Plenary Two:
Changes on the Front End:
Revolutions and Evolutions in Hiring Practices

Kelly Trindel, PhD
Office of Research, Information and Planning, EEOC, Washington, DC

Dana Sussman, Esq.
Policy and Intergovernmental Affairs, NYC Commission On Human Rights

Annette Tyman, Esq.
Pay Equity and Organizational Strategy and Analytics Groups,
Seyfarth Shaw LLP, Chicago, IL

TABLE OF CONTENTS

Prior Salary History Bans

Introduction……..3

What is Prohibited?.....3

Common Questions to Consider……..4

Can Prior Salary Be Considered in Making an Offer?.....4

Can Salary Expectations Be Solicited and Considered?.....5

Can Employers Verify Salary History of Applicants?.....7

Can Forfeiture of Unvested Equity or Deferred Compensation Be Solicited and Considered?.....8

Can Objective Measures of Productivity Be Considered?.....9

Can Employers Disclose Salary Ranges of Position?.....10

Is the Law Applicable to Current Employees?.....11

Leveraging "Big Data" in Employment Decision-making

Introduction……13

What Do We Mean by "Big Data" in an Employment Context? ……13

Current and Potential Uses of Big Data in Employment……...14

Greater Historical and Developmental Context: How Did We Get Here?.....15

Opportunities and Concerns……...16

Banning the Box and Other Initiative Related to Background Checks

Introduction……19

EEOC's Criminal History Guidance……..19

Best Practices for Compliance.…….19

Conducting an Individualized Assessment.…….19

"Ban the Box" State Statutes and Local Ordinances…….....20

When You Should Ask About Criminal Background?.....20

What Time Limitations Exist for Consideration of Criminal Background?.....21

Which Employers are Covered by "Ban the Box"?.....22

The Do's and Don'ts of "Ban the Box"…….…23

Fair Credit Reporting Act and Adverse Action Requirements……..24

What is the FCRA?.....24

When Does the FCRA Apply?.....24

What is a Consumer Report?.....24

What is a Consumer Reporting Agency?.....25

When Does an Employer Have Responsibilities Under the FCRA and What are They?..25

FCRA Adverse Action Rulings.……...26

New York Fair Chance Act

Per Se Violations.……..26

Criminal Background Check Process.……..…27

Article 23A Analysis.……....28

The Fair Chance Process.……..…29

Changes on the Front End: Revolutions and Evolutions in Hiring Practices: Prior Salary History Bans

1. **Introduction**

   A. A number of states and local jurisdictions have enacted laws preventing employers from requesting salary history of job applicants and limiting an employer's ability to consider prior salary when making offers to new hires. Currently, California, Delaware, Massachusetts, New York City and Albany County, NY, Philadelphia, PA (stayed pending legal challenge), Oregon, and San Francisco, CA have enacted such bans. Puerto Rico also passed a ban, which largely mirrors the Massachusetts law. Similar laws are currently or have recently been under consideration by many more jurisdictions.

   B. While similar in intent, the jurisdictions that have enacted these laws each have nuances that employers must navigate.

2. **What is Prohibited?**

   A. California: Seeking or relying on salary history information about an applicant for employment as a factor in determining (1) whether to offer employment; or (2) what salary to offer[1].

   B. Delaware: Seeking compensation history from the applicant or their employer; screening applicants based on compensation histories; requiring applicant's prior compensation to satisfy minimum or maximum criteria[2].

   C. Massachusetts: Seeking the wage or salary history of a prospective employee; requiring that prior wage or salary history meet certain criteria[3].

   D. New York City, NY: Inquiring about salary history; relying on salary history in determining salary, benefits, or "other compensation" during the hiring process. Includes contract negotiations[4].

   E. Albany County, NY: Screening job applicants based on wage, including benefits or other compensation or salary history; requesting or requiring disclosure; seeking from any current or former employer (but applicant may provide written

[1] California Assembly Bill No. 168 *available at:* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201720180AB168
[2] Delaware HB 1 *available at*: http://legis.delaware.gov/BillDetail?legislationId=25664
[3] Massachusetts Session Laws Chapter 177 *available at*: https://malegislature.gov/Laws/SessionLaws/Acts/2016/Chapter177
[4] New York Local Law No. 67 *available at*: https://www1.nyc.gov/assets/cchr/downloads/pdf/amendments/LocalLaw67.pdf

authorization for prospective employer to "confirm" prior wages only after offer has been made)[5].

F. Oregon: Screening applicants based on current or past compensation; relying on past compensation of a prospective employee to determine compensation[6].

G. Philadelphia (stayed): Inquiring about wage history; requiring disclosure of wage history; conditioning employment or consideration for an interview or employment on disclosure of wage history; relying on wage history at any stage of the employment process (including contract negotiations), unless "knowingly and willingly" disclosed[7].

H. Puerto Rico: Asking an applicant about salary history or current salary[8].

I. San Francisco: Inquiring about salary history; considering salary history in determining salary; refusing to hire applicant for not disclosing salary history; releasing salary history to that person's employer or prospective employer without written authorization from the employee (unless the release is required by law, is publicly available or subject to a CBA)[9].

3. **Common Questions to be Considered:**

A. Can Prior Salary Be Considered in Making an Offer?

All of salary history ban laws make it an unlawful employment practice for an employer or, in most jurisdictions an employer's agent, to seek compensation history from external job applicants, or in most instances, their former employers. Some jurisdictions, however, allow employers to continue to rely on the prior salary information if the applicant discloses it "voluntarily."

State Specific Information

1. California: In California, if an applicant "voluntarily and without prompting" discloses salary history, the employer may rely on that information for purposes of determining salary, but may not consider that information for purposes of determining whether or not to hire the individual. However, salary history alone cannot justify pay differences.

[5] Albany County Local Law No. P for 2016 *available at:* http://albanycounty.com/Libraries/County_Executive/20171030-PH-16-LL_P.sflb.ashx
[6] Oregon House Bill 2005 *available at*: https://olis.leg.state.or.us/liz/2017R1/Downloads/MeasureDocument/HB2005
[7] Philadelphia Bill No. 160840 *available at*: https://phila.legistar.com/LegislationDetail.aspx?ID=2849975&GUID=239C1DF9-8FDF-4D32-BACC-296B6EBF726C&FullText=1
[8] Puerto Rico Act No. 16 of March 8, 2017.
[9] San Francisco Ordinance No. 142-17 *available at*: https://sfgov.legistar.com/View.ashx?M=F&ID=5328258&GUID=A694B95B-B9A4-4B58-8572-E015F3120929

2. Delaware: Employers may seek prior salary information only after an offer with compensation terms has been accepted and may be used "solely" for the purpose of confirming compensation history. There is no other express exemption in the law for voluntary disclosures.

3. Massachusetts: In Massachusetts, if an applicant "voluntarily" discloses salary history, the law only permits employers to "confirm" the information provided. The law is silent as to whether this information can be relied upon to make a compensation offer. Further, the Massachusetts law provides that "previous wage or salary history shall not be a defense to an action" alleging gender pay differences.

4. New York City, NY: The New York City law is clear that if the candidate "voluntarily and without prompting" discloses his or her prior compensation, an employer may consider the applicant's compensation history "in determining salary, benefits and other compensation for such applicant, and may verify such applicant's salary history."

5. Albany County, NY: The Albany County law provides that an applicant may provide written authorization to confirm prior wages, including benefits or other compensation or salary history, only after an offer of employment with compensation has been made to the applicant. The law is silent as to whether an employer may rely on prior salary information if the applicant discloses it "voluntarily."

6. Oregon: With written authorization from the candidate, employers may seek prior salary information after an offer with compensation terms has been extended for the purpose of confirming compensation history. There is no other express exemption in the law for voluntary disclosures.

7. Philadelphia (stayed): Philadelphia allows the consideration of voluntarily disclosed salary information. Philadelphia would allow employers "to rely on the wage history of a prospective employee" if that applicant "knowingly and willingly disclosed his or her wage history to the employer, employment agency, employee or agent thereof."

8. Puerto Rico: In Puerto Rico, if an applicant voluntarily discloses salary history, the law only permits employers to "confirm" the information provided. The law is silent as to whether this information can be relied upon to make a compensation offer.

9. San Francisco: If the applicant "voluntarily and without prompting" provides salary history information, employers may rely on that information to make starting salary decisions. However, prior salary history alone may not be used to justify pay differences.

B. Can Salary Expectations Be Solicited and Considered?

None of the laws expressly forbid inquiries into salary expectations. The jurisdictions, however, take different slightly different approaches to the consideration of salary expectations with some of the laws expressly permitting solicitation and consideration of salary expectations and other laws remaining silent.

State Specific Information

1. California: The law in California is silent as to whether salary expectations can be considered but nothing in the law would prohibit an employer from eliciting salary expectations.

2. Delaware: The Delaware law expressly states that employers are not forbidden from "discussing and negotiating compensation expectations provided that the employer or employer's agent does not request or require the applicant's compensation history."

3. Massachusetts: The law in Massachusetts is silent as to whether salary expectations can be considered but nothing in the law would prohibit an employer from eliciting salary expectations. But note that salary expectations is not carved out as a legitimate non-discriminatory factor that may be used to explain differences in pay.

4. New York City, NY: The New York City law says that employers "without inquiring about salary history, [can] engage in discussion with the applicant about their expectations with respect to salary, benefits and other compensation" and the New York City law even states that these "salary expectations" can include discussions about "unvested equity or deferred compensation" that an applicant would forfeit or have cancelled by virtue of the applicant's resignation from their current employer.

5. Albany County, NY: The law in Albany County is silent as to whether salary expectations can be considered but nothing in the law would prohibit an employer from eliciting salary expectations.

6. Oregon: The law in Oregon is silent as to whether salary expectations can be considered but nothing in the laws would prohibit an employer from eliciting salary expectations. But note that salary expectations is not carved out as a legitimate non-discriminatory factor that may be used to explain differences in pay.

7. Philadelphia (stayed): The law in Philadelphia is silent as to whether salary expectations can be considered but nothing in the laws would prohibit an employer from eliciting salary expectations.

8. Puerto Rico: The law in Puerto Rico is silent as to whether salary expectations can be considered but nothing in the law would prohibit an employer from eliciting salary expectations.

9. San Francisco: The San Francisco law permits employers to engage "in discussion[s] with the Applicant about the Applicant's expectations with respect to Salary, including but not limited to unvested equity or deferred compensation or bonus that an Applicant would forfeit or have cancelled by virtue of the Applicant's resignation from their current Employer."

C. Can Employers Verify Salary History of Applicants?

Some laws specifically allow verification of salary history information, usually after an offer that includes compensation terms as been communicated. Others, including those in New York City and Philadelphia, allow for employers to verify salary history if they are doing so to comply with federal, state or local law.

State Specific Information

1. California: The California law states that it does not apply "to salary history information that is disclosable to the public pursuant to federal or state law, including the California Public Records Act . . . or the federal Freedom of Information Act . . . ."

2. Delaware: After offer that includes compensation terms has been accepted, employers may confirm salary post-offer. The information may be used solely for the purpose of confirming compensation history.

3. Massachusetts: After offer that includes compensation has been negotiated and made, employers may confirm salary post-offer. If salary history is "voluntarily" disclosed, employer may also confirm information provided.

4. New York City, NY: The New York City law states that employers may solicit salary history information if they are acting "pursuant to any federal, state or local law that specifically authorizes the disclosure or verification of salary history for employment purposes, or specifically requires knowledge of salary history to determine an employee's compensation."

   After an individual has been hired and an individual's compensation has been set, employers may seek salary history information. See NYC FAQs.

5. Albany County, NY: With written authorization, employers may "confirm" prior salary information after offer with compensation has been made.

6. Oregon: With written authorization, employers may "confirm" prior salary information after offer with compensation has been made.

7. Philadelphia (stayed): The Philadelphia law permits employers to do the same if they are acting "pursuant to any federal, state or local law that

specifically authorizes the disclosure or verification of wage history for employment purposes."

8. Puerto Rico: After offer that includes compensation has been negotiated and made employers may confirm prior salary history information. If salary history is "voluntarily" disclosed, employer may also confirm information provided.

9. San Francisco: Employers can verify salary history information if the applicant "voluntarily and without prompting" discloses salary history. The law is otherwise silent on the issue.

D. Can Forfeiture of Unvested Equity or Deferred Compensation Be Solicited and Considered?

If a candidate states, "I won't join your Company unless you compensate me for the $100,000 bonus that I would have earned had I stayed for two more months," how should an employer respond?

State Specific Information

1. California: In California, if an applicant "voluntarily and without prompting" discloses salary history, the employer may rely on that information for purposes of determining salary, but may not consider that information for purposes of determining whether or not to hire the individual. However, salary history alone cannot justify pay differences.

2. Delaware: The inquiry would be very fact-specific in Delaware. The Delaware law does not provide a carve-out for voluntarily disclosed salary history. Arguably, however, the $100,000 bonus that has not yet been earned is not the employee's compensation "history." The Delaware law expressly states that employers are not forbidden from "discussing and negotiating compensation expectations provided that the employer or employer's agent does not request or require the applicant's compensation history." Therefore, if an employer refrains from "requesting or requiring" this information, this should be permissible in Delaware to consider this information in making a compensation offer.

3. Massachusetts: In Massachusetts, if an applicant "voluntarily" discloses salary history, the law only permits employers to "confirm" the information provided. The law is silent as whether this information can be relied upon to make a compensation offer. Further, the Massachusetts law provides that "previous wage or salary history shall not be a defense to an action" alleging gender pay differences.

4. New York City, NY: The New York City law states that employers can discuss "salary expectations" and, under this broad umbrella, employers can also consider unvested equity or deferred compensation that an

applicant would forfeit or have cancelled by leaving their current employer. See also the discussion about voluntarily-disclosed compensation information.

5. Albany County, NY: The Albany County law provides that an applicant may provide written authorization to confirm prior wages, including benefits or other compensation or salary history, only after an offer of employment with compensation has been made to the applicant.

6. Oregon: Oregon law does not have a carve-out for voluntarily provided information, nor a carve-out for salary expectations.

7. Philadelphia (stayed): Employers should be able to rely on this information in setting compensation in Philadelphia as, in the scenario above, so long as the information was "knowingly and willingly disclosed."

8. Puerto Rico: In Puerto Rico, if an applicant voluntarily discloses salary history, the law only permits employers to "confirm" the information provided. The law is silent as to whether this information can be relied upon to make a compensation offer.

9. San Francisco: The San Francisco law states that employers can discuss "salary expectations" and, under this broad umbrella, employers can also consider unvested equity or deferred compensation that an applicant would forfeit or have cancelled by leaving their current employer. See also the discussion about voluntarily-disclosed compensation information.

E. Can Objective Measures of Productivity Be Considered?

Employers are not prohibited from considering objective measures of productivity -- like revenue or sales -- in New York City and San Francisco. The law is silent on this issue in California, Delaware, Massachusetts, Albany County, Philadelphia, Oregon, and Puerto Rico.

State Specific Information

1. California: The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

2. Delaware: The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

3. Massachusetts: The Massachusetts' law prohibiting discrimination in compensation that will go into effect in July, 2018 will only permit employers to defend compensation differences based on a somewhat

narrow set of factors and there is no general "catch-all" provision for any other legitimate factor, other than sex, that will explain differences in pay. The factors are: "(i) a system that rewards seniority with the employer; provided, however, that time spent on leave due to a pregnancy-related condition and protected parental, family and medical leave, shall not reduce seniority; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production, sales, or revenue; (iv) the geographic location in which a job is performed; (v) education, training or experience to the extent such factors are reasonably related to the particular job in question; or (vi) travel, if the travel is a regular and necessary condition of the particular job." It is not clear, but unlikely, that productively measures from a former employer will support differences in pay.

4. New York City, NY: The New York City law permits inquiry into "any objective measure of the applicant's productivity such as revenue, sales, or other production reports." Employers should safely be able to inquire as to the value of sales made, but should avoid inquiries regarding commissions earned.

5. Albany County, NY: The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

6. Oregon: The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

7. Philadelphia (stayed): The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

8. Puerto Rico: The law does not explicitly contain a carve-out which references measures of productivity, however, such inquiries are also not explicitly barred by the law.

9. San Francisco: The San Francisco law contains a carve out which allows employers to inquire as to an applicant's productivity. Employers should safely be able to inquire as to the value of sales made, but should avoid inquiries regarding commissions earned.

F. Can Employers Disclose Salary Ranges of Position?

While the majority of the laws are silent as to what employers are required to provide regarding salary ranges, California law expressly requires that employers provide the "pay scale" for the position upon "reasonable request" from an applicant. Most other states are silent on the issue although employers in New

York City, NY, while not required to provide salary range information, are not prohibited from doing so.

State Specific Information

1. California: The California law states that an employer, upon reasonable request, must provide the "pay scale" of the position to an applicant.

2. Delaware: The law offers no guidance regarding publication of salary ranges.

3. Massachusetts: The law offers no guidance regarding publication of salary ranges.

4. New York City, NY: The New York City law provides that employers may provide applicants about the position's proposed or anticipated salary or salary range.

5. Albany County, NY: The law offers no guidance regarding publication of salary ranges.

6. Oregon: The law offers no guidance regarding publication of salary ranges.

7. Philadelphia (stayed): The law offers no guidance regarding publication of salary ranges.

8. Puerto Rico: The law offers no guidance regarding publication of salary ranges.

9. San Francisco: Pending legislation in California would actually require disclosing salary ranges.

G. Is the Law Applicable to Current Employees?

Employers often use the current salary of employees as they consider salary information for transferred or promoted employees. Most of the laws are silent on the issue but New York City and San Francisco make it clear that the law does not extend to existing employees.

State Specific Information

1. California: Silent, but reasonably does not apply to current employees because ban explicitly applies to an "applicant for employment."

2. Delaware: Silent, but reasonably does not apply to current employees because ban explicitly applies to an "applicant" which is defined as a "prospective employee for employment."

3. Massachusetts: Silent, but reasonably does not apply to current employees because ban explicitly applies to a "prospective employee."

4. New York City, NY: Does not apply to "applicants for internal transfer or promotion with their current employer."

5. Albany County, NY: Silent. Law applies to "job applicants."

6. Oregon: Employers are not prohibited from consideration compensation of a current employee during a "transfer, move or hire of the employee to a new position with the same employer."

7. Philadelphia (stayed): Silent, but reasonably does not apply to current employees because ban explicitly applies to a "prospective employee."

8. Puerto Rico: Silent, but reasonably does not apply to current employees because ban explicitly applies to an "applicant for employment."

9. San Francisco: The law does not apply to current employees. It expressly excludes individuals applying for employment with their current employer from the term "Applicant."

Changes on the Front End: Revolutions and Evolutions in Hiring Practices: Leveraging "Big Data" in Employment Decision-making

1. **Introduction**

   A. One of the largest changes happening across the U.S. is the use of data in employment decision. Like synergy before it, "big data" is a concept that is now ubiquitous in both the public and private sphere, however, it is a concept that often lacks both definition and understanding. Today we will focus on (a) defining big data in an employment context (b) current and potential uses of big data in employment settings (c) greater historical and developmental context and (d) discussing opportunities and concerns going forward.

2. **What Do We Mean by "Big Data" in an Employment Context?**

   A. 'Big data' means different things to different people. One issue that I would like to clarify immediately is that this is not simply about very large datasets, with many columns and rows. Although the size of these datasets is typically quite large this is not what defines big data. Rather, what makes data 'big' has to do with the nature and the source of the data and how it is collected, merged, transformed and utilized. In the employment context, I would define big data as follows: big data is the combination of nontraditional and traditional employment data with technology-enabled analytics to create processes for identifying, recruiting, segmenting and scoring job candidates and employees.

   B. Nontraditional employment data is stored outside of the traditional personnel data landscape. It comes from places like operations and financial data systems maintained by the employer, public records, social media activity logs, sensors, geographic systems, internet browsing history, consumer data-tracking systems, mobile devices, and communications metadata systems. This list is by no means complete, and every day it grows. Even our faces and voices can be reduced to a stream of code so that a computer system can recognize and analyze the information. This is the sea change that we are here today to talk about-everything is data. Everything that we do and say can be coded, quantified and utilized for analytic purposes. For example, written remarks and testimony from this very meeting can be thought of as data as it will be published to EEOC.gov and thus made public. Our written words can then be scraped from the website, tagged, coded, classified and organized into a matrix which will then be available for analysis. The value in doing this would come not from quantifying information about this meeting alone, but from linking it to other information about each of us coded across the internet or within disparate company, vendor, public information or consumer data bases. As more information is collected and organized about each of us, and as it is linked to outcomes of interest observed over time, predictions can be made about our future behaviors.

C. Employers may utilize their own resources to collect and analyze this type of nontraditional employment data, or they may purchase the data, or insights gleaned from the data, from brokers or vendors. When this type of information is quantified and brought together with traditional employment data like performance appraisals, job tenure, attendance, absenteeism, and salaries, it can be used to uncover patterns of behaviors and outcomes for workers. Those patterns of behaviors and outcomes can be distilled into profiles that can then be used to predict outcomes for similarly-profiled groups of job candidates, applicants, and employees.

3. **Current and Potential Uses of Big Data in Employment**

A. In practice, it appears that the primary motivation behind utilizing big data is the ability to profile employees and job seekers. Data scientists, computer scientists, and analysts generally use traditional and nontraditional employment data to create algorithms or statistical models which predict, classify, or cluster workers on outcome variables like job tenure, turnover, satisfaction, performance appraisals, absenteeism and culture fit. Generally speaking, the algorithm is given a training dataset containing information about a group of people, typically current or former employees, from which it uncovers characteristics that can be correlated with some measure of job success. Given the nature of the data included in the training dataset, the factors that emerge as strong predictors of success may be of the traditional (self-report of previous work experience or education) or nontraditional variety (passively-recorded information about choice of internet browser or number of professional connections outside of one's area of expertise), but they are likely to be some combination of the two. The successful profile can then be used in a number of ways, including seeking out passive job candidates, screening active job applicants, or allocating training resources or incentives for current employees.

B. Employers might develop a profile of the ideal candidate and search for 'similar' people on social media sites or specialized online communities, then encourage these passive candidates to apply for open positions. Employers or vendors might also develop a test or screen based on the ideal profile and apply it to applicants at any stage in the hiring process. They might use the ideal profile to identify current employees of high potential and target them for training opportunities or even pay increases or bonuses. Keep in mind that 'job success' can be operationally defined in multiple ways, including actual job performance ratings, quantified worker output, tenure, or 'culture fit.'

C. At the opposite end of the success spectrum, employers can use this profiling technique to identify employees who are likely to have excessive absences, safety incidents, or to turn over within a specified time frame and use that information in conjunction with 'worth' and 'cost' estimates to make employment decisions or choose other subsequent actions. Some specialty vendors have also come onto the scene more recently offering 'matching' type services, where the vendor develops the ideal employee profile for the employer, and creates profiles for job-seekers

based on some combination of actively or passively supplied information, then notifies each when a 'match' is made. Finally, some employers have developed talent communities where job seekers can engage with one another, and with current employees of the company, to get to know one another over a period of time. During this time the employer develops a profile for the community member and uses it in a similar manner to that described above.

4. **Greater Historical and Developmental Context: How Did We Get Here?**

A. The types of big data analytics that we are seeing in the employment context seem to have naturally developed from other areas of business like marketing and operations. In marketing, analysts seek to segment and identify groups of people for targeting advertisements. The training dataset utilized to develop the algorithm might include information about people who purchase products, and their personal characteristics. This is the type of process that led to Target's now-famous pregnancy prediction score. Data scientist Andrew Pole and his team were able to develop an algorithm that could predict when a shopper was pregnant, as well as her rough due date. This was useful to Target because it allowed the company to focus their advertisement efforts for items that pregnant women need on the right demographic and at the right time (it turns out that gaining the market loyalty of a pregnant woman in her second trimester is considered by some to be the 'holy grail'). The algorithm was trained using data from previous Target shoppers with baby-shower gift registries. Pole and his colleagues were able to determine, by looking backwards in time at shopping behaviors, that women in the early stages of pregnancy tend to purchase certain specific items (toiletries and vitamins) more often than otherwise-similar women. Armed with this knowledge and going forward, the researchers were able to identify subsequent groups of women with a high pregnancy prediction score before the women set up their baby gift registries or purchased necessities. These women were then delivered the relevant advertisements. Andrew Pole started discussing this work in public in 2010[10]. Prior to that, Target had been tracking purchases and demographic information about customers to use for marketing purposes for decades, and Target is just one example. Given that fact that the vast-majority of people move about while carrying 'tracking devices' at all times (mobile phones) it is increasingly possible to accurately predict our next movements, as well as our physical locations at specific set points in the future[11] and retailers, years ago, began to use this type of location and movement data to target the right consumers with the right ads at the right time[12].

B. It was somewhat inevitable that this type of work would spill over from marketing to employment, particularly when employers have, or are able to collect, so much information about worker characteristics and performance. Why not optimize

[10] How Target gets the most out of its guest data to improve marketing ROI (2010). Keynote address at Predictive Analytics World October 2010 in Washington DC.
[11] *See, e.g.*, Ozer et al. (2016). Predicting the location and time of mobile phone users by using sequential pattern mining techniques. The Computer Journal, 59, 908-922
[12] *See, e.g.*, MacKenzie et al (2013). How retailers can keep up with consumers. McKinsey.com retail insight report.

hiring and talent management in the same way that we've optimized advertising; particularly when return on investment can be quantified and reported to senior management? Furthermore, the types of software, hardware and skill sets required to do this type of statistical and analytic work are becoming more attainable for the masses thanks to open-source software, cloud computing options, and free online and in-person training opportunities.

C. This is all happening within a larger context of flourishing artificial intelligence and cognitive computing. Machine learning and natural language processing are already commonly utilized in areas like medicine, banking, wealth-management and even in the criminal justice system. It is expected that within the next five to ten years these types of technologies will impact every important decision that we make in our work and personal lives. Within that time frame self-driving cars are expected to proliferate, 25% of all job tasks will be offloaded to software and 13.6 million jobs will be created for people who know how to work with artificial intelligence tools[13]. All of this is to say that the proliferation of machine learning techniques and predictive analytics in the employment landscape has been coming for some time and its development is expected to continue and accelerate.

5. **Opportunities and Concerns**

A. Of course employers want to optimize their selection and talent management strategies to best service the goals of the company. To the degree that this optimization leads to innovations that promote objectivity and equal opportunity, those efforts should be commended. However, employers should not lose sight of the fact that when criteria affecting employment decisions-- including those identified by machine-developed algorithms-- have an impact based on characteristics like race, gender, age, national origin, religion, disability status, and genetic information, those criteria require careful scrutiny. It is the employer's responsibility to utilize vendor tests and screens responsibly, to understand the selection products that they are utilizing or purchasing, and to determine whether these screens result in adverse impact on particular demographic groups. Where the use of these algorithms evidence adverse impact, it is the employer's responsibility to maintain validity evidence that supports their use. Part of the validity assessment should be whether the employer can use the selection procedure in a way that would reduce its disparate impact, or whether another procedure would have less disparate impact.

B. It is important that vendors and employers remain sensitive to the issues involved in using data to make employment decisions, especially given that many of the people who build and maintain these algorithms may not be familiar with equal employment opportunity law. Computer and data scientists transitioning from marketing into employment algorithm development, for example, may lack the regulatory and legal background required to make complex decisions about EEO compliance. Employers who choose to purchase or adopt these strategies must be

[13] Forrester Research (2015). The future of jobs, 2025: Working side by side with robots.

warned to not simply 'trust the math' as the math in this case has been referred to, by at least one mathematician/data scientist, as an 'opinion formalized in code[14].'

C. The primary concern is that employers may not be thinking about big data algorithms in the same way that they've thought about more traditional selection devices and employment decision strategies in the past. Many well-meaning employers wish to minimize the effect of individual decision-maker bias, and as such might feel better served by an algorithm that seems to maintain no such human imperfections. Employers must bear in mind that these algorithms are built on previous worker characteristics and outcomes. These statistical models are nothing without the training data that is fed to them, and within that, the definition of 'success' input by the programmer. It is the experience of previous employees and decision-makers that is the source of that training data, so in effect the algorithm is a high-tech way of replicating past behavior at the firm or firms used to create the dataset. If past decisions were discriminatory or otherwise biased, or even just limited to particular types of workers, then the algorithm will recommend replicating that discriminatory or biased behavior.

D. As an example of the type of EEO problems that could arise with the use of these algorithms, imagine that a Silicon Valley tech company wished to utilize an algorithm to assist in hiring new employees who 'fit the culture' of the firm. The culture of the organization is likely to be defined based on the behavior of the employees that already work there, and the reactions and responses of their supervisors and managers. If the organization is staffed primarily by young, single, White or Asian-American male employees, then a particular type of profile, friendly to that demographic, will emerge as 'successful.' Perhaps the successful culture-fit profile is one of a person who is willing to stay at the job very late at night, maybe all night, to complete the task at hand. Perhaps this profile is one of a person that finds certain perks in the workplace, such as free dry cleaning , snacks, and a happy hour on Fridays preferable to others like increased child-care, medical and life insurance benefits. Finally, perhaps the successful profile is one of a person who does not own a home or a car and rather appears to bike or walk to work. If the decision-makers at this hypothetical firm look to these and other similar results to assist in the recruiting of passive candidates, or to develop a type of screen, giving preference to those future job-seekers who appear to 'fit the culture', the employer is likely to screen out candidates of other races, women, and older workers. In this situation, not only would the algorithm cause adverse impact, but it would likely limit the growth of the firm.

E. The use of big data algorithms could also potentially disadvantage people with disabilities. Academic research indicates that social media patterns of usage are related to mood disorders, for example[15]. If a machine learning algorithm was to

[14] *See* O'Neil, C. (2016). Weapons of Math Destruction. New York City, NY: Crown Publishing.
[15] *See, e.g.,* Lin et al. (2016). Association between social media use and depression among U.S. young adults. Depression and Anxiety, 33, 323-331

uncover a link between absenteeism and social media posting patterns, its result might suggest that a particular employee, who has recently been posting to social media during certain hours of the night, has a heightened 'absenteeism risk' score. Perhaps when it comes time for performance review, this 'absenteeism risk' score might be reviewed, alongside a heightened 'flight risk' score and the employer may avoid offering certain incentives or career development opportunities to the employee, rather offering those to others with more preferable profiles.

F. Finally, it merits mention that the relationships among variables that are uncovered by advanced algorithms seem, at this point, exclusively correlational in nature. No one argues that the distance an employee lives from work, or her affinity for curly French fries, the websites she visits, or her likelihood to shop at a particular store, makes her a better or worse employee. The variables and outcomes may be correlated because each is also correlated with other variables that are actually driving the causal aspect of the relationship. For example, with regard to distance from work-it isn't likely that the actual distance causes a different score on the success factor but perhaps the time it takes to commute requires the employee to leave earlier than she otherwise would, or perhaps the commuting increases her stress level thereby reducing some aspect of the quality of her work. It would seem to behoove the employer or vendor uncovering this relationship to do some additional, theory-driven research to understand its true nature rather than to stop there and take distance from work into account when making future employment decisions. This is true not only because making selections based on an algorithm that includes distance from work, or some other proxy representing geography, is likely to affect people differently based on their race but also because it is simply an uninformed decision. It is an uninformed decision that has real impact on real people. Rather, perhaps selecting on some variable that is causally related to work quality, in conjunction with offering flexible work arrangement options, might represent both better business and equal opportunity for workers.

Changes on the Front End: Revolutions and Evolutions in Hiring Practices: Banning the Box and Other Initiatives Related to Background Checks

1. **Introduction**

   A. In addition to the EEOC's published guidance on criminal history, a number of states and localities have passed laws which prohibit employers from asking about an applicant's criminal history. In addition to these so-called "Ban the Box" laws, employers also face increasingly complex requirements related to credit checks and reporting under the Fair Credit Reporting Act and related state and local laws.

2. **EEOC's Criminal History Guidance**

   A. Best Practices for Compliance

      1. No Bright Line Rules - "We don't hire felons for any positions."

      2. Three Factor Test[16]

         a. Nature and gravity of the offense

         b. Nature of the job

         c. Time elapsed since conviction or completion of sentence

      3. Remove Questions Related to Convictions from the Application

      4. Only Request Information That Is Necessary to Making the Employment Decision

   B. Conducting an Individualized Assessment

      1. Though not required, the EEOC recommends conducting an individualized assessment of applicants and if such an assessment is not conducted, employers will need to evaluate if there are any criminal offenses that have a "demonstrably tight nexus to the position in question" such that an individualized assessment may be circumvented

      2. As part of such an assessment, employers should review

         a. Facts or circumstances surrounding the offense or conduct;

         b. Number of offenses for which the individual was convicted;

         c. Older age at the time of conviction, or release from prison;

[16] *See Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975)

d. Evidence that the individual performed the same type of work, post-conviction, without any known incidents of criminal conduct;

e. Length and consistency of employment before and after offense;

f. Rehabilitation efforts;

g. Character references; and

h. Whether individual is bonded under a federal, state, or local bonding program

3. **"Ban the Box" State Statutes and Local Ordinances**

A. When Should You Ask About Criminal Background?

State Statutes

1. California: After a conditional offer

2. Connecticut: After the initial application

3. Hawaii: After a conditional offer.

4. Illinois: After the applicant is selected for an initial interview or after a conditional offer

5. Massachusetts: After the initial written application (MCAD interprets this to mean after the first interview)

6. Minnesota: After the applicant is selected for an initial interview or after a conditional offer

7. New Jersey: After the first interview

8. Oregon: After the first interview

9. Rhode Island: During the first interview or thereafter

10. Vermont: After the initial application

Local Ordinances

1. Austin, TX: After extending a conditional offer that is only conditioned on the result of the check

2. Baltimore, MD: After a conditional offer.

3. Buffalo, NY: During the first interview or thereafter

4. Chicago, IL: After the applicant is selected for the initial interview and notified as such or after a conditional offer

5. Columbia, MO: After a conditional offer.

6. Los Angeles, CA: After extending a conditional offer that is only conditioned on the result of the check

7. Montgomery/Prince George's Counties, MD: After the first interview

8. New York City, NY: After a conditional offer.

9. Philadelphia, PA: After the first interview

10. Portland, OR: After a conditional offer.

11. Rochester, NY: After the first interview

12. San Francisco, CA: After the first interview or after a conditional offer

13. Seattle, WA: After the employer has completed an initial screening of applicants to eliminate unqualified applicants

14. Washington, D.C.: After a conditional offer.

B. What Time Limitations Exist for Consideration of Criminal Background?

State Statutes

1. California: None

2. Connecticut: None

3. Hawaii: 10 Years

4. Illinois: None

5. Massachusetts: 5 Years (for misdemeanors unless convicted for another offense within 5 Years)

6. Minnesota: None

7. New Jersey: Depends on the Crime

8. Oregon: None

9. Rhode Island: None

10. Vermont: None

Local Ordinances

1. Austin, TX: None
2. Baltimore, MD: None
3. Buffalo, NY: None
4. Chicago, IL: None
5. Columbia, MO: None
6. Los Angeles, CA: None
7. Montgomery/Prince George's Counties, MD: None
8. New York City, NY: None
9. Philadelphia, PA: None
10. Portland, OR: None
11. Rochester, NY: None
12. San Francisco, CA: 7 Years
13. Seattle, WA: 10 Years
14. Washington, D.C.: None

C. Which Employers are Covered by "Ban the Box"?

State Statutes

1. California: 5 or More Employees
2. Connecticut: 1 or More Employees
3. Hawaii: All Private Employers
4. Illinois: 15 or More Employees
5. Massachusetts: 6 or More Employees
6. Minnesota: All Private Employers
7. New Jersey: 15 or More Employees
8. Oregon: All Private Employers

9. Rhode Island: 4 or More Employees

10. Vermont: 1 or More Employees (within the state)

Local Ordinances

1. Austin, TX: 15 or More Employees

2. Baltimore, MD: 10 or More Employees

3. Buffalo, NY: 15 or More Employees

4. Chicago, IL: All Private Employers

5. Columbia, MO: All Private Employers

6. Los Angeles, CA: 10 or More Employees

7. Montgomery/Prince George's Counties, MD: 15 or More Employees/25 or More Employees

8. New York City, NY: 4 or More Employees

9. Philadelphia, PA: 1 or More Employees (within the city)

10. Portland, OR: 6 or More Employees

11. Rochester, NY: 4 or More Employees

12. San Francisco, CA: 20 or More Employees (regardless of location)

13. Seattle, WA: All Private Employers

14. Washington, D.C.: 10 or More Employees

D. The Do's and Don'ts of "Ban the Box"

1. Do: Ask after conditional offer unless federal or state law requirement

2. Do: Conduct a job-relatedness inquiry

3. Do: Consider centralized background screening role

4. Do: Review policies, applications and procedures

5. Do: Follow FCRA and specific adverse action requirements

6. Don't: Ask about arrests which did not result in a conviction

7. Don't: Ask about sealed, expunged, restricted, juvenile or pardoned records

4. **Fair Credit Reporting Act and Adverse Action Requirements**

A. What is the FCRA?

1. Federal consumer protection statute

2. Mandates responsibilities of third-parties who collect information about applicants or employees (and others) (defined as "Consumer Reporting Agencies" or "CRA's")

3. Mandates requirements for users of this information (defined as "End-Users")

4. Mandates requirements for the entities that furnish information to the CRAs ("Furnishers")

B. When Does the FCRA Apply?

1. Any time an end user gets "consumer report" information from a "consumer reporting agency."

2. Applies to employers who want to obtain information about an individual from a background screening company or another company that qualifies as a CRA.

3. Applies to traditional employees and also to volunteers and independent contractors (according to the Federal Trade Commission).

C. What is a Consumer Report?

1. Any written, oral, or other communication of any information made by a CRA concerning a consumer's:

a. credit worthiness, credit standing, credit capacity,

b. character,

c. general reputation,

d. personal characteristics, or

e. mode of living

2. Which is used or expected to be used or collected for one of the "permissible purposes" enumerated in the Act (e.g., employment purposes).

D. What is a Consumer Reporting Agency?

1. Any person who regularly engages in assembling or evaluating consumer reporting information about individuals for a fee (Note: this does not include employers assembling information on their own)

    a. Credit bureaus

    b. Private investigators

    c. Investigative agencies

E. When Does an Employer Have Responsibilities Under the FCRA and What are They?

1. Responsibilities apply when reports are obtained for "employment purposes." Employment purposes means the report will be used "for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."

2. Disclosure and Authorization

    a. Disclose in a document consisting only of the disclosure/authorization that a consumer report may be obtained for employment purposes.

    b. Obtain written authorization from the individual before ordering the report.

    c. Cannot be on the application form or document.

    d. Best to provide a Summary of Rights at the same time.

    e. Many state laws have specific requirements.

3. Certification to the CRA

    a. That the employer has provided the required written disclosure and obtained the required written authorization;

    b. That the employer will comply with the adverse action requirements; and

    c. That the information will not be used in violation of any non-discrimination laws or regulations.

4. Adverse Action Process

a. Defined as any action taken that is adverse to the interests of the consumer (e.g. not being staffed on a project, not being hired)

b. Before taking adverse action based in whole or in part on consumer report information, an employer or end user must provide the consumer with (1) a copy of the consumer report, (2) a summary of the consumer's rights under the Act, and (3) any required state-law notices

c. After sending a pre-adverse action notice, wait a "reasonable time" before taking adverse action. If the consumer does not contact the employer or the CRA within the time frame, the employer can take adverse action and send the notification. If the consumer does contact the employer or CRA, the employer must notify the CRA of a dispute and/or tell the consumer to notify the CRA and should consider waiting to take further action until any dispute is resolved.

d. The adverse action notification may be oral or in writing and must state (1) that adverse action was taken based in whole or in part on a consumer report, (2) that the CRA did not make the decision to take the adverse action and cannot explain the reasons for the decision, and (3) that the consumer may request a free copy of the report and may dispute any information in the report with the employer or CRA. The adverse action notification must give the contact information for the CRA.

F. FCRA Adverse Action Rulings

1. *Costa v. Family Dollar Stores* (E.D. Va. 2016) - Internal coding is not an adverse action. An adverse action is conduct, such as sending a denial letter, that "affects the applicant."

2. *Williams v. First Advantage LNS Screening Solutions* (N.D. Fla. 2015) - "[A]n adjudication cannot itself be an adverse action, because it is, in effect, an evaluation that results in a decision to take adverse action."

3. *Ramos v. Genesis Healthcare, LLC* (E.D. Pa. 2015) - Internal coding is not an adverse action if the applicant has "a real opportunity to challenge this internal determination."

4. *Manual v. Wells Fargo Bank* (E.D. Va. 2015) - Internal coding may be an adverse action if the employer is "comfortable adhering to that decision" if the individual does not file a dispute.

5. **New York Fair Chance Act**

A. Per Se Violations

1. Declaring, printing, or circulating, or causing the declaration, printing, or circulation of, any solicitation, advertisement, policy or publication that expresses, directly or indirectly, orally or in writing, any limitation or specification in employment regarding criminal history. This includes, but is not limited to, advertisements and employment applications containing phrases such as: “no felonies,” “background check required,” and “must have clean record.”

2. Using applications for employment that require applicants to either grant employers permission to run a background check or provide information regarding criminal history prior to a conditional offer.

3. Making any statement or inquiry relating to the applicant’s pending arrest or criminal conviction before a conditional offer of employment is extended.

4. Using within the City a standard form, such as a boilerplate job application, intended to be used across multiple jurisdictions, that requests or refers to criminal history. Disclaimers or other language indicating that applicants should not answer specific questions if applying for a position that is subject to the Human Rights Law do not shield an employer from liability.

5. Failing to comply with requirements of section 8-107(11-a) of the Human Rights Law, when they are applicable: (1) to provide the applicant a written copy of any inquiry an employer conducted into the applicant’s criminal history; (2) to share with the applicant a written copy of the employer’s Article 23-A analysis; or (3) to hold the prospective position open for at least three business days from the date of an applicant’s receipt of both the inquiry and analysis.

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

B. Criminal Background Check Process

1. Seeking Information: An employer, employment agency, or agent thereof may not inquire about an applicant’s criminal history or request permission to run a criminal background check until after the employer, employment agency, or agent thereof makes the applicant a conditional offer. At no point may an employer, employment agency, or agent thereof seek or consider information pertaining to a non-conviction.

2. Unsolicited Discovery: Inadvertent discovery by an employer, employment agency, or agent thereof or unsolicited disclosure by an applicant of criminal history prior to a conditional offer of employment does not automatically create employer liability. Liability is created when

an employer, employment agency, or agent thereof uses the discovery or disclosure to further explore an applicant's criminal history before having made a conditional offer or uses the information in determining whether to make a conditional offer.

3. Information Obtained After a Conditional Offer: After an employer, employment agency, or agent thereof extends a conditional offer to an applicant, an employer, employment agency, or agent thereof may make inquiries into or statements about the applicant's conviction history. An employer, employment agency, or agent thereof may (1) ask, either orally or in writing, whether an applicant has a criminal conviction history; (2) run a background check or, after receiving the applicant's permission and providing notice, use a consumer reporting agency to do so; and (3) once an employer, employment agency, or agent thereof knows about an applicant's conviction history, ask them about the circumstances that led to the conviction and gather information relevant to the Article 23-A factors. Upon receipt of an applicant's conviction history, an employer, employment agency, or agent thereof may elect to hire the individual. If the employer, employment agency, or agent thereof does not wish to withdraw the conditional offer, the employer, employment agency, or agent thereof does not need to engage in the Article 23-A analysis.

4. Taking Adverse Employment Action: Should an employer, employment agency, or agent thereof wish to withdraw its conditional offer of employment or take an adverse employment action based on an applicant's or employee's conviction history, the employer, employment agency, or agent thereof must (1) engage in an Article 23-A analysis, and (2) follow the Fair Chance Process. Employers, employment agencies, or agents thereof must affirmatively request information concerning clarification, rehabilitation, or good conduct while engaging in the Article 23-A analysis

C. Article 23A Analysis

1. Factors

a. That New York public policy encourages the licensure and employment of people with criminal records;

b. The specific duties and responsibilities necessarily related to the prospective job;

c. The bearing, if any, of the conviction history on the applicant's or employee's fitness or ability to perform one or more of the job's duties or responsibilities;

d. The time that has elapsed since the occurrence of the criminal offense that led to the applicant or employee's criminal conviction, not the time since arrest or conviction;

e. The age of the applicant or employee when the criminal offense that led to their conviction occurred;

f. The seriousness of the applicant's or employee's conviction;

g. Any information produced by the applicant or employee, or produced on the applicant's or employee's behalf, regarding their rehabilitation and good conduct;

h. The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

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

a. To claim the "direct relationship exception," an employer, employment agency, or agent thereof must first draw some connection between the nature of the conduct that led to the conviction(s) and the position. If a direct relationship exists, the employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated.

b. To claim the "unreasonable risk exception," an employer, employment agency, or agent thereof must consider and apply the Article 23-A factors to determine if an unreasonable risk exists.

3. If an employer, employment agency, or agent thereof, after weighing the required factors, cannot determine that either the direct relationship exemption or the unreasonable risk exemption applies, then the employer, employment agency, or agent thereof may not revoke the conditional offer or take any adverse employment action.

D. The Fair Chance Process

1. If, after an employer, employment agency, or agent thereof determines that either the direct relationship or unreasonable risk exemption applies, the employer, employment agency, or agent thereof wishes to revoke the

conditional offer or take an adverse employment action, the employer, employment agency, or agent thereof must first (1)

a. provide a written copy of any inquiry made to collect information about criminal history to the applicant,

b. Provide a written copy of the Article 23-A analysis to the applicant,

c. Inform the applicant that they will be given a reasonable time to respond to the employer's concerns, and

d. Consider any additional information provided by the applicant during this period.

NYC Commission on Human Rights

Revised 06/24/2016

NYC Commission on Human Rights Legal Enforcement Guidance on the Fair Chance Act, Local Law No. 63 (2015)

6/24The New York City Human Rights Law (the "NYCHRL") prohibits discrimination in employment, public accommodations, and housing. It also prohibits discriminatory harassment and bias-based profiling by law enforcement. The NYCHRL, pursuant to the 2005 Civil Rights Restoration Act, must be construed "independently from similar or identical provisions of New York state or federal statutes," such that "similarly worded provisions of federal and state civil rights laws [are] a floor below which the City's Human Rights law cannot fall, rather than a ceiling above which the local law cannot rise."[1]

The New York City Commission on Human Rights (the "Commission") is the City agency charged with enforcing the NYCHRL. Individuals interested in vindicating their rights under the NYCHRL can choose to file a complaint with the Commission's Law Enforcement Bureau within one (1) year of the discriminatory act or file a complaint in New York State Supreme Court within three (3) years of the discriminatory act. The NYCHRL covers employers with four or more employees.

The Fair Chance Act ("FCA"), effective October 27, 2015, amends the NYCHRL by making it an unlawful discriminatory practice for most employers, labor organizations, and employment agencies to inquire about or consider the criminal history of job applicants until after extending conditional offers of employment. If an employer wishes to withdraw its offer, it must give the applicant a copy of its inquiry into and analysis of the applicant's conviction history, along with at least three business days to respond.

I Legislative Intent

The FCA reflects the City's view that job seekers must be judged on their merits before their mistakes. The FCA is intended to level the playing field so that New Yorkers who are part of the approximately 70 million adults residing in the United States who have been arrested or convicted of a crime[2] "can be considered for a position among other equally qualified candidates," and "not overlooked during the hiring process simply because they have to check a box."[3]

Even though New York Correction Law Article 23-A ("Article 23-A") has long protected people with criminal records from employment discrimination,[4] the City determined that such discrimination still occurred when applicants were asked about their records before completing the hiring process because many employers were

[1] Local Law No. 85 (2005). "The provisions of this title shall be construed liberally for the accomplishment of the uniquely broad and remedial purposes thereof, regardless of whether federal or New York State civil and human rights laws, including those laws with provisions comparably worded to provisions of this title have been so construed." N.Y.C. Admin. Code § 8-130.

[2] Gov'tl Affairs Division of the N.Y. City Council, Committee Report on Int. No. 318-A, S. 2015-5, at 2 (June 9, 2015) ("Civil Rights Committee's Report"), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3815856&GUID=59D912BA-68B5-429C-BF39-118EB4DFAAF5.

[3] Testimony of Gale A. Brewer, Manhattan Borough President on Int. No. 318 to Prohibit Employment Discrimination Based on One's Arrest Record or Criminal Conviction at 2 (Dec. 3, 2014) (emphasis in original), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410802&GUID=7D143B7E-C532-41EF-9A97-04FD17854ED7.

[4] Violating Article 23-A is an unlawful discriminatory practice under the NYCHRL. N.Y.C. Admin. Code § 8-107(10).

not weighing the factors laid out in Article 23-A.[5] For that reason, the FCA prohibits any discussion or consideration of an applicant's criminal history until after a conditional offer of employment. Certain positions are exempt from the FCA, as described in Section VII of this Guidance.

While the FCA does not require employers to hire candidates whose convictions are directly related to a job or pose an unreasonable risk, it ensures that individuals with criminal histories are considered based on their qualifications before their conviction histories. If an employer is interested enough to offer someone a job, it can more carefully consider whether or not that person's criminal history makes her or him unsuitable for the position. If the employer wishes to nevertheless withdraw its offer, it must first give the applicant a meaningful opportunity to respond before finalizing its decision.

II Definitions

The FCA applies to both licensure and employment, although this Guidance focuses on employment. The term **"applicant,"** as used in this Guidance, refers to both potential and current employees. The FCA applies to all decisions that affect the terms and conditions of employment, including hiring, termination, transfers, and promotions; where this Guidance describes the **"hiring process,"** it includes the process for making all of these employment decisions. Any time the FCA or this Guidance requires notices and disclosures to be printed or in writing, they may also be communicated by email, if such method of communication is mutually agreed on in advance by the employer and the applicant.

For the purpose of this Guidance, the following key terms are defined as follows:

Article 23-A Analysis

The evaluation process mandated by New York Correction Law Article 23-A.

Article 23-A Factors

The factors employers must consider concerning applicants' criminal conviction history under Section 753 of New York Correction Law Article 23-A.

Conditional Offer of Employment

An offer of employment that can only be revoked based on:

1. The results of a criminal background check;
2. The results of a medical exam in situations in which such exams are permitted by the Americans with Disabilities Act;[6] or
3. Other information the employer could not have reasonably known before the conditional offer if, based on the information, the employer would not have made the offer and the employer can show the information is material to job performance.

For temporary help firms, a conditional offer is the offer to be placed in a pool of applicants from which the applicant may be sent to temporary positions.

---

[5] Transcript of the Minutes of the Committee on Civil Rights at 10 (Dec. 3, 2014) (statement of Council Member Jumaane Williams), *available at* http://legistar.council.nyc.gov/View.ashx?M=F&ID=3410594&GUID=5FE2433E-1A95-4FAA-AECC-D60D4016F3FB.

[6] The Americans with Disabilities Act ("ADA") prohibits employers from conducting medical exams until after a conditional offer of employment. 42 U.S.C. § 12112(d)(3). To comply with the FCA and the ADA, employers may condition an offer of employment on the results of a criminal background check and then, after the criminal background check, a medical examination.

Conviction History

A previous conviction of a crime, either a felony or misdemeanor under New York law,[7] or a crime as defined by the law of another state.

Criminal Background Check

When an employer, orally or in writing, either:

1. Asks an applicant whether or not she or he has a criminal record; or
2. Searches public records, including through a third party, such as a consumer reporting agency ("CRA"), for an applicant's criminal history.

Criminal History

A previous record of criminal convictions or non-convictions or a currently pending criminal case.

Fair Chance Process

The post-conditional offer process mandated by the FCA, as outlined in Section V of this Guidance.

Inquiry

Any question, whether made in writing or orally, asked for the purpose of obtaining an applicant's criminal history, including, without limitation, questions in a job interview about an applicant's criminal history; and any search for an applicant's criminal history, including through the services of a third party, such as a consumer reporting agency.

Non-convictions

A criminal action, not currently pending, that was concluded in one of the following ways:

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

Statement

Any words, whether made in writing or orally, for the purpose of obtaining an applicant's criminal history, including, without limitation, stating that a background check is required for a position.

Temporary Help Firms

A business which recruits, hires, and assigns its own employees to perform work at or services for other organizations, to support or supplement the other organization's workforce, or to provide assistance in special work situations such as, without limitation, employee absences, skill shortages, seasonal workloads, or special assignments or projects.[8]

---

[7] A misdemeanor is an offense, other than a "traffic infraction," for which a person may be incarcerated for more than 15 days and less than one year. N.Y. Pen. L. § 10.00(4). A felony is an offense for which a person may be incarcerated for more than one year. *Id*. § 10.00(5).

[8] N.Y. Lab. L. § 916(5).

III *Per Se* Violations of the FCA

As of October 27, 2015, the following acts are separate, chargeable violations of the NYCHRL:

1. Declaring, printing, or circulating – or causing the declaration, printing, or circulation of – any solicitation, advertisement, or publication for employment that states any limitation or specification regarding criminal history, *even if no adverse action follows.* This includes, without limitation, advertisements and employment applications containing phrases such as: "no felonies," "background check required," and "must have clean record."[9]
2. Making any statement or inquiry, as defined in Section II of this Guidance, before a conditional offer of employment, *even if no adverse action follows.*
3. Withdrawing a conditional offer of employment based on an applicant's criminal history before completing the Fair Chance Process as outlined in Section V of this Guidance. Each of the following is a separate, chargeable violation of the NYCHRL:
   a) Failing to disclose to the applicant a written copy of any inquiry an employer conducted into the applicant's criminal history;
   b) Failing to share with the applicant a written copy of the employer's Article 23-A analysis;
   c) Failing to hold the prospective position open for at least three business days, from an applicant's receipt of both the inquiry and analysis, to allow the applicant to respond.
4. Taking an adverse employment action because of an applicant's non-conviction.[10]

IV The Criminal Background Check Process Under the FCA

The FCA does not change what criminal history information employers may consider. Instead, it changes when employers may consider this information. No employer may seek, obtain, or base an adverse employment action on a non-conviction.[11] No employer may seek, obtain, or base an adverse employment action on a criminal conviction until after extending a conditional offer of employment. After a conditional offer of employment, an employer can only withdraw the offer after evaluating the applicant under Article 23-A and finding that the applicant's conviction history poses a direct relationship or unreasonable risk.

A. Before a Conditional Offer

The FCA prohibits the discovery and use of criminal history before a conditional offer of employment. During this time, an employer must not seek or obtain an applicant's criminal history. Consistent with Article 23-A, an employer's focus must instead be on an applicant's qualifications.

The following are examples of common hiring practices that are affected by the FCA.

i. Solicitations, advertisements, and publications for employment cannot mention criminal history.

---

[9] *See* discussion regarding language that encourages individuals with criminal history to apply *infra* p. 5.

[10] The FCA updates the NYCHRL's protections regarding non-conviction discrimination to match the New York State Human Rights Law. *See* Section XI of this Guidance.

[11] Employers of police and peace officers can consider all non-convictions, except criminal actions terminated in favor of the applicant, as defined by New York Criminal Procedure Law § 160.50. N.Y.C. Admin. Code §§ 8-107(11)(a),(b).

The FCA now explicitly prohibits employers from expressing any limitation or specification based on criminal history in their job advertisements,[12] even though such advertisements are already illegal under the existing NYCHRL.[13] Ads cannot say, for example, "no felonies," "background check required," or "clean records only." Solicitations, advertisements, and publications encompass a broad variety of items, including, without limitation, employment applications, fliers, handouts, online job postings, and materials distributed at employment fairs and by temporary help firms and job readiness organizations. Employment applications cannot ask whether an applicant has a criminal history or a pending criminal case or authorize a background check.

Solicitations, advertisements, and publications may include language that welcomes people with criminal records, however. For example, solicitations, advertisements, or publications that include language such as "People with criminal histories are encouraged to apply," and "We value diverse experiences, including prior contact with the criminal legal system" are permissible. Stigmatizing language, like "ex-felon" and "former inmate," may not be used.

ii. Employers cannot inquire about criminal history during the interview process.

The FCA prohibits employers from making any inquiry or statement related to an applicant's criminal history until after a conditional offer of employment. Examples of prohibited statements and inquiries include, without limitation:

- Questions, whether written or oral, during a job interview about criminal history;
- Assertions, whether written or oral, that individuals with convictions, or certain convictions, will not be hired or cannot work at the employer; and
- Investigations into the applicant's criminal history, including using public records or the Internet, whether conducted by an employer or for an employer by a third party.

The FCA does not prevent employers from otherwise looking into an applicant's background and experience to verify her or his qualifications for a position, including asking for resumes and references and performing general Internet searches (e.g., Google, LinkedIn, etc.). Searching an applicant's name is legal, but trying to discover an applicant's conviction history is not. In connection with an applicant, employers cannot search for terms such as, "arrest," "mugshot," "warrant," "criminal," "conviction," "jail," or "prison." Nor can employers search websites that contain or purport to contain arrest, warrant, conviction, or incarceration information.

The FCA allows an applicant to refuse to respond to any prohibited inquiry or statement. Such refusal or response to an illegal question shall not disqualify the applicant from the prospective employment.

iii. Inadvertent disclosures of criminal record information before a conditional offer of employment do not create employer liability.

The FCA prohibits any inquiry or statement made for the purpose of obtaining an applicant's criminal history. If a legitimate inquiry not made for that purpose leads an applicant to reveal criminal history, the employer should continue its hiring process. It may not examine the applicant's conviction history information until after deciding whether or not to make a conditional offer of employment.

---

[12] *Id.* § 8-107(11-a)(a)(1).

[13] Advertisements excluding people who have been arrested violate the NYCHRL's complete ban on employment decisions based on an arrest that did not lead to a criminal conviction. *Id.* § 8-107(11). Employers whose advertisements exclude people with criminal convictions are not engaging in the individual analysis required by Article 23-A. *Id.* § 8-107(10).

If the applicant raises her or his criminal record voluntarily, the employer should not use that as an opportunity to explore an applicant's criminal history further. The employer should state that, by law, it will only consider the applicant's record if it decides to offer her or him a job. Similarly, if an applicant asks an employer during the interview if she or he will be subject to a criminal background check, the employer may state that a criminal background check will be conducted only after a conditional offer of employment. It must then move the conversation to a different topic. Employers who make a good faith effort to exclude information regarding criminal history before extending a conditional offer of employment will not be liable under the FCA.

B. After the Conditional Offer of Employment

After extending a conditional offer of employment, as defined in Section II of this Guidance, an employer may make the same inquiries into, and statements about, an applicant's criminal history as before the FCA became effective. An employer may:

- Ask, either orally or in writing, whether an applicant has a criminal conviction history or a pending criminal case;
- Run a background check itself or, after giving the applicant notice and getting her or his permission, use a consumer reporting agency to do so;[14] and
- Once an employer knows about an applicant's conviction, ask her or him about the circumstances that led to it and begin to gather information relevant to every Article 23-A factor.

Employers must never inquire about or act on non-conviction information, however. To guard against soliciting or considering non-conviction information, employers may frame inquiries by using the following language after a conditional offer is made:

> Have you ever been convicted of a misdemeanor or felony? Answer "NO" 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 an employer hires an applicant after learning about her or his conviction history, the FCA does not require it to do anything more. An employer that wants to withdraw its conditional offer of employment, however, must first consider the Article 23-A factors. If, after doing so, an employer still wants to withdraw its conditional offer, it must follow the Fair Chance Process.

C. Evaluating the Applicant Using Article 23-A

Under Article 23-A, an employer cannot deny employment unless it can:

1. Draw a direct relationship between the applicant's criminal record and the prospective job; or
2. Show that employing the applicant "would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public."[15]

An employer that cannot show the applicant meets at least one of the exceptions to Article 23-A cannot withdraw the conditional offer because of the applicant's criminal record.

---

[14] The consumer report cannot contain credit information. Under the Stop Credit Discrimination in Employment Act, employers, labor organizations, and employment agencies cannot request or use the consumer credit history of an applicant or employee for the purpose of making any employment decisions, including hiring, compensation, and other terms and conditions of employment. *Id.* §§ 8-102(29); 8-107(24).

[15] N.Y. Correct. L. § 752.

An employer cannot simply presume a direct relationship or unreasonable risk exists because the applicant has a conviction record.[16] The employer must evaluate the Article 23-A factors using the applicant's specific information before reaching either conclusion.

- To claim the direct relationship exception, an employer must first draw some connection between the nature of conduct that led to the conviction(s) and the potential position. If a direct relationship exists, an employer must evaluate the Article 23-A factors to determine whether the concerns presented by the relationship have been mitigated.[17]
- To claim the unreasonable risk exception, an employer must begin by assuming that no risk exists and then show how the Article 23-A factors combine to create an unreasonable risk.[18] Otherwise, this exception would cover all convictions not directly related.

The Article 23-A factors are:

- That New York public policy encourages the licensure and employment of people with criminal records;
- The specific duties and responsibilities of the prospective job;
- The bearing, if any, of the person's conviction history on her or his fitness or ability to perform one or more of the job's duties or responsibilities;
- The time that has elapsed since the occurrence of the events that led to the applicant's criminal conviction, not the time since arrest or conviction;
- The age of the applicant when the events that led to her or his conviction occurred, not the time since arrest or conviction;
- The seriousness of the applicant's conviction history;[19]
- Any information produced by the applicant, or produced on the applicant's behalf, regarding her or his 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.

Employers must also consider a certificate of relief from disabilities or a certificate of good conduct, which shall create a presumption of rehabilitation regarding the relevant conviction.[20]

Employers must carefully conduct the Article 23-A analysis. Before extending a conditional offer of employment, employers must define the job's duties and responsibilities, as required by Article 23-A. Employers cannot alter the job's duties and responsibilities after making a conditional offer of employment. Once an employer extends a conditional offer and learns of an applicant's criminal record, it must solicit the information necessary to properly consider each Article 23-A factor, including the applicant's evidence of rehabilitation.

The Commission will review private employers' adverse employment decisions to ensure that they correctly consider the Article 23-A factors and properly apply the exceptions. The Commission will begin with the

---

[16] *Bonacorsa v. Van Lindt,* 71 N.Y.2d 605, 613-14 (N.Y. 1988).

[17] *Id.* at 613-14; *see Soto v. N.Y. State Office of Mental Retardation & Developmental Disabilities,* 907 N.Y.S.2d 104, 26 Misc. 3d 1215(A) at *9 (N.Y. Sup. Ct. 2010) (citing *Marra v. City of White Plains,* 467 N.Y.S.2d 865, 870 (N.Y. App. Div. 1983)).

[18] *Bonacorsa,* 71 N.Y.2d at 613; *Exum v. N.Y. City Health & Hosps. Corp.,* 964 N.Y.S.2d 58, 37 Misc. 3d 1218(A) at *6 (N.Y. Sup. Ct. 2012)

[19] Employers may judge the seriousness of an applicant's criminal record based on the number of felony and misdemeanor convictions, along with whether the acts underlying those convictions involved violence or theft.

[20] N.Y. Correct. L. § 753(2). An employer may not disfavor an applicant because she or he does not possess a certificate.

purpose of Article 23-A: to create "a fair opportunity for a job is a matter of basic human fairness," one that should not be "frustrated by senseless discrimination."[21] The Commission will also consider Article 23-A case law.[22] Employers must evaluate each Article 23-A factor; they cannot ignore evidence favorable to the applicant;[23] and they cannot disproportionately weigh any one factor over another.[24] Employers should consider applicants' successful performance of their job duties in past employment, along with evidence that they have addressed the causes of their criminal activity.[25]

V The Fair Chance Process

If, after evaluating the applicant according to Article 23-A, an employer wishes to decline employment because a direct relationship or unreasonable risk exists, it must follow the Fair Chance Process:

1. Disclose to the applicant a written copy of any inquiry it conducted into the applicant's criminal history;
2. Share with the applicant a written copy of its Article 23-A analysis; and
3. Allow the applicant at least three business days, from receipt of the inquiry and analysis, to respond to the employer's concerns.

A. Disclosing the Inquiry

The Commission requires an employer to disclose a complete and accurate copy of every piece of information it relied on to determine that an applicant has a criminal record, along with the date and time the employer accessed the information. The applicant must be able to see and challenge the same criminal history information relied on by the employer.

Employers who hire consumer reporting agencies to conduct background checks can fulfill this obligation by supplying a copy of the CRA's report on the applicant.[26] Because CRAs can be held liable for aiding and abetting discrimination under the NYCHRL, they should ensure that their customers only request criminal background reports after a conditional offer of employment. Employers who rely on criminal record information beyond what is contained in a criminal background report must also give that information to the applicant.

Employers who search the Internet to obtain criminal histories must print out the pages they relied on, and such printouts must identify their source so that the applicant can verify them. Employers who check public records must provide copies of those records. Employers who rely on oral information must provide a written summary of their conversation. The summary must contain the same information the employer relied on in reaching its determination, and it should identity whether that information was provided by the applicant.

B. Sharing the Fair Chance Notice

The FCA directs the Commission to determine the manner in which employers inform applicants under Article 23-A and provide a written copy of that analysis to applicants.[27] The Commission has prepared a Fair

---

[21] Governor's Approval Mem., Bill Jacket, L. 1976, ch. 931.

[22] Nearly all reported cases concern public agencies' employment decisions, which cannot be reversed unless "arbitrary and capricious." N.Y. Correct. L. § 755; *see* C.P.L.R. § 7803(3). The "arbitrary and capricious" standard does not apply to private employers.

[23] *Gallo v. N.Y. State Office of Mental Retardation & Developmental Disabilities,* 830 N.Y.S.2d 796, 798 (N.Y. App. Div. 2007).

[24] *Soto,* 26 Misc. 3d 1215(A) at *7.

[25] *Odems v. N.Y.C. Dep't of Educ.,* No. 400637/09 at *4, 2009 WL 5225201, at *5, 2009 N.Y. Misc. LEXIS 6480, at *5 (N.Y. Sup. Ct. Dec. 16, 2009); *El v. N.Y.C. Dep't of Educ.,* 23 Misc.3d 1121(A), at *4-5 (N.Y. Sup. Ct. 2009).

[26] 15 U.S.C. § 1681d; N.Y. Gen. Bus. L. § 380-b(b).

[27] N.Y.C. Admin. Code § 8-107(11-a)(b)(ii).

Chance Notice (the "Notice")[28] that employers may use to comply with this requirement. As long as the material substance – considering specific facts in the Article 23-A analysis – does not change, the Notice may be adapted to an employer's preferred format.

The Notice requires employers to evaluate each Article 23-A factor and choose which exception – direct relationship or unreasonable risk – the employer relies on. The Notice also contains space for the employer to articulate its conclusion.[29] Boilerplate denials that simply list the Article 23-A factors violate the FCA. For example, an employer cannot simply say it considered the time since conviction; it must identify the years and/or months since the conviction. An employer also cannot list specific facts for each factor but then fail to describe how it concluded that the applicant's record met either the direct relationship or unreasonable risk exceptions to Article 23-A.

Finally, the Notice informs the applicant of her or his time to respond and requests evidence of rehabilitation and good conduct. The Notice provides examples of such information. Employers may identify specific examples of rehabilitation and good conduct that would be most relevant to the prospective position, but examples must be included.

C. Allowing Time to Respond

Employers must give applicants a reasonable time, which shall be no less than three business days, to respond to the employer's inquiry and Notice. During this time, the employer may not permanently place another person in the applicant's prospective position. This time period begins running when an applicant receives both the inquiry and Notice. Employers may therefore wish to confirm receipt, either by disclosing the information in person, electronically, or by registered mail. Such method of communication must be mutually agreed on in advance by the applicant and employer. Otherwise, the Commission will credit an applicant's recollection as to when she or he received the inquiry and Notice.

By giving an applicant at least three business days to respond, the FCA contemplates a process in which employers discuss their reasons for finding that an applicant's record poses a direct relationship or unreasonable risk. The process allows an applicant to respond either orally or in writing and provide additional information relevant to any of the Article 23-A factors.[30] After receiving additional information from an applicant, an employer must examine whether it changes its Article 23-A analysis. Employers may offer an applicant a similar position that mitigates the employer's concerns. If, after communicating with an applicant, the employer decides not to hire her or him, it must relay that decision to the applicant.

The three-day time period to respond also provides an opportunity for the applicant to address any errors on the employer's background report, including any discrepancies between the convictions she or he disclosed and the results of the background check. As detailed below, a discrepancy could be due to an error on the report or an applicant's intentional misrepresentation.

i. Handling Errors in the Background Check

An error on a background check might occur because, for example, it contains information that pertains to another person or is outdated. If an applicant is able to demonstrate an error on the background report, the employer must conduct the Article 23-A analysis based on the corrected conviction history information to ensure its decision is not tainted by the previous error. If the employer then finds a direct relationship or unreasonable risk and intends to take an adverse action on that basis, it must follow the Fair Chance Process: the applicant

[28] The Notice is available on the Commission's website, http://www.nyc.gov/FairChanceNYC.

[29] N.Y. Correct. L. § 753(1)(h).

[30] N.Y.C. Admin. Code § 8-107(11-a)(b).

must be given a copy of the corrected inquiry, the employer's Article 23-A analysis, at least three business days to respond, with an opportunity to provide any additional information for the employer to review and re-examine its analysis.

ii. Handling Applicants' Misrepresentations of Their Conviction Histories

If an applicant cannot or does not demonstrate that any discrepancy between the information she or he disclosed and the employer's background report is due to an error, the employer can choose not to hire the individual based on the applicant's misrepresentation. It need not evaluate the applicant's record under Article 23-A.

VI Temporary Help Firms Under the Fair Chance Act

Temporary help firms employ individuals, either as direct or joint employers, and place them in job assignments at the firms' clients. The FCA applies the same way to temporary help firms as it does to any other employer. The only difference is that, for these firms, a conditional offer of employment is an offer to place an applicant in the firm's labor pool, from which the applicant may be sent on job assignments to the firm's clients. Before a temporary help firm withdraws a conditional offer of employment after discovering an applicant's conviction history, it must follow the Fair Chance Process, according to Section V of this Guidance. To evaluate the job duties, a temporary help firm may only consider the basic skills necessary to be placed in its applicant pool.

Employers who accept placements from temporary help firms, and who wish to inquire about temporary workers' criminal histories, must follow the Fair Chance Act. They may not make any statements or inquiries about an applicant's criminal record until after the worker is assigned to the employer, and they must follow the Fair Chance Process if they wish to decline employment because of an applicant's criminal record.

As with any other type of discrimination, temporary help firms will be liable if they aid and abet an employer's discriminatory hiring preferences. For example, a temporary help firm cannot, based on an employer's instructions, refer only temporary workers who do not have criminal histories or who have "less serious" criminal histories.

VII Positions Exempt from the FCA

Consistent with the Local Civil Rights Restoration Act of 2005,[31] all exemptions to coverage under the FCA's anti-discrimination provisions are to be construed narrowly. Employers may assert the application of an exemption to defend against liability, and they have the burden of proving the exemption by a preponderance of the evidence. Other than the employers described in Subsections C and D of this Section, the Commission does not assume that an entire employer or industry is exempt and will
investigate how an exemption applies to a particular position or role. Positions that are exempt from the FCA are not necessarily exempt from Article 23-A.

A. Employers hiring for positions where federal, state, or local law requires criminal background checks or bars employment based on certain criminal convictions

The FCA does not apply to the actions of employers or their agents that are taken pursuant to any state, federal, or local law that requires criminal background checks for employment purposes or bars employment

[31] N.Y.C. Local Law No. 85 (2005); N.Y.C. Admin. Code § 8-130.

based on criminal history.[32] The purpose of this exemption is to not delay a criminal background inquiry when the results of that inquiry might legally prohibit an employer from hiring an applicant.

A network of federal, state, and local laws creates employment barriers for people with criminal records. The Commission characterizes these barriers as either mandatory or discretionary. Mandatory barriers require a licensing authority or employer to deny applicants with certain convictions enumerated in law. Discretionary barriers allow, but do not require, a licensing authority or employer to deny applicants with criminal records, and may or may not enumerate disqualifying convictions. The FCA controls any time an employer's decision is discretionary, meaning it is not explicitly mandated by law.

For example, state law contains mandatory barriers for – and requires background checks of – applicants to employers regulated by the state Department of Health ("DOH"), Office of Mental Health ("OMH"), and Office of People with Developmental Disabilities ("OPWDD").[33] These agencies require the employers they regulate to conduct background checks because the agencies are charged by state law to ensure that individuals with certain convictions are not hired to work with vulnerable people.[34] Employers regulated by DOH, OMH, and OPWDD are therefore exempt from the FCA when hiring for positions where a criminal history check is required by law. For positions that do not require a criminal history check, however, such employers have to follow the FCA.

The FCA applies when an employer hires people who require licensure, or approval by a government agency, even if the license has mandatory barriers. In that case, an employer can only ask whether an applicant has the required license or can obtain one within an acceptable period of time. Any inquiry into the applicant's criminal record – before a conditional offer of employment – is not allowed. An applicant who has a license has already passed any criminal record barriers and been approved by a government agency. An applicant who cannot, because of her or his conviction record, obtain a required license may have her or his conditional offer withdrawn or employment terminated for such legitimate nondiscriminatory reason.

B. Employers Required by a Self-Regulatory Organization to Conduct a Criminal Background Check of Regulated Persons

Employers in the financial services industry are exempt from the FCA when complying with industry-specific rules and regulations promulgated by a self-regulatory organization ("SRO").[35] This exemption only applies to those positions regulated by SROs; employment decisions regarding other positions must still comply with the FCA.

C. Police and Peace Officers, Law Enforcement Agencies, and Other Exempted City Agencies

Police and peace officers are limited to their definitions in CPL §§ 1.20(34) and 2.10, respectively. Employment decisions about such officers are exempt from the FCA, as are decisions about positions in law enforcement agencies exempted under New York Correction Law Article 23-A.[36]

As of the date of this Guidance, the following City agencies are also exempt from the FCA: the New York City Police Department, Fire Department, Department of Correction, Department of Investigation, Department of Probation, the Division of Youth and Community Development, the Business Integrity Commission, and the District Attorneys' offices in each borough.

---

[32] N.Y.C. Admin. Code § 8-107(11-a)(e).

[33] N.Y. Exec. L. § 845-b.

[34] *Id.* at 845-b(5)(a).

[35] 15 U.S.C. § 78c(a)(26).

[36] N.Y. Correct. L. § 750(5).

D. City Positions Designated by the Department of Citywide Administrative Services ("DCAS") as Exempt

This exemption gives the Commissioner of DCAS the discretion to determine that employment decisions about some City positions, not already exempted pursuant to another provision, need not comply with the FCA because the position involves law enforcement; is susceptible to bribery or other corruption; or entails the provision of services to, or the safeguarding of, people vulnerable to abuse.

Once DCAS exempts a position, applicants may be asked about their conviction history at any time during the hiring process. Under this exemption, however, applicants who are denied employment because of their conviction history must receive a written copy of the DCAS's Article 23-A analysis.[37]

VIII Best Practices for Employers

An employer claiming an exemption must be able to show that the position falls under one of the categories in Section VII of this Guidance. Employers availing themselves of exemptions to the FCA should inform applicants of the exemption they believe applies and keep a record of their use of such exemptions for a period of five (5) years from the date an exemption is used. Keeping an exemption log will help the employer respond to Commission requests for information.

The exemption log should include the following:

- Which exemption(s) is claimed;
- How the position fits into the exemption and, if applicable, the federal, state, or local law or rule allowing the exemption under Sections VII(A) or (B) of this Guidance;
- A copy of any inquiry, as defined by Section V(A) of this Guidance, along with the name of the employee who made it;
- A copy of the employer's Article 23-A analysis and the name of any employees who participated in it; and
- The final employment action that was taken based on the applicant's criminal history.

Employers may be required to share their exemption log with the Commission. Prompt responses to Commission requests may help avoid a Commission-initiated investigation into employment practices.

The Commission recommends that the results of any inquiry into an applicant's criminal history be collected and maintained on separate forms and kept confidential. An applicant's criminal history should not be used, distributed, or disseminated to any persons other than those involved in making an employment decision about an applicant.[38]

IX Enforcement

The Commission will vigorously enforce the FCA. The amount of a civil penalty will be guided by the following factors, among others:

- The severity of the particular violation;
- The existence of additional previous or contemporaneous violations;

[37] N.Y.C. Admin. Code § 8-107(11-a)(f)(2).

[38] After hire, the employee's supervisor or manager may also be informed of the applicant's criminal record.

- The employer's size, considering both the total number of employees and its revenue; and
- Whether or not the employer knew or should have known about the FCA.

These penalties are in addition to the other remedies available to people who successfully resolve or prevail on claims under the NYCHRL, including, but not limited to, back and front pay, along with compensatory and punitive damages.

The Commission will presume, unless rebutted, that an employer was motivated by an applicant's criminal record if it revokes a conditional offer of employment, as defined in Section II of this Guidance. Consistent with that definition, the Commission will presume that any reason known to the employer before its conditional offer is not a legitimate reason to later withdraw the offer.

X Criminal Record Discrimination in Obtaining Credit

The FCA additionally prohibits inquiries and adverse actions based on non-convictions when a person is seeking credit.

New York State Bar Association

Labor & Employment Law Section

Changes on the Front End

Revolutions and Evolutions in Hiring Practices

January 26, 2018

TABLE OF CONTENTS

1 2 3 4 5

1 Presenters

2 Leveraging “Big Data”

3 Background Checks and the Fair Chance Act

4 Salary History Inquiries

5 Questions

Changes on the Front End:
Revolutions and Evolutions in Hiring Practices

PRESENTERS

Presenters

Dana Sussman, Esq.
Deputy Commissioner for Policy and Intergovernmental Affairs, New York City Commission on Human Rights

Kelly Trindel, PhD
Chief Analyst, Office of Research, Information and Planning, EEOC

Annette Tyman, Esq.
Co-Chair of the Pay Equity and Organizational Strategy and Analytics Group, Seyfarth Shaw LLP

Changes on the Front End:
Revolutions and Evolutions in Hiring Practices

LEVERAGING "BIG DATA"

5

Changes on the Front End: Revolutions and Evolutions in Hiring Practices

1 2 3 4 5

Leveraging "Big Data"

Traditional Employment Selection	Big Data/People Analytics Approach
• Resume Review • References Request • Test of Job Knowledge • Work Sample • Personality Assessment • IQ Test • Criminal Background Check • Credit Check	• Profiling Top Performers and High Potentials to Attract and Select 'Similar' Job Candidates • Passive Data Collection/Recruiting • Facial Expression/Tone of Voice/Pattern of Speech Analysis • Network and Communication Pattern analysis • Assessment Gamification
Traditional Job Analysis and Validation	Built in Criterion-Related Validity

6 |

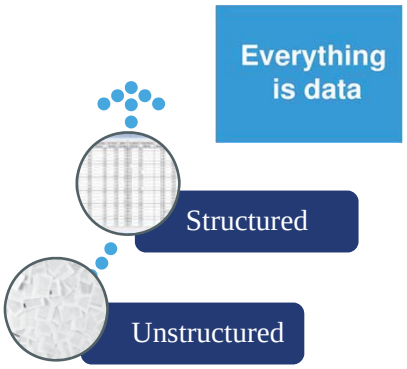
What we Mean when we Say 'Data'

Regulating the internet giants

The world's most valuable resource is no longer oil, but data

The data economy demands a new approach to antitrust rules

The valuation of a company, of its clients, and of the data it owns are intertwined.



Yes, Employers are Using these Tools

32% of HR professionals reported that their organizations use big data to support HR; those in larger organizations (i.e., greater than 200 full time employees) were almost twice as likely to use big data tools as those in smaller organizations.

SHRM survey (Kurtessis, Alonso, and Mulvey, 2016)

82% of organizations plan to either begin or increase their use of big data in HR over the next three years.

Recent report from the SHRM Foundation/Economic Intelligence Unit

Potential **Value** of Algorithms in Selection

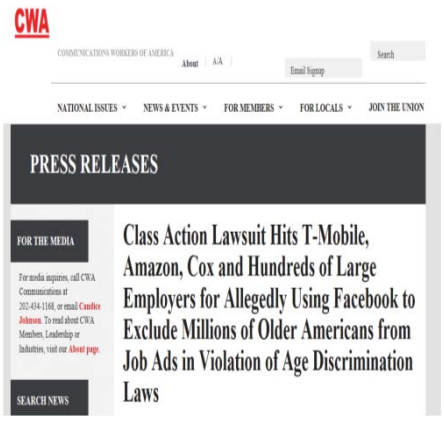
- Efficiency
  - Find the best candidates fast
  - Improve the candidate experience
- Effectiveness
  - Demonstrate ROI
- Job Relatedness
  - Criterion validity is often built into the process
- Fairness
  - Minimize the likelihood of intentional discrimination
  - Minimize the likelihood of unconscious bias
  - Automate the search for less discriminatory alternatives

Potential **Danger** of Algorithms in Selection

- Job Relatedness
  - Construct and Content validity evidence often missing
  - Traditional job analysis often missing
- Fairness
  - Algorithms replicate previous decisions
  - If training data is homogeneous, algorithm results will tend to perpetuate that homogeneity in race, gender, age, etc.
- Data and Computer Scientists tend not to be trained in issues of fairness and job-relatedness
  - Employment decisions are much more high-stakes and better-regulated than marketing decisions

Leveraging "Big Data"

Algorithms in Marketing Versus Employment



Changes on the Front End:
Revolutions and Evolutions in Hiring Practices

BACKGROUND CHECKS
AND
THE FAIR CHANCE ACT

Disclaimer

This presentation is designed to give you an overview and outline of the Commission and the Human Rights Law and in no way should be construed as an exhaustive outline of the Commission's duties or the Human Rights Law itself. Specific questions and/or complaints should be addressed directly to the Commission.

Credit and Criminal History Protections

1. Employers may not request or use **credit history** in an employment decision.
2. Employers may not request or use **criminal history** in an employment decision **until a conditional offer** is made. If an employer wishes to rescind the offer, he/she must first follow the Fair Chance Process.

Separate exemptions apply to both laws.

Background Checks and the Fair Chance Act

Stop Credit Discrimination in Employment Act

Background Checks and the Fair Chance Act

Requesting or Using Credit History Is Illegal

It is illegal under the NYC Human Rights Law for an employer to **request**, either orally or in writing, or **use** consumer credit history in employment decisions for:

- Potential employees and
- Current employees

Consumer credit history is a person's credit worthiness, credit standing, credit capacity, or payment history, as indicated by:

- A consumer credit report;
- Credit score; or
- Information an employer obtains directly from the individual.

Information in a Consumer Credit Report Can Include:

- Credit accounts;
- Late or missed payments;
- Charged-off debts;
- Items in collections;
- Credit limit;
- Prior credit report inquiries;
- Bankruptcies, judgments or liens;
- Credit card debt, child support, student loans;
- Foreclosures.

Exemptions

- There are exemptions under the SCDEA's anti-discrimination provisions; they are to be construed narrowly.
  - Exemptions **do not include**, for example:
    - Cashiers;
    - Salespeople;
    - Clerical workers and administrative staff;
    - Restaurant or bar workers; and
    - Private security workers.
- No exemption applies to an entire employer or industry.
- Exemptions apply only to particular positions.

Exemptions

1. Police officers and peace officers;
   - Peace officers include many govt. inspectors; court, correction, and school safety officers; parole and probation officers, etc.
2. Law enforcement or investigative positions with NYC Dept. of Investigation;
3. Positions requiring security clearance under federal or state law;
   - Security clearance is the ability to access classified information, not an employer's self-described "clearance process."

Exemptions

4. Positions requiring the employee to be bonded by the city, state, or federal law or regulation;
   - **Only six:** Bonded Carrier for U.S. Customs; Harbor Pilot, Pawnbroker; Ticket Seller & Reseller; Auctioneer; and Tow Truck Driver.
5. Positions where a credit check is required by federal or state law;
   - **Only one:** Licensed mortgage loan originator.

Exemptions

6. Positions required to register with self-regulatory organizations, such as FINRA (Financial Industry Regulatory Authority) & NFA (National Futures Association);
7. Positions with regular access to trade secrets, intelligence or national security information;
   - Not recipes, formulas, or customer lists regularly used or collected by non-salaried employees and their supervisors

Exemptions

8. Positions with signatory authority over third-party funds or assets or the ability to contract for $10,000 or more;
   - Executive-level positions with financial control over the company and senior staff in finance department.
9. Positions involving digital security systems.
   - Chief Technology Officer or senior information technology executives that control access to a company's computer system.

What Are an Employee's Rights When Credit Is Checked?

Under the state and federal Fair Credit Reporting Act, employers must:

1. Give employees **notice** and get **permission** before requesting their consumer report;
2. If you are going to take an adverse action, give employees a copy of their report and a reasonable **time to respond** before taking an adverse action based on the report; and
3. If the employer takes an adverse action, tell employees **how to request their own copy** of the report.

We Will Investigate Exemptions to the Credit History Ban

The application process for **nearly all jobs** in NYC can no longer include a credit check.

1. Employers that use a public record to discover an employee's credit history should keep a copy that includes the date and time it was obtained.
2. Employers who claim to be exempted should inform employees why and be prepared to prove that to the Commission.

The Fair Chance Act

Discovery and Use of Criminal History Is Now Restricted

1. Criminal history should play no part in the employment process until **after a conditional offer** of employment.
   - Applies to both potential and current employees
2. After a conditional offer, employers have the **same rights and obligations** as before the Fair Chance Act.
3. Employers who want to hire someone with a record **need not** follow any additional steps.
4. Employers who wish to decline employment based on an applicant's criminal record have to follow the **Fair Chance Process.**

Criminal History Is Excluded from the Hiring Process

Criminal history should play no part in the employment process until **after a conditional offer** of employment.

- No solicitation, advertisement, or publication for employment should express **any limitation or specification** based on criminal history.
- Applicants **may not be asked** whether they have a record, either on an application or in an interview.
- **No statements** about criminal history or background checks may be made.
- A background check, either through a company or the Internet, **may not be done**.

Criminal History Is Excluded from the Hiring Process

Criminal history should play no part in the employment process until **after a conditional offer** of employment.

- Cannot ask about **pending criminal cases**.
- If an employer **inadvertently discovers** an applicant's criminal history, it should ignore the information and continue the hiring process.
- If an **applicant asks** whether a background check will be done, an employer should say it will make that decision only after a conditional offer.

Conviction History Inquiries After a Conditional Offer

After a conditional offer, employers **may** do everything they could do before the Fair Chance Act.

- Ask, either orally or in writing, 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 circumstances that lead to any criminal conviction.

Employers also have the **same constraints**, however, so they **may not** ask about or base a decision on a non-conviction:

- **Favorable termination** or youthful offender adjudication, even if not sealed;
- Sealed convictions for non-criminal **violations**; or
- Convictions **sealed** after completing a drug treatment program.

Employers Should Review Existing Forms and Train Staff

Employers who want to hire someone with a record **need not** follow any additional steps.

To comply with the FCA until **this point** of the hiring process, an employer need only:

- Ensure all employment forms **no longer ask** about convictions or authorize background checks; and
- Retrain employees to **make no statements or inquiries**, either of the applicant or another source, about criminal history before a conditional offer.

The Fair Chance Process

Employers who wish to decline employment based on an applicant's criminal record have to follow the **Fair Chance Process**, which involves:

1. Evaluating the applicant under Correction Law **Article 23-A**;
2. **Sharing** that written evaluation with the applicant;
3. Giving the **applicant a copy** of any criminal background check regarding the applicant; and
4. Allowing the applicant three business days to **respond**.

The Fair Chance Process: 1. Article 23-A Analysis

When considering whether to deny a job to an applicant with a criminal record, employers must consider:

1. New York's **public policy** in favor of employing people with criminal histories.
2. How the conviction relates to applicant's fitness and ability to perform **job duties**.
3. How **long ago** and how **serious** the crime was; the applicant's **age** at the time.
4. The applicant's evidence of **rehabilitation**.
5. The employer's **interest** in protecting people and property.
6. A **certificate** showing rehabilitation, if possessed.

The Fair Chance Process: 1. Article 23-A Analysis

Employers **may not** decline to hire someone because of a criminal record unless that record poses:

1. A **direct relationship** to the prospective job, and that connection is not mitigated by the preceding factors; or
   - Consider the elements of the crime or the facts leading to conviction.
2. An **unreasonable risk**, after looking at all of the factors.
   - Begin by assuming no risk exists; then see if the factors combine to create a risk.

These are **exceptions** to the rule that convictions may not form the basis of an adverse employment action.

The Fair Chance Process: 1. Article 23-A Analysis

Employers **may not** use matrices or grids to decide that certain criminal convictions automatically disqualify a person.

- Article 23-A factors require a more nuanced, **individualized determination**.
- Under the NYCHRL, no type of conviction history is a **per se disqualification** from any job.

The Fair Chance Process: 2. Sharing the Analysis

Applicants must be given the **employer's analysis**, which:

- **Specifies** whether the employer is relying on the direct relationship or unreasonable risk exception;
- Lists **specific facts** going to each factor;
- Describes how, **considering those facts**, the employer reached its conclusion; and
- Notifies the applicant that she or he **has three business days** to respond.

The Fair Chance Process: 3. Sharing the Criminal History

Applicants must be given any information the employer relied upon to determine the applicant's criminal record. Employers that:

- Hire consumer reporting agencies to conduct **background checks** must turn over those reports.
- Search the **internet or public records** must provide copies, including the date and time accessed.
- Use **oral information** must summarize the information relied upon.

Applicants should be able to see and challenge **the same criminal history information** the employer relied upon.

The Fair Chance Process: 4. Time to Respond

Applicants must be given a reasonable time—at least **three business days**—to respond to the employer's analysis and criminal record information.

- Begins running when the applicant **receives information**.
- Upon request, employers should engage in a **constructive conversation**, discussing their conclusions and identifying how an applicant might address them.
- Employers may offer a **similar position** that mitigates an employer's concerns.

Temp Agencies Have Unique Obligations Under the FCA

For **temporary hire firms**, a "conditional offer of employment" is an offer to place an applicant in a pool to be sent on job assignments.

- Cannot aid and abet an employer's discriminatory hiring preferences.
- Cannot fail to send people with records to assignments or give less desirable placements.

Background Checks and the Fair Chance Act

Employers Exempted from the FCA

1. Employers required by federal, state, or local law to conduct background checks or bar employment based on particular convictions.
   - Exemption only applies when an employer's decision is compelled by law. If an employer's choice is discretionary, the FCA applies.
   - If an occupational license has criminal record barriers, an employer is not exempt: he/she may only ask whether the person has the required license.
2. Police and peace officers, law enforcement agencies, and other exempted City law enforcement agencies;
3. City positions designated by the Department of Citywide Administrative Services;
4. Employers of people required to register with a self-regulatory organization when making employment decisions about such individuals. (ex. Securities Exchange Commission)

Changes on the Front End:
Revolutions and Evolutions in Hiring Practices

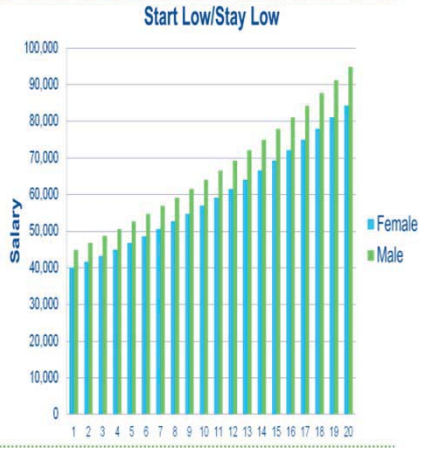
SALARY HISTORY INQUIRIES

The Legal Landscape on Equal Pay Issues Impacting Employers:

"The Wage Gap" – It's Everywhere

Importance of Starting Salary Decisions

- Starting salary is typically the most important pay decision
  - "Start Low/Stay Low" phenomenon



Salary History Inquiries

Effect of Starting Pay

Year	Female Hire $	Female Merit Increase	Male Hire $	Male Merit Increase	Difference
1996	$40,000.00	4.00%	$47,000.00	3.50%	$ (7,000.00)
1997	$41,600.00	4.00%	$48,645.00	3.50%	$ (7,045.00)
1998	$43,264.00	4.00%	$50,347.58	3.50%	$ (7,083.58)
1999	$44,994.56	4.00%	$52,109.74	3.50%	$ (7,115.18)
2000	$46,794.34	4.00%	$53,933.58	3.50%	$ (7,139.24)
2001	$48,666.12	4.00%	$55,821.26	3.50%	$ (7,155.14)
2002	$50,612.76	4.00%	$57,775.00	3.50%	$ (7,162.24)
2003	$52,637.27	4.00%	$59,797.13	3.50%	$ (7,159.85)
2004	$54,742.76	4.00%	$61,890.02	3.50%	$ (7,147.26)
2005	$56,932.47	4.00%	$64,056.18	3.50%	$ (7,123.70)
2006	$59,209.77	4.00%	$66,298.14	3.50%	$ (7,088.37)
2007	$61,578.16	4.00%	$68,618.58	3.50%	$ (7,040.41)
2008	$64,041.29	4.00%	$71,020.23	3.50%	$ (6,978.94)
2009	$66,602.94	4.00%	$73,505.93	3.50%	$ (6,902.99)
2010	$69,267.06	4.00%	$76,078.64	3.50%	$ (6,811.58)
2011	$72,037.74	4.00%	$78,741.40	3.50%	$ (6,703.65)
2012	$74,919.25	4.00%	$81,497.34	3.50%	$ (6,578.09)
2013	$77,916.02	4.00%	$84,349.75	3.50%	$ (6,433.73)
2014	$81,032.66	4.00%	$87,301.99	3.50%	$ (6,269.33)
2015	$84,273.97	4.00%	$90,357.56	3.50%	$ (6,083.59)
2016	$87,644.93	4.00%	$93,520.08	3.50%	$ (5,875.15)
				Total	**$(143,897.05)**

Salary History Inquiries

Summary of Laws Banning Prior Salary Inquiries

Currently Active	Coming Soon	Enjoined
Puerto Rico (eff. 3/8/2017 but penalties begin 3/8/2018)	Massachusetts (eff. 7/1/2018)	Philadelphia (5/2017, enjoined)
Oregon (eff. 10/06/2017; 1/1/2019; private action begins 1/1/2024)	San Francisco (eff. 7/1/2018 but penalties begin 7/1/2019)	
New York City (eff. 10/31/2017)		
Delaware (eff. 12/14/2017)		
Albany County (eff. 12/17/2017)		
California (eff. 1/1/2018)		

The Basic Prohibition

Do not inquire about an applicant's prior or current compensation history.

But of course, in this patchwork of legislation, nuances abound!

So what do the laws really say?

State Prior Salary Inquiry Laws

Jurisdiction	Definition of Salary History, Compensation or Wages	Prohibition	Applicable to Current Employees?	Is Salary "Expectations" Inquiry OK?
Albany County	Wages: includes "benefits or other compensation"	Screen job applicants based on their wage or salary histories by requiring that an applicant's prior wages satisfy minimum or maximum criteria; request or require as a condition of being interviewed or considered that an applicant disclose prior wages; seek the salary history of any applicant from any current or former employer	Silent	Silent
California	Salary history: includes "compensation and benefits" Note: Upon reasonable request, the employer must provide the applicant with the pay scale for the position	Seek or rely salary history information about an applicant for employment as a factor in determining (1) whether to offer employment; or (2) what salary to offer	Silent, but reasonably does not apply to current employees because ban explicitly applies to an "applicant for employment."	Silent, but presumably, Yes because not expressly prohibited
Delaware	Compensation: "monetary wages as well as benefits and other forms of compensation"	Seek compensation history from the applicant or their employer; screen applicants based on compensation histories; require applicant's prior compensation to satisfy minimum or maximum criteria	Silent	Yes

Salary History Inquiries

State Prior Salary Inquiry Laws

Jurisdiction	Definition of Salary History, Compensation or Wages	Prohibition	Applicable to Current Employees?	Is Salary "Expectations" Inquiry OK?
Massachusetts	Wages: "all forms of remuneration for employment"	Seek the wage or salary history of a prospective employee; require that prior wage or salary history meet certain criteria	Silent	Not explicit but AG unofficially said yes
New York City	Salary history: "current or prior wage, benefits or other compensation" but not "any objective measure of the applicant's productivity such as revenue, sales or other production reports"	Inquire about salary history; rely on salary history in determining salary, benefits, or "other compensation" during the hiring process. Includes contract negotiations.	No	Yes, as long as there is no salary history inquiry. Discussions about expectations related to unvested equity, deferred compensation, benefits and other compensation that an applicant would forfeit is also permissible.
Oregon	Compensation: "wages, salary, bonuses, benefits, fringe benefits and equity-based compensation"	Screen applicants based on current or past compensation; rely on past compensation of a prospective employee to determine compensation	No	Not expressly prohibited

Salary History Inquiries

State Prior Salary Inquiry Laws

Jurisdiction	Definition of Salary History, Compensation or Wages	Prohibition	Applicable to Current Employees?	Is Salary "Expectations" Inquiry OK?
Philadelphia (Enjoined)	Wages: "all earnings of an employee, regardless of whether determined on time, task, piece, commission or other method of calculation and including fringe benefits, wage supplements, or other compensation whether payable by the employer from employer funds or from amounts withheld from the employee's pay by the employer."	Inquire about wage history; require disclosure of wage history; condition employment or consideration for an interview or employment on disclosure of wage history; rely on wage history at any stage of the employment process (including contract negotiations), unless "knowingly and willingly" disclosed	Not explicit, but it may be inferred given the use of "prospective employee"	Not expressly prohibited
Puerto Rico	Salary: "any salary, pay type and any kind of compensation or remuneration"	Ask an applicant about salary history or current salary.	Silent, but likely no because it refers to "applicants"	Silent, but presumably, Yes because not expressly prohibited
San Francisco	Salary history: "current and past salary" but not "any objective measure of the applicant's productivity such as revenue, sales, or other production reports" Salary: "Applicant's financial compensation in exchange for labor, including but not limited to wages, commissions. and any monetary emoluments."	Inquire about salary history; consider salary history in determining salary; refuse to hire applicant for not disclosing salary history; release salary history to that person's employer or prospective employer without written authorization from the employee (unless the release is required by law, is publicly available or subject to a CBA).	No	Yes, as long as there is no salary history inquiry. Discussions about expectations related to unvested equity, deferred compensation or bonus that an applicant would forfeit is also permissible.

Salary History Inquiries

Frequently Asked Questions

Can we ask candidates about their prior salary on our employment applications?

Albany County	California	Delaware
		
Massachusetts	**New York, NY**	**Oregon**
		
Philadelphia, PA (Enjoined)	**Puerto Rico**	**San Francisco, CA**
		

Salary History Inquiries

Frequently Asked Questions

Can we ask about a candidate's salary expectations?

Albany County	California	Delaware
		
Massachusetts	**New York, NY**	**Oregon**
		
Philadelphia, PA (Enjoined)	**Puerto Rico**	**San Francisco, CA**
		

Salary History Inquiries

Frequently Asked Questions

Can we search public records to find out what the candidate made in a previous role?

Albany County	California	Delaware
	 *	
Massachusetts	**New York, NY**	**Oregon**
		
Philadelphia, PA (Enjoined)	**Puerto Rico**	**San Francisco, CA**
		

Salary History Inquiries

Frequently Asked Questions

Can we ask about and confirm prior wages after making an offer that includes compensation (if not already disclosed)?

Albany County	California	Delaware
		
Massachusetts	**New York, NY**	**Oregon**
		 *
Philadelphia, PA (Enjoined)	**Puerto Rico**	**San Francisco, CA**
		

Salary History Inquiries

Where Are You Asking About Prior Salary Now?

- Job applications
- Background check documents
- Phone screens
- Standard interview templates
- Compensation planning documents
- Hiring manager/recruiting training materials
- Compensation guidelines
- Disposition codes (for "salary requirements too high")

Salary History Inquiries

Best Practices for All Jurisdictions

Prior salary often reflects differences in skills, experience, and performance
- Document these differences rather than prior salary as the reason for pay difference
- Inquire about salary *expectations*
- Document voluntary disclosures – differences in jurisdictions

Consider developing a formal policy regarding how the company sets starting salary
- Clear Standards
- Develop a Compensation Structure
- Salary guidelines
- Starting pay philosophy
- Market Considerations

Develop a practice of documenting when an applicant voluntarily discloses salary history and other compensation information

Train recruiters, human resources professionals and any recruiting or decision-making managers about laws in the jurisdiction regarding an applicant's wage history

QUESTIONS