



## COMMITTEE ON CIVIL RIGHTS

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Dana Sussman

Special Counsel to the Office of the Chairperson  
New York City Commission on Human Rights  
P.O. Box 2023  
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Dear Ms. Sussman:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

- The definition of the terms “**applicant**” and “**conditional offer**” should reflect that current employees may be considered for job changes that are not definitively “positive,” such as transfers or lateral position changes. It is just as important to avoid discrimination in these employment decisions. We therefore recommend that the word “positive” and “positively” be deleted from these definitions.
- “**Conviction history**” should include unsealed violations (or their analogues) in other states, just as such history currently includes unsealed violation convictions in New York. Applicants with out-of-state unsealed violations should receive the same legal protections as applicants with unsealed violations from New York State.
- The definition of the term “**criminal history**” should refer to “convictions” rather than “criminal convictions,” so as to make clear that individuals with unsealed violation convictions have the same legal protections as individuals with misdemeanor or felony convictions.
- The list of “**non-conviction**” outcomes should include juvenile delinquency findings and pardons. Juvenile delinquency cases by definition are not convictions, but should be included on this list to ensure that such findings are not used as the basis for adverse employment actions.

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

Sincerely,

A handwritten signature in black ink, appearing to read 'Sebastian Riccardi', written in a cursive style.

Sebastian Riccardi  
Chair, Civil Rights Committee