

INFORMATION FOR EMPLOYERS

The New York City Commission on Human Rights is a resource to help you strengthen your business, become a more inclusive employer, and conform your employment practices to comply with the NYC Human Rights Law (“NYCHRL”). This document provides information regarding employers’ obligations to not discriminate against job applicants and employees because of their criminal history and incorporates information about new protections added to the NYCHRL by Local Law 4 of 2021, which is effective July 29, 2021.

Before a Conditional Offer of Employment

Job applicants’ criminal history cannot be part of your hiring process until after a conditional offer of employment is extended. This means you must:

- Eliminate any reference to arrest or conviction history when advertising for positions. Phrases such as, “no felonies,” “background check required,” and “must have clean record” on job advertisements cannot be used.
- Ensure that your application forms and agents acting on your behalf do not ask whether an applicant has a criminal record or any open criminal cases or ask an applicant to authorize a background check.
- Instruct your human resources and hiring staff to not ask applicants any questions about criminal records, run a background check, or attempt to discover whether an applicant has an arrest or conviction history before the conditional offer.

During the hiring process, an applicant may reveal their criminal history to you. If that happens, inform the applicant that any consideration of their criminal record will happen only after you decide to offer them a job, then let them know that you are moving on to another topic and that it is not proper to discuss that issue until later, if at all. You may want to make a note in the applicant’s file about what happened in case the disclosure later becomes an issue.

After a Conditional Offer of Employment is Made to the Applicant

A conditional offer is one that is extended after you’ve vetted an applicant on all non-criminal information, such as work experience, educational qualifications, licensure, interviews, etc.¹ After you extend a conditional offer of employment, you are permitted but not required to ask whether an applicant has a criminal conviction history or a pending criminal case; check the applicant’s criminal record; and ask the applicant about the underlying circumstances of their criminal history. As you ask these questions, you should gather information necessary to analyze the person’s conviction history under the Fair Chance Process, which is explained below.

Employers should note that there is certain arrest and conviction information that is always off-limits. You may never ask about or consider arrests that did not result in a criminal conviction. These include cases where a person was not found guilty or their case was later sealed. You also may not ask about or consider cases adjourned in contemplation of dismissal, violations for things like disorderly conduct, or cases where a person was adjudicated as a youthful offender or juvenile delinquent. Usually, this information will not appear on a background check, but even if it does you

¹ An employer may also condition the offer on the results of a medical exam as permitted by the Americans with Disabilities Act of 1990 or “[o]ther information the employer could not have reasonably known before the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.” N.Y.C. Admin. Code. § 8-102.

cannot ask the applicant about it or consider the information at any point in the hiring process.

The following is a sample question you can use after a conditional offer of employment that only asks about information you are legally allowed to consider:

Have you ever been convicted of a misdemeanor or felony? Answer “NO” if you received an adjournment in contemplation of dismissal (“ACD”) that has not been revoked and restored to the calendar for further prosecution or if your conviction: (a) was sealed, expunged, or reversed on appeal; (b) was for a violation, infraction, or other petty offense such as “disorderly conduct;” (c) resulted in a youthful offender or juvenile delinquency finding; or (d) if you withdrew your plea after completing a court program and were not convicted of a misdemeanor or felony.

If your review of the person’s criminal record does not make you reconsider your offer of employment, you are not required to do anything further and you may hire the person. If, however, you are considering withdrawing the offer of employment based on your review of the criminal record, you must first complete three steps:

1. Evaluate the applicant under Relevant Fair Chance Factors (which include Article 23-A Factors for criminal convictions prior to employment and the NYC Fair Chance Factors for pending cases and criminal convictions that occur during employment) and share your written evaluation with the applicant. You can use the Fair Chance Notice on the Commission’s website to complete this written analysis.
2. Give the applicant a copy of any background check or other documents you used to determine that they have a criminal record.
3. Hold the job open for at least five business days so the applicant can respond.

If the applicant responds with new information, you must revisit your initial Fair Chance Analysis based on the new information provided by the applicant and, again, provide a written explanation of your analysis, to which the applicant may respond.

Disclosing a Background Check

You must give the applicant the exact information you used to determine they had a criminal record. The information should contain the date and time it was accessed. Complying is straightforward:

- If you hired another company to do a background check report, turn over a copy of that report.
- If you searched the Internet, print out the pages you relied upon.
- If you checked public records, provide copies of those records.
- If you relied on oral information, summarize your conversation and the information obtained in writing. This includes information provided by the applicant.

Evaluating the Applicant Under the Fair Chance Analysis

Under state and city law, New Yorkers cannot be denied work simply because of a criminal record. You may only decline to hire someone if there is a direct relationship between the applicant’s criminal record and the prospective job or if you can show that employing the person creates an unreasonable risk to your property or to the safety of specific individuals or the general public. In making that determination, you must consider specific factors described below. If your initial assessment is that there is a direct relationship, you must consider whether these factors mitigate that relationship; if there isn’t a direct relationship, you may not deny employment unless, considering the factors below, the person’s conviction poses an unreasonable risk. You should affirmatively request the information from the applicant that you need to complete your analysis.

- New York public policy encourages the employment of people with criminal records.
- The specific duties and responsibilities of the prospective job.

- The bearing, if any, of the person's alleged or convicted crime on their fitness or ability to perform one or more of the job's duties or responsibilities.
- For convictions, the time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the arrest or conviction itself. (You can skip this step if you are considering a person's pending case.)
- The age of the applicant when the events that led to their alleged or convicted crime occurred. (If they were 25 or younger, you should treat that as a mitigating factor.)
- The seriousness of the applicant's conduct leading to the charge or conviction. Note that the Commission does not consider convictions or charges for possession or sale of a controlled substance to be particularly serious.
- Any information produced by the applicant, or produced on the applicant's behalf, regarding their rehabilitation or good conduct.
- The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.
- If an applicant has a certificate of relief from disabilities or a certificate of good conduct, you must presume they are rehabilitated. The absence of such a certificate is not evidence of a lack of rehabilitation or good conduct.

The Commission's website contains additional information about how to conduct the Fair Chance Analysis, along with a form you may use to comply with this requirement. The form may be adapted to your preferred format or distributed electronically but the substantive material language must remain the same.

Allowing Time for the Applicant to Respond

You must give applicants a reasonable amount of time to respond to the background check and Fair Chance Analysis. The law requires at least five business days, from when an applicant receives this information, but you may provide the applicant even more time to gather any information necessary to respond. You must hold the job open for the applicant during this five-day period.

If an applicant contacts you during this time, you may be able to resolve the issue by explaining your concerns and having the applicant address them. You may also decide to offer the applicant a different position that you believe is more appropriate for the applicant. If you are not able to reach a resolution, you must inform the applicant that they will not be hired before you can move onto the next candidate.

Handling Arrests and Convictions of Current Employees

New York law offers continued protection to workers with criminal history after the start of their employment. Employers are not permitted to automatically discipline or terminate an employee based on a pending case or conviction and may only do so if there is a direct relationship between the employee's criminal history and the job or if the employer can show that continuing to employ the person creates an unreasonable risk to its property or to the safety of specific individuals or the general public. You must make that determination based on consideration of the factors listed above with respect to the Fair Chance Analysis for job applicants, and you must also take into consideration the employee's record of positive performance on the job.

You are permitted, but not required, to place the employee on leave for a reasonable period while you conduct the Fair Chance Analysis. (You should complete your analysis within five business days; delays beyond five business days are presumptively unreasonable.) You must provide the employee with your initial analysis and give them five business days to respond. If the employee provides additional information, you should take that information into account in completing your Fair Chance Analysis and provide the employee with your final written determination.

Does This Law Cover My Business?

Probably. Employers must have four or more employees in New York City to be covered by the NYCHRL. For small businesses, the owner counts toward this total. The four employees need not work in the same location, as long as one of them works in New York City.

There are certain exemptions that apply to the NYCHRL's employment protections based on criminal history. You should review the *NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act and Employment Discrimination on the Basis of Criminal History*, available on the Commission's website, to understand whether these exemptions may apply to a position at your business.