whole or in part on those dispositions–even where the ACD or non-conviction is not a mandatory bar. This exemption is far too broad, albeit unintentionally so.

The Guidance is instructive as to why the proposed formulation is incorrect. It provides the example of a licensed private investigator looking to hire an administrative assistant and who is prohibited by General Business Law § 81 from knowingly employing anyone who has been convicted of a felony or any of the offenses listed in General Business Law § 74(2), unless the mandatory bar is removed by sealing or a Certificate of Relief from Disabilities. In the Guidance,

that employer is exempted from certain *per se* restrictions, such as being able to run a background check prior to a conditional offer in order to determine in advance of that offer whether they would be prohibited by law from hiring said applicant. However, as the Guidance explains in various helpful scenarios, the employer must follow the FCA where the applicant's background check does not reveal a conviction subject to mandatory exclusion. See Guidance, at 25-26. For example, in one scenario where the background check reveals a criminal history that is not subject to the legal bar but nevertheless concerns the employer, the employer must conduct the Fair Chance Employment Analysis, provide the applicant a copy of the criminal background check and the completed Fair Chance Notice, allow the applicant at least five business days to respond, and communicate in writing if the employer ultimately declines to hire the applicant. See Guidance at 26. As written, however, the Proposed Rule at § 2-04(1)(b) and (8)(b) could be read to permit that same employer to bypass the FCA process completely and deny employment due to the fact that the position is subject to a law that imposes a mandatory bar.

Proposed § 2-04(7) is similarly overbroad and unintentionally disregards the Guidance. Many positions for low-wage workers in helping professions, such as home health aides, are subject to legally required background checks. Under the current language of N.Y.C. Admin. Code § 8-107(11-a)(g)(3), home health aides are entitled to most of the FCA protections because, again, the exemption applies only to employer actions that are taken pursuant to a law requiring a background check. For example, those employers that are required by Public Health Law § 2899-a(1) to request that the Department of Health run a background check are permitted to make such a request because that is an "action[] taken . . . pursuant to any state, federal or local law." If the Department of Health directs an employer to deny employment to the applicant, the employer may deny the applicant employment without providing a copy of the Fair Chance Act Notice because

the denial of employment is an "action[] taken . . . pursuant to any state, federal or local law" (specifically, pursuant to Executive Law § 845-b(5)(h)). However, the FCA as currently written protects applicants in situations where an employer takes an action that is not specifically mandated by state, federal or local law. For example, if the Department of Health approves the applicant to work for an employer, that employer may not deny the applicant employment based on their conviction record unless the employer provides them with a copy of their background check inquiry and the Fair Chance Act Notice, gives them a reasonable period to respond, and considers their response pursuant to Article 23-A of the Correction Law – because if the Department of Health approved the applicant to work, the job denial would not be an "action[] taken . . . pursuant to any state, federal or local law." This example is helpfully illustrated in the Guidance, as well. See Guidance, at 24.

Unfortunately, the proposed language of § 2-04(g)(7) could be read to remove all FCA protections for workers in certain industries because they seek to work in "Positions for Which a Criminal Background Check is Legally Required." This language change between the FCA and the Proposed Rule is likely unintentional, but the consequences could be enormous. Thousands of low-wage workers in New York City who work in industries in which a background check is required by law could lose the FCA protections that the Commission works so hard to enforce. If employers or judges interpret § 2-04(g)(7) to remove FCA protections for entire industries, the FCA will lose its value. The exemption will swallow the rule, and low-wage workers in New York City will return to the state they were in before the FCA's enactment in 2015.

Our redraft of proposed § 2-04(g)(1), (6), (7), and (8), attached to this testimony, newly amended as § 2-04(g)(5) and (6), clarifies the exemptions and properly anchors them to employer actions, rather than employment sectors or positions. The redraft primarily uses language taken

directly from the 2022 Guidance. In amended § 2-04(g)(5), employers (such as home health agencies) that are required by law to conduct a background check, are instructed on whether or how to follow the FCA in the event that, as often happens, the law does not require them to deny employment. In amended § 2-04(g)(6), the redraft identifies which employer actions are exempted in scenarios where, as was the case for the licensed private investigator mentioned above, the employer is prohibited from hiring someone who was convicted of an automatically disqualifying crime. Further, in redrafted subdivision (6), because the mandatory disqualifying conviction exempts the employer from engaging in the Fair Chance Process, we have added paragraph (d), which would permit applicants to notify employers of an error on their background report and show that they do not have a legally mandated exclusion. Once that action is satisfied, the employer must either hire the applicant or continue the Fair Chance Process if it wishes to deny employment based on the results of the applicant's background check that are not otherwise a mandatory exclusion.

The redrafted subdivisions also provide that a mistake of law is not a defense to a charge of a violation of either section (paragraph (d) of redrafted subdivision (5) and paragraph (e) of redrafted subdivision (6)). We believe that our formulation better clarifies the language that is currently in CCHR's Proposed Rule: "When an employer, employment agency or their agency relies on a mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a)." Further, we have made this language a freestanding paragraph for clarity and emphasis.

Additionally, instead of pulling out the self-regulatory organization language as a freestanding exemption, as provided for in proposed § 2-04(g)(6), and subjecting it to the same problems as subdivisions (1), (7), and (8), as it is currently written, we have included the exemption

within our redrafted § 2-04(g)(5) and (6) to state, "For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended." This language and structure is identical to the language and structure of N.Y.C. Admin. Code § 8-107(11-a)(g)(3).

Lastly, § 2-04(g)(2)(ii) and (iv) of CCHR's Proposed Rule permit denial of employment or adverse action based on certain convictions or adjudications for civilian positions within law enforcement (i.e., positions other than police or peace officers); however, these sections, too, are overbroad. The Guidance states that "Other positions at law enforcement agencies, including civilian positions, are protected from discrimination based on an [adjournment in contemplation of dismissal] or a favorable outcome under Criminal Procedure Law § 160.50 [N.Y.C. Admin. Code § 8-107(11)(a); N.Y. Exec. law § 296(16)], but are not protected against inquiries or adverse actions based on a conviction, youthful offender adjudication, or pending case, and are not entitled to the Fair Chance Process before adverse action is taken based on such cases." See Guidance, at 26-27. The Guidance makes clear, as does the cited law included therein, that law enforcement employers may consider many, but not all, criminal cases when hiring for civilian positions. For that reason, we request that section (ii) be corrected to state, "denying employment to an applicant based on the applicant's unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e)," is not prohibited, rather than the Proposed Rule's overbroad statement that denial may be based on the applicant's "arrest or conviction record." We mimic the same language in section (iv) for purposes of taking adverse employment actions against an employee.

2) ***We request an addition to proposed § 2-04(a)(5) to address what we believe is an unintentional omission that severely weakens FCA protections.***

We request an addition to proposed rule § 2-04(a)(5) as follows: "(vi) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant." Proposed Rule § 2-04(a)(5)(i)-(v) as written falls short of what it is intended to do, specifically require the employer to genuinely consider how the employee or applicant's Fair Chance Notice Response impacts the employer's initial Fair Chance Employment Analysis. Without the suggested addition, employers are free to appear to conduct a Fair Chance Employment Analysis but abstain from the crucial step of actually considering the information submitted in the Fair Chance Notice Response.

The Society has several clients who have been adversely impacted by employers' failure to consider their Fair Chance Notice Response. For example, I recently submitted a timely Fair Chance Notice Response to an employer on behalf of my client. In response, the employer issued a final denial that stated that it had never received any additional information in response to the Fair Chance Notice. Another client of mine was recently terminated after submitting a Fair Chance Notice Response that corrected an error on the employer's background check. We believe that making it a per se violation to fail to follow the steps outlined in Rule § 2-04(a)(5)(i)-(v), but omitting our suggested addition that also makes it a per se violation to fail to properly consider the Fair Chance Notice Response would unintentionally defeat the purpose of the Fair Chance Process. Under CCHR's Proposed Rule, employers may appear to have completed the Fair Chance Process once they give the employee or applicant a reasonable period of at least five business days to respond to the Fair Chance Notice. However, failure to consider the employee or applicant's Fair Chance Notice Response addressing the employer's concerns and providing additional information

about any of the relevant fair chance factors - which may include correction of a background check error - should also be a per se violation.

Once again, the Guidance is instructive as to why this suggested addition is appropriate and would be a helpful clarification for employers. The Guidance states, "After receiving additional information from an applicant, an employer must examine whether the new information changes the employer's Fair Chance Analysis." See Guidance, at 19. The legislative intent behind the Fair Chance Act is for employers to be mandated to actually consider Fair Chance Notice Responses. Our suggested language making it a per se violation to fail to consider the Fair Chance Notice Response puts employers on notice that they must meaningfully examine whether the new information changes the employer's original Fair Chance Analysis.

3) We request further instruction to employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).

We request that the Proposed Rule provide further and more accurate instruction to employers who seek to understand the "direct relationship" or "unreasonable risk" exceptions listed at § 2-04(e)(1)(v)(A) and (B).

First, we request that in providing instructions regarding the direct relationship exception, the Proposed Rule be modified to state that the "employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and the specific duties necessarily related to the job." This modified rule is grounded in the plain language of Article 23-A and case law. See N.Y. Correct. Law § 750(3) ("'Direct relationship' means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question."); Marra v. City of White Plains, 467 N.Y.S.2d 865, 869 (2d Dep't 1983) ("A direct relationship can be found

where the applicant's prior conviction was for an offense related to the industry or occupation at issue . . . or the elements inherent in the nature of the criminal offense would have a direct impact on the applicant's ability to perform the duties necessarily related to the license or employment sought."). The modified rule is also more accurate than the version of the rule proposed by CCHR, which states that the employer must merely draw "some connection" – no matter how indirect – between the conduct and the job, and need not consider whether the offense is related to the necessary duties of the job.

Second, we request that in describing the unreasonable risk exception, CCHR add the following clarifying instructions: "An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk." These instructions echo CCHR's Legal Enforcement Guidance and stem from relevant case law. See Guidance, at 15 ("To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant fair chance factors combine to create an unreasonable risk to people or property."); Matter of Bonacorsa v. Van Lindt, 71 N.Y.2d 605, 613 (1988) ("Undoubtedly, when the employer or agency relies on the unreasonable risk exception, the eight factors contained in section 753(1) should be considered and applied to determine if in fact an unreasonable risk exists. The employer or agency may not assume that the exception applies and then consider the factors

to determine whether the employment should be offered or the license should nevertheless be granted."). The instructions also provide needed clarity for employers by explaining that consideration of all the factors means that employers shall not create a categorical bar for serious offenses or for any particular type of offense.

4) ***We request the modification of § 2-04(e)(2)(iv)(B) to make clear that employers must make a final decision within a reasonable period of time, and that the presumed reasonable period of time is not to exceed five business days.***

We request that § 2-04(e)(2)(iv)(B) state that the employer, employment agency, or agent thereof must relay its decision in writing "within a reasonable period of time." We also request that that same paragraph state, "There is a rebuttable presumption that a reasonable time will not exceed five business days." The first proposed addition is identical to the language in the Guidance. See Guidance, at 19 ("If, after communicating with an applicant, the employer decides not to hire them, it must relay that decision to the applicant in writing within a reasonable period of time."). The second proposed addition uses the identical rebuttable presumption that is in § 2-04(e)(1)(vii) of CCHR's Proposed Rule ("There is a rebuttable presumption that a reasonable time will not exceed five business days.").

This addition is essential so that workers are not indefinitely waiting for a final decision from an employer. The Society has clients who have responded to a Fair Chance Notice, only to wait weeks or months for a final decision (or only to receive a final decision after a legal services attorney contacts the employer). These weeks or months of unemployment can be devastating for a worker, and they are contrary to the purpose of the FCA. There is no reason why an employer should need weeks or months to make a final decision after having received a response to the Fair Chance Notice – and if there truly is a reason, the employer can rebut the five-day presumption by explaining why it needs more time.

5) ***We request the addition of the "Intentional Misrepresentation" definition into § 2-01, the definitions section, and request the modification of proposed § 2-04(e)(3)(ii) to incorporate explanation to and guidance for employers when faced with applicants' or employees' incorrect representation of their criminal record.***

Explicitly defining the conduct that qualifies as an intentional misrepresentation protects both applicants and employers and is consistent with both the spirit and the plain language of the FCA. We request that the following definition be added to § 2-01: "'Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive." This definition would provide increased clarity to employers, and it uses almost the same language as the Guidance. See Guidance, at 19.

But, simply adding a definition is not enough. We further propose expanding § 2-04(e)(3)(ii) to include more specific guidance for employers to ensure that applicants who simply misremember or misstate their criminal history without intention to deceive are not discriminated against. The language we suggest below is drawn almost entirely from the Guidance. See Guidance, at 19-20.

There are a number of circumstances where a misrepresentation may occur without the intent to deceive. In our professional experiences, it is extremely common for applicants of all ages to not fully remember or understand their own criminal history. As attorneys who have practiced in criminal court, we know that criminal court is convoluted and fast-paced. Judges, prosecutors and defense attorneys alike use legal terminology and acronyms that can be confusing and opaque. A plea and sentencing can all occur in a less than two-minute appearance. Applicants with multiple convictions often choose to list the most recent or most serious conviction, understanding that the employer will run a background check and be able to see additional contacts. Some applicants might wrongly believe their cases were sealed.

For example, I recently worked with a client who had three cases sealed. He mistakenly believed the fourth case – in which he pled guilty to two misdemeanors – was also sealed. Many years later, he answered "no" to the question of whether he had any criminal convictions when completing a background check consent form. Based on the overreaching scope employers currently have to rely on intentional misrepresentations to rescind employment offers, my client was unable to dispute the subsequent employment offer withdrawal because he made a genuine mistake by forgetting that one of his cases – from years prior – was not sealed. Another Society client had an employment offer withdrawn because while he disclosed his felony conviction, he did not disclose his older misdemeanor convictions. The Society has also seen countless employment questionnaires requesting applicants to list all their cases, dates and counties of convictions. Such onerous details are not easy to confirm for many New Yorkers.

To protect applicants who are simply attempting to obtain gainful employment while navigating the stigma of their convictions, the proposed rules should provide further guidance to employers so they can understand the narrow circumstances where an applicant should be denied employment for intentional misrepresentation.

As indicated in the attached redline of § 2-04(e)(3)(ii), the rules should first make clear that an employer who is considering taking adverse action due to a misrepresentation must properly consider the applicant or employee's response (after giving the applicant or employee at least five days to respond). But the applicant or employee's right to explain the misrepresentation is meaningless if the rules do not also make clear that the employer must meaningfully consider the employee's response. Thus, we also propose adding a statement that the employer shall "properly consider[] the applicant or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis

to the applicant or employee in writing." See Guidance at 19 ("If the applicant credibly demonstrates either that the information provided was not a misrepresentation or that a misrepresentation was unintentional, the employer is required to perform the Fair Chance Analysis before taking adverse action against the applicant.")

Next, we request that the rules restate the definition of intentional misrepresentation, and note that "[m]ere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation." The Guidance is instructive and provides helpful examples of discrepancies that might occur unintentionally. See Guidance, at 19-20. We request that the rules incorporate the examples listed in the Guidance, as well as common situations we have confronted as advocates, by stating that "[s]uch discrepancies can arise if, for example:

a) the applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) the applicant believed the conviction was sealed;
c) the applicant confused the charge initially filed against them with the one for which they were convicted;
d) because of an error in the criminal history record; or
e) the applicant disclosed their most serious or most recent conviction, but not all of their convictions."

Finally, the rules should remind employers that it is their burden to demonstrate that a misrepresentation was intentional if the misrepresentation serves as the basis for denying employment to the applicant. To do this, we request the addition of the following language from the Guidance: "It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Process violate the NYCHRL." See Guidance, at 20.

These recommended additions do not change the existing legislative scheme; they simply provide additional clarity and consistency for both employers and applicants.[1]

6) We request the following additional modifications:

a) We request the "Article 23-A factors" definition in § 2-01 add the clause "or release from incarceration" to further clarify that the time since the end of an applicant's carceral term, much like the time since arrest or conviction, is not the relevant time period employers need to consider under Article 23-A.

b) We request a clarifying edit to the definition of Fair Chance Employment Analysis in § 2-01 of the Proposed Rule. Currently, subdivision two of the definition states that the Fair Chance Employment Analysis refers to the steps for evaluating "An applicant's pending cases that occurred prior to their application for employment or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." Our requested edit is for subdivision two to state, "An applicant's pending cases that occurred *prior to becoming an employee* or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors." This minor edit would ensure that individuals who have pending employment applications when they get arrested are not excluded from Fair Chance protections.

c) We request a clarifying edit to the definition of Pending case in § 2-01 of the Proposed Rule. The current proposed definition hinges the status of a pending criminal case on whether it has been "adjudicated to a verdict." Instead, we request

[1] Although this is outside the scope of this Proposed Rule, The Legal Aid Society would support the elimination of requirements to self-report one's criminal history altogether. Requiring people with convictions to recite their conviction history for employment is a belittling test of honesty and memory that people without criminal convictions do not have to go through, and it is rendered unnecessary when an applicant consents to a background check.

clearer language that doesn't introduce new, confusing terminology. Specifically, we request the definition be amended to state that "A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined in section 1.20(13) of the criminal procedure law or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case."

d) We request a clarifying edit to § 2-04(a)(2) of the Proposed Rule. We ask that the rule be modified to state, "Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check." As written, the inclusion of two consecutive "prior to" clauses in the Proposed Rule invites confusion. By one interpretation, the text as written could prohibit employers from asking about an applicant's conviction history prior to a conditional offer *unless* the employer requested authorization to run a background check. As that is not the law, we request that our edit be accepted.

e) We request that § 2-04(f) replace the permissive "may not" to "shall not" to better enforce the prohibition against temporary help firms aiding and abetting employer discrimination. The Guidance states, "As with any other type of discrimination,

temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences." See Guidance, at 23. As per that section of the Guidance, the imperative "shall not" is the appropriate language.

Conclusion

We thank you for hearing our testimony today. We strongly support the Commission's proposed rule changes and believe that our recommended modifications will make the rule more effective. We are happy to answer any questions about these recommendations. We look forward to continuing to work with the Commission to ensure that all New Yorkers have a meaningful opportunity to work and maintain financial stability.

Section 4. Section 2-01 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

For purposes of this chapter,

[*Article 23-A analysis.* "Article 23-A analysis" refers to the process required under subdivisions 9, 10, 11, and 11-a of Section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.]

Article 23-A factors. "Article 23-A factors" refers to the following factors that employers, employment agencies, or their agents must consider concerning applicants' and employees' pre-employment conviction histories under [Section] § 753 of Article 23-A of the New York [correction law] Correction Law:

1. that New York public policy encourages the licensure and employment of people with criminal records;
2. the specific duties and responsibilities necessarily related to the prospective job;
3. the bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
4. the time that has elapsed since the occurrence of the criminal offense that led to the applicant's or employee's criminal conviction, not the time since arrest, ~~or~~ conviction, or release from incarceration;
5. the age of the applicant or employee when the criminal offense that led to their conviction occurred;
6. the seriousness of the applicant's or employee's conviction;
7. any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
8. the legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

. . .

Fair Chance Employment Analysis. "Fair Chance Employment Analysis" refers to the steps for evaluating:

1. An applicant's or employee's convictions that occurred prior to the start of their employment using the Article 23-A factors; or

2. An applicant's pending cases that occurred prior to becoming an employee ~~their application for employment~~ or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors.

. . .

Intentional Misrepresentation. "Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive.

. . .

Pending case. A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined by section 1.20(13) of the criminal procedure law been ~~adjudicated to a verdict~~ or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case.

Section 6. Section 2-04 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-04 Prohibitions on Discrimination Based on Criminal History

47 RCNY §§ 2-04(a) through 2-04(g) relate to prohibitions on discrimination in employment only. 47 RCNY § 2-04(h) relates to prohibitions on discrimination in licensing only. 47 RCNY § 2-04(i) relates to enforcement of violations of the Human Rights Law under this section in employment and licensing.

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

(1) [Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing,] Prior to a conditional offer, expressing any [limitation or specification in employment] limitations or specifications regarding criminal history, including asserting that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered. This includes [, but is not limited to, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."] unsolicited statements about criminal background checks. Solicitations, advertisements, and publications may include affirmative encouragement for individuals with criminal records to apply.

(2) [Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer] ~~Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or pending cases prior to requesting authorization to perform a background check or criminal history check whether on an application or otherwise.~~ Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check.

(3) [Making any] Prior to a conditional offer, [statement] statements or [inquiry] inquiries or actions seeking to discover information relating to [the] an applicant's [pending arrest or] criminal history [conviction] whether oral or in writing [before a conditional offer of employment is extended]. This includes conducting any investigation into an applicant's criminal history, including but not limited to the use of publicly available records or the Internet for the purpose of learning about an applicant's criminal history, whether such investigations are conducted by an employer, employment agency, or their agent or for an employer, employment agency, or their agent by a third party. This also includes searching for terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" in connection with an applicant, or searching websites that purport to provide information

regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history information about an applicant.

(4) Using [within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability] forms or applications that contain a disclaimer, note exceptions, or note that applicants can skip certain questions related to criminal history are prohibited unless the specific language is required by any other federal, state or local law.

(5) Failing to [comply with requirements of § 8-107(11-a) of the Human Rights Law,] undertake any of the following obligations when they are applicable:

(i) the requirement to request from the employee or applicant information relating to the relevant Fair Chance Employment Factors;

([1] ii) the requirement to provide the applicant or employee a written copy of any inquiry an employer, employment agency, or their agent conducted into the applicant's criminal history;

([2]iii) the requirement to share with the applicant or employee a written copy of the employer's, employment agency's, or their agent's [Article 23-A analysis] Fair Chance Employment Analysis;

[or] ([3]iv.) the requirement to hold the prospective position open for at least [three] five business days from the date of an applicant's receipt of both the inquiry and analysis; or

(v.) the requirement to allow the employee a reasonable time to respond, which shall be at least five business days from the date of the employee's receipt of both the inquiry and analysis, before taking an adverse action based on the employee's criminal history.

(vi.) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant.

. . . .

(e) *Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action*. Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's [or employee's] conviction history or pending case(s), the employer, employment agency, or agent thereof must

. . .

[(iv)] (v) After evaluating the factors in subdivision [(e)(1)(i)] (e)(1) of this section, an employer, employment agency, or agent thereof must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job, or (2) employing or continuing to employ the [applicant] person would involve an unreasonable risk to property or to the safety or

welfare of specific individuals or the general public.

(A) To claim the ["direct relationship exception,"] "direct relationship" exception, an employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and specific duties necessarily related to the job ~~draw some connection between the nature of the conduct that led to the [conviction(s)] conviction or pending case and the position~~. If a direct relationship exists, the employer, employment agency, or agent thereof must evaluate the [Article 23-A factors]relevant New York City Fair Chance Employment Factors, as that term is defined in 47 RCNY § 2-01, to determine whether the concerns presented by the relationship have been mitigated.

(B) To claim the ["unreasonable risk exception,"] "unreasonable risk" exception, an employer, employment agency, or agent thereof must consider and apply the [Article 23-A factors] relevant New York City Fair Chance Employment Factors~~, as that term is defined in 47 RCNY § 2-01,~~ to determine if an unreasonable risk exists. An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or to property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk.

. . . .

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

. . .

(B) If the employer, employment agency, or agent thereof reviews the additional information and makes a determination not to hire the [applicant] person or take an adverse employment action, the employer, employment agency, or agent thereof must relay that decision to the [applicant] person in writing within a reasonable period of time. There is a rebuttable presumption that a reasonable time will not exceed five business days.

. . . .

(3) *Errors, Discrepancies, and Misrepresentations.*

. . .

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

employer, employment agency, or agent thereof first provides the person with the information that led it to the determination that an intentional misrepresentation was made and gives the person a reasonable period of at least five business days to respond, ~~.~~ and properly considers the applicant's or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing.

A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive. Mere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation. Such discrepancies can arise if, for example:

a) The applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) The applicant confused the charge initially filed against them with the one for which they were convicted;
c) The applicant believed their conviction was sealed;
d) The applicant disclosed their most serious or most recent conviction but not all of their convictions; or
e) Because of an error in the criminal history record;

It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Employment Process violates the NYCHRL.

However, an employer, employment agency, or agent thereof may not take adverse action based on the person's failure to divulge information that the employer, employment agency, or agent thereof is prohibited from inquiring about or taking adverse action on pursuant to § 8-107(11) of the Code.

. . . .

(f) *Temporary Help Firms*

. . .

(4) A temporary help firm ~~may~~ shall not aid or abet an employer's discriminatory hiring practices. A temporary help firm ~~may~~ shall not determine which candidates to refer to an employer based on an employer's preference not to employ persons with a specific type of conviction or criminal history generally. A temporary help firm ~~may~~ shall not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

. . . .

(g) *Exemptions*. Consistent with N.Y.C. Local Law No. 85 (2005) and N.Y.C. Admin. Code § 8-130, all exemptions to coverage under the following section must be construed narrowly. Employers, employment agencies, or their agents who invoke an exemption to defend against liability have the burden of proving the exemption by a preponderance of the evidence.

~~(1) **Mandatory Forfeiture, Disability, or Bar to Employment Imposed by Law.** For applicants and employees where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct, employers, employment agencies, and their agents are not prohibited from:~~

~~(i) making inquiries or statements about an applicant's or employee's non-convictions, denying employment to an applicant, or taking adverse action against an employee based on the applicant's or employee's non-convictions as set forth in 47 RCNY §§2-04(a)(6) and (b); and~~

~~(ii) denying employment to an applicant or taking adverse employment action against an employee based on the applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process set forth in 47 RCNY §§ 2-04 (a)(5) and (e).~~

~~When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04 (a).~~

~~(2)~~ **(1) Police Officers and Peace Officers.** For police officer and peace officer positions, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's criminal history prior to making a conditional offer of employment, as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);

(ii) denying employment to an applicant based on the applicant's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §2-04(e);

(iii) making inquiries or statements about an employee's non-convictions, as set forth in 47 RCNY § 2-04(a) (6); and

(iv) taking adverse employment action against an employee based on the employee's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(3)~~ **(2) Positions with Law Enforcement Agencies Other than Police Officers and Peace Officers.** For non-police officer and non-peace officer positions with law enforcement agencies, as the term "law enforcement" is used in article 23-a of the correction law,
including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family justice of the administration for

children's services, the business integrity commission, and the district attorneys' offices, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways, as set forth in 47 RCNY §§ 2-04(b), (d), and (e):

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59;

(ii) denying employment to an applicant based on the applicant's ~~arrest or~~ unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e);

(iii) making inquiries or statements about a current employee's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways:

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59, except for those described in sections 1 and 2.a of the definition of "non-conviction"; and

(iv) taking adverse employment action against an employee based on the employee's unsealed conviction history, youthful offender adjudication, sealed convictions enumerated in section (2)(iii) of this subsection, or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(4)~~ **(3) Public Agencies Other than Law Enforcement Agencies Taking Adverse Action Against an Employee.** Where an employee of a public agency is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law, the public agency is permitted to take adverse employment action against an employee based on criminal convictions that occur during employment or pending cases that preceded or arose during employment without undertaking the Fair Chance Employment Process.

~~(5)~~ **(4) Specific Positions Listed by the New York City Department of Citywide Administrative Services** Certain positions are determined by the commissioner of citywide administrative services to involve law enforcement, be susceptible to bribery or

other corruption, or entail the provision of services to or safeguarding of persons who,

because of age, disability, infirmity or other condition, are vulnerable to abuse. With regard to such positions, which are listed in a calendar item on the department's website, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4)~~, (6),~~ and (b)-(d); and

(ii) denying employment to an applicant based on the applicant's conviction history or pending cases or taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

Notwithstanding the exemption set forth in section 2-04(g)(5) of this chapter, for such positions, employers, employment agencies, or their agents must provide a written copy of the employer's Fair Chance Employment Analysis to applicants who are denied employment or employees subject to an adverse employment action because of the applicant's or employee's conviction history or pending cases.

~~(6) **Certain Positions Regulated by Self-Regulatory Organizations as Defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as Amended.** Employers, employment agencies, and their agents in the financial services industry are exempt from the following prohibitions, to the extent that compliance with industry-specific rules and regulations promulgated by a self-regulatory organization require such actions:~~

~~(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

~~(ii) denying employment to an applicant based on an applicant's conviction history or arrest record without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5), and (e); and~~

~~(iii)taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

~~Non-regulated positions in self-regulatory organizations are not exempt under 47 RCNY § 2-04(g)(6).~~

~~(7)~~ **(5) Actions Taken Pursuant to Federal, State, or Local Law Requiring Criminal Background Checks. ~~Positions for Which a Criminal Background Check is Legally Required for~~ ~~Employment Purposes Pursuant to Federal, State, or Local Law.~~**

(a) Employers, employment agencies, and their agents required by law to perform a criminal background check~~s~~ may conduct the background check prior to a conditional offer; and ~~are exempt from the following prohibitions, to the extent that compliance with federal, state, or local law requires such actions:~~

(i) if the employer, employment agency, or their agent is required to deny employment to an applicant or take adverse employment action against an

employee based on the applicant's or employee's conviction or pending case for any of the specific offenses subject to the legally mandated exclusion regardless of whether they have received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct, then they may do so without undertaking the Fair Chance Employment Process, or

(ii) if the employer, employment agency, or their agent wishes to deny an applicant employment but is not required by law to deny employment because the applicant does not have a conviction for which they would be barred by federal, state, or local law, or because the applicant's excluded conviction can and has been removed by an executive pardon, certificate of relief from disabilities, or certificate of good conduct, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

~~(iii) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

(iv) making inquiries or statements related to an applicant's conviction history or pending cases until after extending a conditional offer of employment as set forth in 47 RCNY § 2-04(b); and

(v) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5), and (e).

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(7~~5~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. An employer employment agency, or their agent that is legally required to undertake a criminal background check of an applicant may conduct the background check prior to a conditional offer, but, if they are not required to reject the candidate, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

(d) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent erroneously believe their action is mandated by federal, state, or local law.

(e) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

~~(8)~~ **(6) Actions Taken Pursuant to Federal, State, or Local Law Requiring Barring Employment Based on Certain Criminal Histories. ~~Legally Mandated Exclusions from Employment Based on Certain Criminal~~ Histories.**

(a) Employers, employment agencies, and their agents required by law to exclude applicants with certain criminal histories ~~from certain positions~~ are exempt from the following actions ~~prohibitions, to the extent that compliance with federal, state, or local law requires such action~~:

(i) making inquiries or statements about an employee's or applicant's conviction ~~history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d); and~~ for any of the specific offenses subject to the legally mandated exclusion for which they have not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct;

(ii) conducting a criminal background check prior to making a conditional offer of employment; and

(iii) performing a Fair Chance Employment Analysis or providing a copy of the Fair Chance Notice when denying employment to an applicant or taking adverse employment action against an employee based on any conviction or pending case that is subject to the legally mandated exclusion.

~~(iv) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(~~86~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption.

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. ~~An employer that is legally required to exclude an applicant from~~

~~employment based on a specific criminal history may conduct the background check prior to a conditional offer. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).~~

(d) If an applicant identifies an error on the background report and can show that they do not have a conviction that is subject to a legally mandated exclusion, they should promptly notify the employer and the employer must then conduct the Fair Chance Employment Analysis based on the corrected background information.

(e) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent rely on a mandatory legal barrier in error.

(f) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

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TESTIMONY OF:

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BROOKLYN DEFENDER SERVICES

Presented before the New York City Commission on Human Rights

Rules Hearing: Employment Discrimination Based on Criminal History

September 5, 2024

My name is Anna Arkin-Gallagher, and I am the Associate Director of the Civil Justice Practice at Brooklyn Defender Services (BDS). BDS is a public defense office whose mission is to provide outstanding representation and advocacy free of cost to people facing loss of freedom, family separation and other serious legal harms by the government. For over 25 years, BDS has worked, in and out of court, to protect and uphold the rights of individuals and to change laws and systems that perpetuate injustice and inequality. We thank the New York City Commission on Human Rights (CCHR) for holding this hearing on revisions to the rules relating to employment discrimination based on criminal history.

BDS's employment practice provides legal representation and informal advocacy to people facing employment discrimination due to current or prior contact with the criminal legal system. Our clients face numerous formal and informal barriers to employment. Many of our clients are suspended or terminated from employment upon arrest and absent any finding of criminal culpability, while others are completely excluded from employment opportunities due to their criminal histories.

BDS is also a member of the Coalition of Reentry Advocates. The Coalition of Reentry Advocates (CoRA) is a New York State coalition of advocates working to change laws, policies, and practices to eliminate the perpetual punishment that flows from involvement with the criminal legal system.

We support many of the changes that CCHR has proposed to the rules regarding discrimination against people with criminal histories, which will aid the CCHR in enforcing the 2021 amendments to the Fair Chance Act (FCA). The FCA is a critical law that allows people with current and prior criminal legal system involvement to get and

to keep jobs. For many of the people our office represents, the FCA's requirements that an applicant's criminal history cannot be considered until after they receive a conditional job offer and that employers must perform an FCA analysis before suspending or terminating a current employees is the difference between their having a job and being unemployed. Members of BDS's employment practice use the language of the FCA, the CCHR Rules and the CCHR's Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History (Legal Enforcement Guidance) on a near-daily basis to fight for our clients to get or keep their jobs.

We appreciate many of the changes that CCHR has proposed to its rules concerning employment discrimination based on criminal history, including making clear that applicants have five days to respond to Fair Chance Act Notices, adding protections for people with pending criminal cases, unsealed violations, unsealed non-criminal offenses, and adjournments in contemplation of dismissal, and adding additional protections for current employees. We are also pleased that in many places CCHR has incorporated the clear and understandable language from the Legal Enforcement Guidance directly into the rules.

However, we are concerned that some of the proposed revisions to CCHR's rules have the effect – perhaps unintentionally – of weakening rather than strengthening the existing protections of the Fair Chance Act. Along with other CoRA member organizations, we have suggested modifications to the Proposed Rule, highlighting recommendations for changes we would like to see in the final version of the Proposed Rule, and clarifying areas in which the Proposed Rule could better align with the goals of the FCA. We have also attached a redlined version of these proposed changes to this testimony. In most cases, the language in these recommended changes was taken largely from CCHR's own Legal Enforcement Guidance.

Below I am emphasizing just a few of the changes that we are hoping to see in the final version of the Proposed Rule.

1. *Clarify Section 2-04(g) to make clear that the Fair Chance Act still applies to many applicants subject to mandatory background checks.*

We are particularly concerned about the section of the Proposed Rule concerning those employers who are required to perform criminal background checks of applicants, and that – as written – the Proposed Rule has the potential to give these employers nearly unfettered ability to discriminate against applicants with criminal histories.

The language of the Fair Chance Act states that a number of FCA requirements "shall not apply to any actions taken by an employer or agent thereof . . . [p]ursuant to any

federal, state, or local law requiring criminal background checks for employment purposes or barring employment based on criminal history." N.Y.C. Admin. Code § 8-107(11-a)(g)(3). In other words, the statutory text of the FCA exempts only those particular employer "actions" that are required by a law requiring criminal background checks or barring employment based on criminal history; all other employer actions must be conducted in conformance with the FCA. In contrast, CCHR's proposed Sections 2-04(g)(1), (6), (7), and (8) state that whenever an employer is subject to a law requiring a background check or barring employment based on criminal history, the employer is exempt from the substantive and procedural protections of the FCA. Although some of the language in these sections suggests that CCHR was not attempting to exempt all positions requiring background checks from all of the requirements of the FCA, the language in the Proposed Rule could nevertheless be read by employers and judges to exempt entire industries from all aspects of the FCA.

A large number of low-wage workers in New York City, such as home health aides and security guards, work in positions where background checks are required. Because so many workers are subject to these mandatory background checks, it is important that this section of the Proposed Rule clearly prescribes what actions employers are and are not permitted to take, so that the protections of the Fair Chance Act clearly apply to these workers to the extent permitted by law.

For example, my client Ms. M. had worked for years as a home health aide, providing excellent care to her patients. After taking several years off of work to raise her children, she looked forward to returning to the healthcare field. Though she had a criminal conviction, the New York State Department of Health had granted her clearance to work as a home health aide after reviewing her criminal history. However, she ran into trouble when applying for jobs with private home healthcare agencies, who sought to deny her work due to her conviction record. After advocacy from my office, we were able to explain to the agencies that the Department of Health had cleared Ms. M. to work, and that they were required to go through the Fair Chance Act process – including considering mitigating evidence that Ms. M. provided, looking at the length of time since her conviction, and determining whether the conviction was related to the job responsibilities. After going through this process, Ms. M. was hired by a home health care agency, and able to get back to the work that she considers so meaningful and that she uses to support her family.

Under the proposed revisions to the rules, Ms. M. may not have been afforded the chance to explain her conviction, and to have her employer go through the Fair Chance Act process; the employer could have summarily denied her without explanation.

Our proposed revisions to this section clarify how and when employers who are required to perform background checks must comply with the Fair Chance Act in situations where they are not legally required to deny an applicant employment.

2. *Add further guidance regarding "intentional misrepresentation" of criminal history.*

Explicitly defining the conduct that qualifies as an intentional misrepresentation of criminal history protects both applicants and employers and is consistent with both the spirit and the plain language of the Fair Chance Act.

We propose including more specific guidance for employers to ensure that applicants who simply misremember or misstate their criminal history without intention to deceive are not discriminated against. Our office has worked with many people who have inadvertently misstated their criminal history because they misunderstood their conviction history, misremembered long-ago convictions, or believed a conviction was sealed when it was not.

As indicated in our suggestions for changes to the Proposed Rule, the rules should first make clear that an employer who is considering taking adverse action due to a misrepresentation must properly consider the applicant or employee's response (after giving the applicant or employee at least five days to respond). But the applicant or employee's right to explain the misrepresentation is meaningless if the rules do not also make clear that the employer must meaningfully consider the employee's response. Thus, we also propose adding a statement that the employer shall "properly consider[] the applicant or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing."

Brooklyn Defenders worked with a client who had several old convictions, including a single felony conviction and two misdemeanor convictions. Our client was forthcoming about his felony conviction and the circumstances surrounding this conviction, but did not realize that he also had to disclose the two misdemeanor cases. Because our client had disclosed a far more serious conviction, it was clear that he had not intended to withhold information from his prospective employer; he in fact believed that misdemeanor cases had been sealed after a number of years. Using the language of the Legal Enforcement Guidance – which we suggest adding into the rules themselves – we were able to explain the reason for his omission, and he was ultimately offered the job. Including examples like those in the Legal Enforcement Guidance directly in the CCHR's rules would both protect those seeking jobs who inadvertently misrepresent their criminal histories, and also help employers to understand what may constitute an unintentional misrepresentation.

Finally, the rules should remind employers that it is their burden to demonstrate that a misrepresentation was intentional if the misrepresentation serves as the basis for

denying employment to the applicant. To do this, we request the addition of the following language, taken from the Legal Enforcement Guidance: "It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Process violate the NYCHRL."
These recommended additions do not change anything about the existing legislative scheme - they simply provide additional clarity and consistency for both employers and applicants.

3. *Make clear that employers must make a final decision about an applicant's response to a Fair Chance Act notice within a reasonable period of time, and that the presumed reasonable period of time does not exceed five business days.*

A common scenario that we witness is one where a job applicant – having received a Fair Chance Act notice from a prospective employer – sends additional information to the employer to explain their criminal history or pending case, or to provide mitigating evidence. The employer will then fail to respond to the applicant at all or take weeks – or even months – to issue a response, all while the applicant is waiting to hear if they will get the job. The CCHR rules should include a requirement that the employer must relay its decision regarding an applicant's hiring "within a reasonable period of time" and include a rebuttable presumption that "a reasonable time will not exceed five business days." This proposed addition is drawn from the Legal Enforcement Guidance.

These additions will ensure that workers are not indefinitely waiting for a final decision from an employer.

Conclusion

Thank you for holding this important hearing and for your consideration of our comments. As noted above, we have attached a full list of proposed revisions to the Proposed Rule to our testimony.

If you have any questions, please feel free to contact me at aarkingallagher@bds.org or (929) 437-9923.

Section 4. Section 2-01 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-01 Definitions.

For purposes of this chapter,

[*Article 23-A analysis.* "Article 23-A analysis" refers to the process required under subdivisions 9, 10, 11, and 11-a of Section 8-107 of the Administrative Code to comply with Article 23-A of the New York Correction Law.]

Article 23-A factors. "Article 23-A factors" refers to the following factors that employers, employment agencies, or their agents must consider concerning applicants' and employees' pre-employment conviction histories under [Section] § 753 of Article 23-A of the New York [correction law] Correction Law:

1. that New York public policy encourages the licensure and employment of people with criminal records;
2. the specific duties and responsibilities necessarily related to the prospective job;
3. the bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;
4. the time that has elapsed since the occurrence of the criminal offense that led to the applicant's or employee's criminal conviction, not the time since arrest, ~~or~~ conviction, or release from incarceration;
5. the age of the applicant or employee when the criminal offense that led to their conviction occurred;
6. the seriousness of the applicant's or employee's conviction;
7. any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;
8. the legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

. . .

Fair Chance Employment Analysis. "Fair Chance Employment Analysis" refers to the steps for evaluating:

1. An applicant's or employee's convictions that occurred prior to the start of their employment using the Article 23-A factors; or

2. An applicant's pending cases that occurred prior to becoming an employee ~~their application for employment~~ or an employee's pending cases or convictions that occur during employment using the New York City Fair Chance Employment Factors.

. . .

Intentional Misrepresentation. "Intentional misrepresentation" refers to an applicant's inaccurate representations about their criminal history or pending cases only if made with knowledge of their falsity and with intent or purpose to deceive.

. . .

Pending case. A criminal accusation or an arrest based on a criminal accusation that has not yet resulted in a conviction as defined by section 1.20(13) of the criminal procedure law been ~~adjudicated to a verdict~~ or been dismissed at the time of the Fair Chance Employment Analysis conducted by an employer, employment agency, or their agent. An action that has been adjourned in contemplation of dismissal shall not be considered a pending case unless, prior to the time the Fair Chance Employment Analysis is conducted by an employer, employment agency, or their agent, the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution. An action that has been calendared after a conviction shall not be considered a pending case.

Section 6. Section 2-04 of Title 47 of the Rules of the City of New York is amended to read as follows:

§ 2-04 Prohibitions on Discrimination Based on Criminal History

47 RCNY §§ 2-04(a) through 2-04(g) relate to prohibitions on discrimination in employment only. 47 RCNY § 2-04(h) relates to prohibitions on discrimination in licensing only. 47 RCNY § 2-04(i) relates to enforcement of violations of the Human Rights Law under this section in employment and licensing.

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

(1) [Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing,] Prior to a conditional offer, expressing any [limitation or specification in employment] limitations or specifications regarding criminal history, including asserting that individuals with a criminal history, or individuals with certain convictions, will not be hired or considered. This includes [, but is not limited to, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."] unsolicited statements about criminal background checks. Solicitations, advertisements, and publications may include affirmative encouragement for individuals with criminal records to apply.

(2) [Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer] ~~Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or pending cases prior to requesting authorization to perform a background check or criminal history check whether on an application or otherwise.~~ Prior to a conditional offer, asking questions or seeking information about an applicant's criminal history or asking permission to run a background check.

(3) [Making any] Prior to a conditional offer, [statement] statements or [inquiry] inquiries or actions seeking to discover information relating to [the] an applicant's [pending arrest or] criminal history [conviction] whether oral or in writing [before a conditional offer of employment is extended]. This includes conducting any investigation into an applicant's criminal history, including but not limited to the use of publicly available records or the Internet for the purpose of learning about an applicant's criminal history, whether such investigations are conducted by an employer, employment agency, or their agent or for an employer, employment agency, or their agent by a third party. This also includes searching for terms such as "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison" in connection with an applicant, or searching websites that purport to provide information

regarding arrests, warrants, convictions or incarceration information for the purpose of obtaining criminal history information about an applicant.

(4) Using [within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability] forms or applications that contain a disclaimer, note exceptions, or note that applicants can skip certain questions related to criminal history are prohibited unless the specific language is required by any other federal, state or local law.

(5) Failing to [comply with requirements of § 8-107(11-a) of the Human Rights Law,] undertake any of the following obligations when they are applicable:

(i) the requirement to request from the employee or applicant information relating to the relevant Fair Chance Employment Factors;

([1] ii) the requirement to provide the applicant or employee a written copy of any inquiry an employer, employment agency, or their agent conducted into the applicant's criminal history;

([2]iii) the requirement to share with the applicant or employee a written copy of the employer's, employment agency's, or their agent's [Article 23-A analysis] Fair Chance Employment Analysis;

[or] ([3]iv.) the requirement to hold the prospective position open for at least [three] five business days from the date of an applicant's receipt of both the inquiry and analysis; or

(v.) the requirement to allow the employee a reasonable time to respond, which shall be at least five business days from the date of the employee's receipt of both the inquiry and analysis, before taking an adverse action based on the employee's criminal history.

(vi.) following the employee's or applicant's response to a Fair Chance Notice, failing to conduct a new Fair Chance Employment Analysis that additionally considers the employee's or applicant's response and, should the employer act adversely against the employee or applicant, provide a copy of its analysis in writing to the employee or applicant.

. . . .

(e) *Withdrawing a Conditional Offer of Employment or Taking an Adverse Employment Action*. Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's [or employee's] conviction history or pending case(s), the employer, employment agency, or agent thereof must

. . .

[(iv)] (v) After evaluating the factors in subdivision [(e)(1)(i)] (e)(1) of this section, an employer, employment agency, or agent thereof must then determine whether (1) there is a "direct relationship" between the applicant's or employee's conviction history or pending case and the prospective or current job, or (2) employing or continuing to employ the [applicant] person would involve an unreasonable risk to property or to the safety or

welfare of specific individuals or the general public.

(A) To claim the ["direct relationship exception,"] "direct relationship" exception, an employer, employment agency, or agent thereof must first show a direct connection between the specific nature of the alleged conduct in a pending case or convicted conduct and specific duties necessarily related to the job ~~draw some connection between the nature of the conduct that led to the [conviction(s)] conviction or pending case and the position~~. If a direct relationship exists, the employer, employment agency, or agent thereof must evaluate the [Article 23-A factors]relevant New York City Fair Chance Employment Factors, as that term is defined in 47 RCNY § 2-01, to determine whether the concerns presented by the relationship have been mitigated.

(B) To claim the ["unreasonable risk exception,"] "unreasonable risk" exception, an employer, employment agency, or agent thereof must consider and apply the [Article 23-A factors] relevant New York City Fair Chance Employment Factors~~, as that term is defined in 47 RCNY § 2-01,~~ to determine if an unreasonable risk exists. An employer cannot simply presume that an unreasonable risk exists because the applicant has a criminal record. To properly establish that there is an unreasonable risk, an employer must begin by assuming that no risk exists and then show how the relevant Fair Chance Employment Factors combine to create an unreasonable risk to people or to property. Because an employer cannot demonstrate an unreasonable risk without evaluating all of the relevant Fair Chance Employment Factors, seriousness of the offense alone does not demonstrate an unreasonable risk, nor may employers categorically assume that any particular type of offense creates an unreasonable risk.

. . . .

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

. . .

(B) If the employer, employment agency, or agent thereof reviews the additional information and makes a determination not to hire the [applicant] person or take an adverse employment action, the employer, employment agency, or agent thereof must relay that decision to the [applicant] person in writing within a reasonable period of time. There is a rebuttable presumption that a reasonable time will not exceed five business days.

. . . .

(3) *Errors, Discrepancies, and Misrepresentations.*

. . .

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

employer, employment agency, or agent thereof first provides the person with the information that led it to the determination that an intentional misrepresentation was made and gives the person a reasonable period of at least five business days to respond, ~~.~~ and properly considers the applicant's or employee's response prior to taking any adverse action. If the employer takes any adverse action against the applicant or employee, it must provide a copy of its analysis to the applicant or employee in writing.

A misrepresentation is intentional if it is made with knowledge of its falsity and with intent or purpose to deceive. Mere discrepancies between an applicant's criminal background record and self-report of their criminal history may not constitute credible evidence of an intentional misrepresentation. Such discrepancies can arise if, for example:

a) The applicant believed the conviction was too old to be considered or not relevant to the job duties;
b) The applicant confused the charge initially filed against them with the one for which they were convicted;
c) The applicant believed their conviction was sealed;
d) The applicant disclosed their most serious or most recent conviction but not all of their convictions; or
e) Because of an error in the criminal history record;

It is an employer's burden to credibly demonstrate that any discrepancy on which they wish to rely as a basis for disqualifying an applicant is attributable to an intentional misrepresentation. Employers who improperly invoke intentional misrepresentation as a pretextual basis for failing to comply with the Fair Chance Employment Process violates the NYCHRL.

However, an employer, employment agency, or agent thereof may not take adverse action based on the person's failure to divulge information that the employer, employment agency, or agent thereof is prohibited from inquiring about or taking adverse action on pursuant to § 8-107(11) of the Code.

. . . .

(f) *Temporary Help Firms*

. . .

(4) A temporary help firm ~~may~~ shall not aid or abet an employer's discriminatory hiring practices. A temporary help firm ~~may~~ shall not determine which candidates to refer to an employer based on an employer's preference not to employ persons with a specific type of conviction or criminal history generally. A temporary help firm ~~may~~ shall not provide the applicant's criminal history to prospective employers until after the employer has made a conditional offer to the applicant.

. . . .

(g) *Exemptions*. Consistent with N.Y.C. Local Law No. 85 (2005) and N.Y.C. Admin. Code § 8-130, all exemptions to coverage under the following section must be construed narrowly. Employers, employment agencies, or their agents who invoke an exemption to defend against liability have the burden of proving the exemption by a preponderance of the evidence.

~~(1) **Mandatory Forfeiture, Disability, or Bar to Employment Imposed by Law.** For applicants and employees where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct, employers, employment agencies, and their agents are not prohibited from:~~

~~(i) making inquiries or statements about an applicant's or employee's non-convictions, denying employment to an applicant, or taking adverse action against an employee based on the applicant's or employee's non-convictions as set forth in 47 RCNY §§2-04(a)(6) and (b); and~~

~~(ii) denying employment to an applicant or taking adverse employment action against an employee based on the applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process set forth in 47 RCNY §§ 2-04 (a)(5) and (e).~~

~~When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04 (a).~~

~~(2)~~ **(1) Police Officers and Peace Officers.** For police officer and peace officer positions, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's criminal history prior to making a conditional offer of employment, as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);

(ii) denying employment to an applicant based on the applicant's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §2-04(e);

(iii) making inquiries or statements about an employee's non-convictions, as set forth in 47 RCNY § 2-04(a) (6); and

(iv) taking adverse employment action against an employee based on the employee's criminal history without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(3)~~ **(2) Positions with Law Enforcement Agencies Other than Police Officers and Peace Officers.** For non-police officer and non-peace officer positions with law enforcement agencies, as the term "law enforcement" is used in article 23-a of the correction law,
including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family justice of the administration for

children's services, the business integrity commission, and the district attorneys' offices, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an applicant's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways, as set forth in 47 RCNY §§ 2-04(b), (d), and (e):

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59;

(ii) denying employment to an applicant based on the applicant's ~~arrest or~~ unsealed conviction record, youthful offender adjudication, or sealed convictions enumerated in section (2)(i) of this subsection without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5) and (e);

(iii) making inquiries or statements about a current employee's convictions for a violation sealed pursuant to Criminal Procedure Law §160.55 and criminal actions that are not currently pending that were concluded in one of the following ways:

i. an adjudication as a youthful offender, as defined by Criminal Procedure Law § 720.35(1), even if not sealed or marked confidential;

ii. a conviction of a violation, as defined in Criminal Procedure Law § 160.55, even if not sealed; or

iii. a conviction that has been sealed under Criminal Procedure Law § 160.58 or § 160.59, except for those described in sections 1 and 2.a of the definition of "non-conviction"; and

(iv) taking adverse employment action against an employee based on the employee's unsealed conviction history, youthful offender adjudication, sealed convictions enumerated in section (2)(iii) of this subsection, or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

~~(4)~~ **(3) Public Agencies Other than Law Enforcement Agencies Taking Adverse Action Against an Employee.** Where an employee of a public agency is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law, the public agency is permitted to take adverse employment action against an employee based on criminal convictions that occur during employment or pending cases that preceded or arose during employment without undertaking the Fair Chance Employment Process.

~~(5)~~ **(4) Specific Positions Listed by the New York City Department of Citywide Administrative Services** Certain positions are determined by the commissioner of citywide administrative services to involve law enforcement, be susceptible to bribery or

other corruption, or entail the provision of services to or safeguarding of persons who,

because of age, disability, infirmity or other condition, are vulnerable to abuse. With regard to such positions, which are listed in a calendar item on the department's website, employers, employment agencies, and their agents are not prohibited from:

(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4)~~, (6),~~ and (b)-(d); and

(ii) denying employment to an applicant based on the applicant's conviction history or pending cases or taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).

Notwithstanding the exemption set forth in section 2-04(g)(5) of this chapter, for such positions, employers, employment agencies, or their agents must provide a written copy of the employer's Fair Chance Employment Analysis to applicants who are denied employment or employees subject to an adverse employment action because of the applicant's or employee's conviction history or pending cases.

~~(6) **Certain Positions Regulated by Self-Regulatory Organizations as Defined in Section 3(a)(26) of the Securities Exchange Act of 1934, as Amended.** Employers, employment agencies, and their agents in the financial services industry are exempt from the following prohibitions, to the extent that compliance with industry-specific rules and regulations promulgated by a self-regulatory organization require such actions:~~

~~(i) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

~~(ii) denying employment to an applicant based on an applicant's conviction history or arrest record without undertaking the Fair Chance Employment Process as set forth in 47 RCNY §§ 2-04(a)(5), and (e); and~~

~~(iii)taking adverse employment action against an employee based on the employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

~~Non-regulated positions in self-regulatory organizations are not exempt under 47 RCNY § 2-04(g)(6).~~

~~(7)~~ **(5) Actions Taken Pursuant to Federal, State, or Local Law Requiring Criminal Background Checks. ~~Positions for Which a Criminal Background Check is Legally Required for~~ ~~Employment Purposes Pursuant to Federal, State, or Local Law.~~**

(a) Employers, employment agencies, and their agents required by law to perform a criminal background check~~s~~ may conduct the background check prior to a conditional offer; and ~~are exempt from the following prohibitions, to the extent that compliance with federal, state, or local law requires such actions:~~

(i) if the employer, employment agency, or their agent is required to deny employment to an applicant or take adverse employment action against an

employee based on the applicant's or employee's conviction or pending case for any of the specific offenses subject to the legally mandated exclusion regardless of whether they have received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct, then they may do so without undertaking the Fair Chance Employment Process, or

(ii) if the employer, employment agency, or their agent wishes to deny an applicant employment but is not required by law to deny employment because the applicant does not have a conviction for which they would be barred by federal, state, or local law, or because the applicant's excluded conviction can and has been removed by an executive pardon, certificate of relief from disabilities, or certificate of good conduct, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

~~(iii) making inquiries or statements about an employee's or applicant's conviction history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d);~~

(iv) making inquiries or statements related to an applicant's conviction history or pending cases until after extending a conditional offer of employment as set forth in 47 RCNY § 2-04(b); and

(v) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5), and (e).

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(7~~5~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. An employer employment agency, or their agent that is legally required to undertake a criminal background check of an applicant may conduct the background check prior to a conditional offer, but, if they are not required to reject the candidate, they must still conduct a Fair Chance Employment Analysis of the applicant's criminal history and provide the applicant a copy of the inquiry and Fair Chance Employment Notice and a reasonable period of at least five days to respond.

(d) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent erroneously believe their action is mandated by federal, state, or local law.

(e) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

~~(8)~~ **(6) Actions Taken Pursuant to Federal, State, or Local Law Requiring Barring Employment Based on Certain Criminal Histories. ~~Legally Mandated Exclusions from Employment Based on Certain Criminal~~ Histories.**

(a) Employers, employment agencies, and their agents required by law to exclude applicants with certain criminal histories ~~from certain positions~~ are exempt from the following actions ~~prohibitions, to the extent that compliance with federal, state, or local law requires such action~~:

(i) making inquiries or statements about an employee's or applicant's conviction ~~history or pending cases as set forth in 47 RCNY §§ 2-04(a)(2)-(4), (6), and (b)-(d); and~~ for any of the specific offenses subject to the legally mandated exclusion for which they have not received an executive pardon removing the disability, a certificate of relief from disabilities, or a certificate of good conduct;

(ii) conducting a criminal background check prior to making a conditional offer of employment; and

(iii) performing a Fair Chance Employment Analysis or providing a copy of the Fair Chance Notice when denying employment to an applicant or taking adverse employment action against an employee based on any conviction or pending case that is subject to the legally mandated exclusion.

~~(iv) denying employment to an applicant or taking adverse employment action against an employee based on an applicant's or employee's conviction history or pending cases without undertaking the Fair Chance Employment Process, as set forth in 47 RCNY §§ 2-04(a)(5) and (e).~~

(b) Employers, employment agencies, and their agents subject to an exemption under 47 RCNY § 2-04(g)(~~86~~) of this chapter are required to undertake all other actions required by this chapter that are not in conflict with the requirements of the federal, state or local law that form the basis for the exemption.

(c) Unless the employer is explicitly required by another law to state in a job posting that a background check is required, the employer, employment agency, or their agent is prohibited by this chapter from doing so in a job advertisement. ~~An employer that is legally required to exclude an applicant from~~

~~employment based on a specific criminal history may conduct the background check prior to a conditional offer. When an employer, employment agency or their agency relies on mandatory legal bar in error, the adverse action will be evaluated consistent with 47 RCNY § 2-04(a).~~

(d) If an applicant identifies an error on the background report and can show that they do not have a conviction that is subject to a legally mandated exclusion, they should promptly notify the employer and the employer must then conduct the Fair Chance Employment Analysis based on the corrected background information.

(e) It is not a defense to a charge of a violation of this chapter should an employer, employment agency, or their agent rely on a mandatory legal barrier in error.

(f) For purposes of this subdivision federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

September 4, 2024

New York City Commission on Human Rights
Commissioner Annabel Palma; Chair
22 Reade Street
New York, NY 10007

RE: PBSA CLARIFICATION QUESTIONS REGARDING FAIR CHANCE HIRING IN NEW YORK

Dear Chairperson Palma,

On behalf of the Professional Background Screening Association (PBSA), whose members include New York City residents and businesses, we write to you to with questions regarding the recent changes to Fair Chance hiring practices made by Local Law 4 (2021). As a nonprofit organization consisting of over 850 small and large companies engaged in the background screening profession, PBSA has been dedicated to providing the public with safe places to live and work since 2003. The PBSA member companies conduct millions of employment and tenancy-related background checks each year, helping employers, staffing agencies, and nonprofit organizations make more informed decisions regarding the suitability of potential employees, contractors, tenants and volunteers.

In both 2021 and 2023, we wrote your office seeking clarification regarding the Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History issued on July 15, 2021. The Guidance notes that all non-criminal items must be reviewed prior to extending a conditional offer and conducting a criminal search (inclusive of an MVR/driving records search).

110 Horizon Drive, Ste. 210, Raleigh, NC 27615, US

Phone: 919.459.2082 | Fax: 919.459.2075 | Email: info@thepbsa.org

To date, we have not yet received answers to our queries. With the changes to Fair Chance hiring practices under the proposal being heard on September 5th, 2024, we would again reach out seeking clarification to our questions so we might best assist the New York businesses we serve. We would appreciate your assistance.

There are several items that remain unclear under the bifurcated screening process under the 2021 Fair Chance alterations and we would seek clarification to the following:

1) **Enforcement date.** The systems and software for tracking applicants are exceptionally complex and were not built to accommodate the bifurcation process, let alone a myriad of new regulations altering that process. While efforts to accommodate bifurcation have been made and remain ongoing, with the limited notice window provided, does the Commission intend to offer an additional grace period to employers who are working to come into compliance with the Guidance?

2) **Are employers allowed to run other screens - such as drug testing, drivers record screening, education verification, etc. - concurrently?** The current fair chance hiring process builds in a number of days to allow for proper response by both applicant and employer, this results in a considerable amount of time between application and actually beginning work. Functionally, it benefits both applicants and employers to run multiple screens concurrently. Provided the criminal record search is held as required presently, are employers allowed to run noncriminal screens in concurrence?

3) **When can drug testing be done under the Fair Chance Act? Does drug testing fall under the category of a "medical exam"?**
    a. Does returning a drug test that is unsatisfactory to the employer make the applicant unqualified under the definition of "otherwise qualified?"

4) **When can a Social Security Number (SSN) trace be done under the Fair Chance Act?** A common search performed in background checks is an SSN Trace. This product largely functions to develop address history and/or additional names that may be associated with the candidate in order to develop where a criminal records search should be performed. Given that this product is tied to a criminal history search, may it also be performed post-offer?

5) **Are employers required to have already collected information from the applicant and analyzed the information before sending the FCA form?**

6) **Must there be express consent for the use of communication such as email? Or is it implied by the applicant's use of the medium?** The NYCCHR guidance of July 15, 2021 states: *"notices and disclosures…may also be communicated by email, if such method of communication is mutually agreed on in advance by the employer and the applicant or employee."* Does this mean the employer must receive consent from the individual to send adverse action information via email? If so, can this consent be written or verbal?

7) **Define the act of a Consumer Reporting Agency (CRA) "aiding and abetting discrimination."** The July 15 guidance contains an attempt at an example, but in reality, the stated example is inapplicable. CRAs rarely, if ever, advise on the approval or denial of an applicant. Beyond that stated scenario, there are no further examples or guidance provided regarding this provision, leaving CRAs to navigate and determine compliance with an imprecise standard. Therefore, a more exact definition of aiding and abetting is needed to ensure CRAs do not inadvertently fall out of compliance with this vague standard.

8) **Expand on the guidance of proper use of driving abstracts, and their ability to be produced concurrently to other screening.** The July 15 guidance states: *"Because it is often impracticable to separate criminal and non-criminal information contained in a driving abstract, employers must not review driving abstracts until after a conditional offer has been extended. The employer may treat non-criminal information on the driving abstract as a form of non-criminal information that the employer could not have reasonably known before the conditional offer."* This statement actually creates greater confusion as to the use of driving abstracts as, according to the guidance, an invalid or suspended license meets the definition of non-criminal information that the employer could not have reasonably known before the offer. In reality, this is not the case. In fact, employers could have reasonably known the license was invalid or suspended by requesting an abstract prior to the conditional offer.

   By essentially mandating additional time to request the driving abstract puts that employer at risk of being unable to provide services to their customers or the communities they serve as the timeline of the entire screening process is dragged out further and possibly restarted entirely with another candidate if the initial candidate fails to meet the standards where driving is a requirement for the position.

9) **Define "otherwise qualified."** Currently, there is no standard or legal definition of what this term constitutes and applying a "common sense" definition can still potentially result in legal consequences. Nationally, there is

no codified or judicially established definition for the term. Does it require the "checking of the box" for every educational or experiential requirement for the position? Or is meeting a simple majority of the requirements adequate? Does it account or diversity requirements or preferences for internal hiring? Does it apply if required drug tests are failed? The term is far too vague without greater definition or guidance. Therefore, PBSA would ask the Commission to provide a legal definition of "otherwise qualified".

We thank you for taking the time to hear our questions, and we do hope the Commission can guide us in our work to serve New Yorkers. PBSA and its members are prepared to discuss these and other questions that may arise from the previous Fair Chance Act changes, as well as those proposed this summer, and look forward to working with you further. Please feel free to contact me directly with any questions at 402-957-1179 or brent.smoyer@thepbsa.org.

Sincerely,

Brent Smoyer, JD
PBSA State Government Relations &
Grassroots Director

PBSA
PROFESSIONAL BACKGROUND
SCREENING ASSOCIATION

Amendment to Rules Governing Employment Discrimination Based on Criminal History

Rule status: Proposed

Agency: CCHR

Comment by date: September 4, 2024

Rule Full Text
Final-Proposed-Amendment-to-Rules-Governing-Employment-Discrimination-Based-on-Criminal-History.pdf

The New York City Commission on Human Rights (the “Commission”) is proposing to amend its rules governing employment discrimination based on criminal history.

Attendees who need reasonable accommodation for a disability such as a sign language translation should contact the agency by calling 1 (212) 416-0218 or emailing by **August 29, 2024**

Send comments by

- **Email**:

- **Mail**: The New York City Commission on Human Rights, 22 Reade Street ; New York, New York 10007

Public Hearings

Public Hearing

Date

September 5, 2024
11:00am - 12:00pm EDT

Location

Connect Virtually

https://events.gcc.teams.microsoft.com/event/ede84e09-a790-4ebb-85d5-1ad4a492786b@32f56fc7-5f81-4e22-a95b-15da66513bef
To participate in the public hearing via phone, please dial +1 646-893-7101. • Phone conference ID: 297 976 496#
Disability Accommodation

Comments are now closed.

Online comments: 3

Karl Beecher

Wednesday August 14 2024 1:31am

Hi, my name is Karl Beecher. In my youth I got into some trouble but thankfully it did not result in going to prison.

However, it appears my character has been given a life sentence behind societies bars. It's really unfair and down right unconstitutional that a moment of youthful indiscretions will remain with me for a lifetime.

I propose that all criminal records should be summarily,automatically and totally expunged from the entire system if the individual has not been involved in any crime for10 consecutive years.

If the individual has not been involved in any criminal acts for five consecutive years, then the police department can maintain that information for access but it would not be public record and would not affect an individual seeking employment. Particularly, his past offenses would not be mandated or required for disclosure on job application or any document for that matter.

The benefit of implementing such a ruling would assist individuals to reclaim their life, dignity and give them the hope and inspiration to move forward from their bad mistakes.

Conversely, when an emblazoned, indelible stain is placed upon an individual for life, it takes away hope, produces a low-key subconsciously present depression and creates an inevitable recidivistic inclination and mentality born out of shame and despair.

In the case where people have done their time, they have satisfied their judgment; it is very unfair, unreasonable and unkind to perpetuate a conviction(s) in light of the fact judgement was satisfied.

God Himself makes it clear once the punishment for sin has been satisfied He will remember our sins no more. If God/Jesus can forgive and forget, how much more should we do the same

Jeremiah 31:34 NLT
…." says the Lord. "And I will forgive their wickedness, and I will never again remember their sins."
https://bible.com/bible/116/jer.31.34.NLT

Hebrews 8:12 NLT
[12] And I will forgive their wickedness, and I will never again remember their sins."
https://bible.com/bible/116/heb.8.12.NLT

Isaiah 43:25 NLT
[25] “I—yes, I alone—will blot out your sins for my own sake and will never think of them again.
https://bible.com/bible/116/isa.43.25.NLT

⭐⭐⭐⭐⭐
Psalms 82:2
“How long will you hand down unjust decisions by favoring the wicked?
Psalms 82:2 NLT
https://bible.com/bible/116/psa.82.2.NLT

⭐⭐⭐⭐⭐
Psalms 94:20
Can unjust leaders claim that God is on their side— leaders whose decrees permit injustice?
Psalms 94:20 NLT
https://bible.com/bible/116/psa.94.20.NLT

⭐⭐⭐⭐⭐
⭐Lamentations 3:35-36
if they deprive others of their rights in defiance of the Most High, if they twist justice in the courts— doesn’t the Lord see all these things?
Lamentations 3:35-36 NLT
https://bible.com/bible/116/lam.3.35-36.NLT

⭐⭐⭐⭐⭐
1 Thessalonians 4:8
Therefore, anyone who refuses to live by these rules is not disobeying human teaching but is rejecting God, who gives his Holy Spirit to you.
1 Thessalonians 4:8 NLT
https://bible.com/bible/116/1th.4.8.NLT

I’m not sure if I’ll be alive when these changes will be implemented but I have faith and hope that it will occur. Truth always prevails, it just takes time to be set free.

Thank you for taking the time to read my thoughts 😊🙏🏽

YouVersion Bible app
https://www.arbernard.com/arbernardpodcasts
http://www.KnowGod.com
http://www.wmca.com radio 570AM
http://www.KLove.com 95.5 FM
http://www.Familyradio.org 92.7FM
http://www.thenarrowpath.com

http://www.unshackled.org
http://www.gotquestions.org
http://www.Oneplace.com

Jesus is the only way to our Heavenly Father.

Comment added August 14, 2024 1:38pm

NYC Guy

Businesses should be able to decline to hire criminals based on their past crimes. I don’t want embezzlers working at my bank, or child molesters working at schools. Makes no sense. Dont do the crime if you dont want the pay the consequences.

Comment added September 1, 2024 7:18pm

Nathaniel M.

I strongly support the proposed amendments to the New York City Commission on Human Rights rules concerning prohibitions on employment discrimination based on criminal history. These changes align with the ongoing efforts to provide individuals with a second chance and reduce the stigma associated with a criminal record.

In addition to the proposed changes, I propose that all criminal records should be automatically expunged from the entire system if the individual has not been involved in any criminal activity for a period of ten consecutive years. Furthermore, if the individual has not been involved in any criminal acts for five consecutive years, the police department may maintain that information for internal access, but it would not be public record and would not be used to discriminate against the individual in employment or other opportunities.

The implementation of these changes would have a significant positive impact on individuals who have made mistakes in the past. By removing the barrier of a criminal record, these individuals would have a greater opportunity to rebuild their lives, regain their dignity, and move forward from past mistakes. This would not only reduce the likelihood of recidivism but also promote social justice and equality.

It is unjust to continue to punish individuals long after they have served their sentences. By expunging their records, we can demonstrate our commitment to rehabilitation and ensure that everyone has an equal opportunity to succeed. I urge the Commission to adopt these proposed changes and take a leadership role in creating a more equitable and just society.

Comment added September 3, 2024 2:35pm

EXTERNAL] Comments regarding proposed amendments to CCHR Rules governing discrimination on the basis of criminal history

Fuchs, Stephen A. <SFuchs@littler.com>

Wed 9/4/2024 11:14 AM

To: Policy (CCHR) <Policy@cchr.nyc.gov>

Hello. I am a partner with Littler Mendelson, P.C. in our New York City office. I counsel employers on compliance with the New York City Fair Chance Act ("FCA") on a daily basis. I have reviewed the Commission's Final Proposed Amendment to Rules Governing Employment Discrimination Based on Criminal History and have the following comments.

- **Comments on the Amendment to the definition of a "Conditional Offer" in §2-01 to add "regardless of the results of a criminal background check":**
  1) The standard of proof for an employer to demonstrate it would not have made the offer regardless of the results of the criminal background check is undefined and is subject to the CCHR concluding that whether the offer would have been regardless of the background check results is nearly always a material issue of fact requiring a plenary hearing. The agency should include examples supporting such a position, such as evidence of misrepresentations in the employee's record received after the receipt of criminal history despite the record having been requested before the conditional offer.

  2) The amendments should provide clarification that the FCA is not violated when a conditional offer is withdrawn for other than the reasons listed under the definition of conditional offer *where the applicant has no criminal history, or the any consumer report received by the employer after a conditional offer contains no criminal history.* As written, the FCA can be interpreted to indicate an employer violates the FCA where it withdraws a conditional offer for any other reason, even if the applicant has no criminal history. However, where no criminal history exists, the purposes of the statute are not invoked, and withdrawal of a conditional offer is not an adverse action based on an applicant's criminal history.

- **Comments on the revised definition of a "non-conviction."** The proposed amendments add that a criminal action that has been adjourned in contemplation of dismissal is a non-conviction unless revoked and the case is restored to the calendar for further prosecution, in which case it is treated as a pending case. **Comment:** The amendments should clarify that this provision is limited specifically to adjournments in contemplation of dismissal as defined under the New York Penal Code. Various jurisdictions have mechanisms for deferral of sentencing until a later date dependent on interim conditions being met. Employers are unclear if a deferred sentence mechanism used in another state should be considered equivalent to an "adjournment in contemplation of dismissal" under the FCA. The amendments should clarify that an employer's prohibition on considering an adjournment in contemplation of dismissal is limited to that device under the NY Penal Code, and not to deferred sentences following guilty pleas in general or to other deferral mechanisms in other states.
- **Amendment to §2-04(a)(1),(2)** – please confirm:
  a) these amendments remove the prohibition on ads that simply state "background check required" or state that applicants will be subject to a background check where there is no reference to criminal history, or to a requirement of an applicant having a "clean" background check or other exclusionary language. Since the passage of the FCA NYC employers have received demands from attorneys representing non-applicants based on the simple mention that there will be a background check.
  b) Confirm this section does not prohibit references in the Disclosure and Authorization required by the Fair Credit Reporting Act indicating that criminal history may be one of the categories of information requested, even if a Disclosure and Authorization is issued prior to a conditional offer so that non-criminal history can be checked. The CCHR's guidance once contained language indicating Disclosures and Authorizations should *not* refer to criminal history, but that language was quietly removed without notice sometime in approximately 2022.
- **Amendment to §2-04(a)(3).** The amendment should add that nothing in statute prohibits general internet or social media searches on a candidate for employment not including prohibited terms or not conducted for purpose of revealing a candidate's criminal history. If a neutral search inadvertently reveals criminal history, such information must be put aside and not considered by the decision maker until after a conditional offer.

- **Amendment to §2-04(a)(4)** – The regulations should be amended to specifically include that an employer's inclusion of statements required by laws such as those of California, Los Angeles, and San Francisco laws that qualified applicants with criminal histories will be considered in accordance with applicable law does not violate the prohibition against statements regarding criminal history in a job posting or application. Such language previously appeared in CCHR's guidance but was removed.
- **Amendment to §2-04(a)(5)(iii)** – The amendments should clarify that the requirement to provide the employer's analysis of the Fair Chance factors is satisfied by providing the applicant or employee with a properly and fully completed Fair Chance Act Notice. The employer is not required to turn its internal notes or worksheet to the applicant or employee in addition to the completed Fair Chance Notice to comply with this requirement.
- **Amendment to §2-04(e)(1)(vii)** – Five business days has proven to be insufficient time for employers to engage in and complete the Fair Chance Act process for a current employee who is arrested and charged with a crime. Employers should have the option of placing a current employee on paid leave for a suspension in excess of five (5) business days additional time required to complete the Fair Chance Process.
- **Amendment to §2-04(e)(7), (8)** – Where a criminal background check must be conducted by the prospective employer pursuant to law or regulation, job postings should be permitted to say that a background check will take place as required by law, regardless of whether such a disclosure is required to be contained in the job posting by law. This was the CCHR's position prior to the July 28, 2021 amendments and should be restored.

Thank you for your courtesy and consideration with respect to these comments. I look forward to participating in the rules hearing tomorrow, September 5, 2024.

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