STATE OF NEW YORK

7058

2021-2022 Regular Sessions

IN ASSEMBLY

April 21, 2021

Introduced by M. of A. BICHOTTE HERMELYN, VANEL, BARRON -- read once and referred to the Committee on Governmental Operations

AN ACT to amend the administrative code of the city of New York, the correction law, the criminal procedure law, the executive law and the social services law, in relation to prohibiting discrimination based on a person's arrest record or criminal conviction

The People of the State of New York, represented in Senate and Assembly, do enact as follows:

Section 1. This act shall be known and may be cited as "The New York State Fair Chance Act".

§ 2. Subdivisions 10 and 11 of section 8-107 of the administrative code of the city of New York, as amended by local law number 4 of the city of New York for the year 2021, are amended to read as follows:

10. Employment actions based on pending arrests and criminal accusations, and criminal convictions preceding and during employment. (a) Actions prohibited by state law concerning criminal convictions preceding employment. It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to deny employment to any person or take adverse action against any employee by reason of such person or employee having been convicted of one or more criminal offenses, or by reason of finding the person lacks "good moral character" based on**:**

(i) such person or employee having been convicted of one or more criminal offenses, when such denial or adverse action is in violation of the provisions of article [~~23-A~~] **twenty-three-A** of the correction law **regardless of when such conviction occurred, including if such conviction occurred while such person was employed at the job at issue; or**

(ii) such person or employee having a final judgment of guilt entered for a felony more than ten years ago and a misdemeanor more than five years ago. These periods of time shall be measured from the date judg-

EXPLANATION--Matter in *italics* (underscored) is new; matter in brackets [-] is old law to be omitted.

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ment was entered or the release from incarceration, whichever date is later, until the date of the adverse action in question. Criminal acts committed outside the state shall be classified as felonies or misdemeanors committed within the state based on the maximum sentence that could have been imposed for such conviction under the laws of such foreign jurisdiction.

(b) Criminal convictions during employment. It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to take adverse action against any employee by reason of such person having been convicted during their employment of one or more criminal offenses, or by reason of finding the person lacks "good moral character" based on such person having been convicted during their employment of one or more criminal offenses, unless, after considering the relevant fair chance factors, the employer determines that either:

(i) there is a direct relationship between the criminal conviction and the employment held by the person; or

(ii) the continuation of the employment would involve an unreasonable risk to property, or to the safety or welfare of specific individuals or the general public.

(c) Pending arrests and criminal accusations preceding and during employment. It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to take adverse action against any applicant or employee based on an arrest or criminal accusation that is pending, or by reason of finding the person lacks "good moral character" based on such a pending arrest or criminal accusation, unless, after considering the relevant fair chance factors, the employer determines that either:

(i) there is a direct relationship between the alleged wrongdoing that is the subject of the pending arrest or criminal accusation and the employment sought or held by the person; or

(ii) the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

(d) For purposes of paragraphs (b) and (c) of this section, placing an employee on unpaid leave for a reasonable time while the employer takes the steps described in such paragraphs and subdivision [~~11-a~~] eleven-a of this section shall not be deemed to be an adverse action.

(e) For purposes of this subdivision, an action that has been adjourned in contemplation of dismissal shall not be considered a pending action unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution.

(f) Paragraphs (b) and (c) of this subdivision shall not apply to an applicant for employment or a current employee employed:

(i) as a police officer or peace officer, as those terms are defined in subdivisions [~~33 and 34~~] thirty-three and thirty-four of section 1.20 of the criminal procedure law, respectively[~~.~~]; or

(ii) at a law enforcement agency as that term is used in article [~~23-A~~] twenty-three-A of the correction law.

(g) Nothing in this section shall prevent an employer from taking adverse action against an applicant or employee who is found to have made intentional misrepresentations regarding their arrest or conviction history, provided that such adverse action is not based on a failure to divulge information that a person may not be required to divulge, as provided in subdivision [~~16~~] sixteen of section [~~296 of article 15~~] two hundred ninety-six of the executive law and in subdivision [~~11~~] eleven

of this section, and provided further that the employer provides the applicant or employee with a copy of the documents that formed the basis of the determination that an intentional misrepresentation was made and gives the person a reasonable time to respond.

(h) Paragraphs (b) and (c) **of this subdivision** shall not apply to public agencies taking adverse action against an employee based upon a pending arrest or criminal accusation that preceded or arose during employment, or convictions that occurred during employment, where the employee is entitled to a disciplinary process as set forth in section [~~75~~] **seventy-five** of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law.

(i) The provisions of this subdivision shall not apply where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct.

(j) The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article [~~78~~] **seventy-eight** of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against other employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter [~~5~~] **five** of this title.

11. Non-pending arrests and criminal accusations, and dispositions of charges that an employer may not consider. (a) Non-pending arrests and criminal accusations; adjournments in contemplation of dismissal; youthful offender adjudications; convictions sealed pursuant to certain sections of the criminal procedure law. It shall be an unlawful discriminatory practice, unless specifically required or permitted by any other law, for any person to make any inquiry in writing or otherwise about, or deny employment to, any applicant or act adversely upon any employee by reason of an arrest of or criminal accusation against such applicant or employee when such inquiry, denial or adverse action is in violation of subdivision [~~16~~] **sixteen** of section [~~296 of article 15~~] **two hundred ninety-six** of the executive law.

(b) Violations and non-criminal offenses that have not been sealed. (1) It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to make any inquiry**, as defined in subdivision ten of this section,** in writing or otherwise about, or deny employment to any person or take adverse action against any employee, based on the applicant or employee having:

(i) been convicted of a violation as defined in section 10.00 of the penal law; or

(ii) been convicted of a non-criminal offense, as defined by a law of another state.

(2) It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to make any inquiry in writing or otherwise about, or deny employment to any person or take adverse action against any employee based on an arrest or criminal accusation that was followed by an order or conviction described in subparagraph [~~(1)~~] **one** of this paragraph.

(3) The provisions of this paragraph shall not apply to an applicant for employment or a current employee employed**:**

(i) as a police officer or peace officer, as those terms are defined in subdivisions [~~33 and 34~~] **thirty-three and thirty-four** of section 1.20 of the criminal procedure law, respectively[~~,~~]**;** or

(ii) at a law enforcement agency as that term is used in article [~~23-A~~] twenty-three-A of the correction law.

(4) The provisions of this paragraph shall not apply where a mandatory forfeiture, disability or bar to employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct.

(5) The provisions of this paragraph [~~(b)~~] shall be enforceable against public agencies by a proceeding brought pursuant to article [~~78~~] seventy-eight of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against other employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter [~~5~~] five of this title.

§ 3. Subparagraph 5 of paragraph (b) and paragraph (f) of subdivision 11-a of section 8-107 of the administrative code of the city of New York, as amended by local law number 4 of the city of New York for the year 2021, are amended and a new paragraph (i) is added to read as follows:

(5) After giving the applicant the inquiry and analysis in writing, allows the applicant a reasonable time to respond, which shall be no less than [~~five~~] seven business days and during this time, holds the position open for the applicant.

(f) An applicant shall not be required to respond to any inquiry or statement that violates paragraph (a) of this subdivision and any refusal to respond to such inquiry or statement shall not disqualify an applicant from the prospective position. Nothing in this paragraph shall prohibit an applicant from voluntarily disclosing information pertaining to his or her criminal history.

(i) A person who is required to perform a criminal background check pursuant to federal, state or local law may inform the applicant that the prospective license, permit, or employment is subject to a background check and that the person is prohibited by law from licensing, permitting, or employing individuals with certain criminal convictions, though such prohibition may be lifted by a certificate of relief from disabilities or certificate of good conduct under article twenty-three of the correction law.

§ 4. Section 8-102 of the administrative code of the city of New York is amended by adding a new definition in alphabetical order to read as follows:

Criminal offense. The term "criminal offense" means any offense as defined in section 55.10 of the penal law.

§ 5. Subdivisions 2 and 5 of section 750 of the correction law, as added by chapter 931 of the laws of 1976, are amended and a new subdivision 6 is added to read as follows:

(2) "Private employer" means any person, company, corporation, labor organization or association which employs [~~ten~~] four or more persons.

(5) "Employment" means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that "employment" shall not, for the purposes of this article, include [~~membership in any law enforcement agency~~] employment as a police officer or a peace officer as defined in section 2.10 of the criminal procedure law.

(6) "Criminal offense" means any offense as defined in section 55.10 of the penal law.

§ 6. Section 751 of the correction law, as amended by chapter 284 of the laws of 2007, is amended to read as follows:

§ 751. Applicability. The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who **is currently charged with or who** has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose **pending arrest for or** conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license**, and to any license or employment held by any person whose pending arrest for or conviction of one or more criminal offenses in this state or in any other jurisdiction occurred during the period of such employment or granting of a license**, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

§ 7. Section 752 of the correction law, as amended by chapter 284 of the laws of 2007, is amended to read as follows:

§ 752. Unfair discrimination against persons [~~previously~~] **charged with or** convicted of one or more criminal offenses prohibited. No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's **having been charged with one or more offenses or** having been [~~previously~~] convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has [~~previously~~] been **charged with or** convicted of one or more criminal offenses, unless:

(1) there is a direct relationship between one or more of the [~~previous~~] criminal offenses and the specific license or employment sought or held by the individual; [~~or~~] **and**

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

§ 8. The article heading of article 23-A of the correction law, as added by chapter 931 of the laws of 1976, is amended to read as follows:

LICENSURE AND EMPLOYMENT OF PERSONS [~~PREVIOUSLY~~]
CONVICTED OF ONE OR MORE CRIMINAL OFFENSES

§ 9. The section heading and subdivision 1 of section 753 of the correction law, as added by chapter 931 of the laws of 1976, paragraph (b) of subdivision 1 as amended by chapter 284 of the laws of 2007, are amended to read as follows:

Factors to be considered concerning a [~~previous~~] criminal **charge or** conviction; presumption. 1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons [~~previously~~] **charged with or** convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was [~~previously~~] **charged with or** convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

(e) The age of the person at the time of occurrence of the criminal offense or offenses.

(f) The seriousness of the offense or offenses.

(g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.

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

§ 10. Section 753 of the correction law is amended by adding a new subdivision 3 to read as follows:

3. A presumption of rehabilitation in regard to an offense or offenses previously committed shall exist:

(a) with regard to one or more previous felony convictions, when the person so convicted has not been convicted of any additional crimes in the ten years following entry of judgment or release from jail or prison, whichever date is latest; and

(b) with regard to one or more previous misdemeanor convictions, when the person so convicted has not been convicted of any additional crimes in the five years following entry of judgment or release from jail or prison, whichever date is latest.

§ 11. Section 754 of the correction law, as added by chapter 931 of the laws of 1976, is amended to read as follows:

§ 754. Written statement upon denial of license or employment **or has been subject to adverse employment action**. At the request of any person [~~previously~~] **charged with or** convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial **or adverse employment action**.

§ 12. The correction law is amended by adding a new section 755 to read as follows:

§ 755. Arrest and conviction records; employer inquiries. 1. It shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to:

(a) Declare, print or circulate or cause to be declared, printed or circulated any solicitation, advertisement or publication, which expresses, directly or indirectly, any limitation, or specification in employment based on a person's arrest or criminal conviction; or

(b) Make any inquiry or statement related to the pending arrest or criminal conviction record of any person who is in the process of applying for employment with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant.

(c) For purposes of this section:

(1) with respect to an applicant for temporary employment at a temporary help firm as such term is defined by subdivision five of section nine hundred sixteen of the labor law, an offer to be placed in the temporary help firm's general candidate pool shall constitute a conditional offer of employment;

(2) "any inquiry" means any question communicated to an applicant in writing or otherwise, or any searches of publicly available records or consumer reports that are conducted for the purpose of obtaining an applicant's criminal background information; and

(3) "any statement" means a statement communicated in writing or otherwise to the applicant for purposes of obtaining an applicant's criminal background information regarding: (i) an arrest record; (ii) a conviction record; or (iii) a criminal background check.

2. After extending an applicant a conditional offer of employment, an employer, employment agency or agent thereof may inquire about the applicant's arrest or conviction record if before taking any adverse employment action based on such inquiry, the employer, employment agency or agent thereof:

(a) provides a written copy of the inquiry to the applicant in a manner to be determined by the division of criminal justice services, and advises the applicant that he or she may submit any available evidence of rehabilitation or good conduct since the offense in question, which shall be considered in the analysis performed under this article;

(b) performs an analysis of the applicant under this article and provides a written copy of such analysis to the applicant in a manner to be determined by the division of criminal justice services, and advises the applicant that he or she may submit any available evidence of rehabilitation or good conduct since the offense in question, which shall be considered in the analysis performed under this article, which shall include but not be limited to supporting documents that formed the basis for an adverse action based on such analysis and the employer's or employment agency's reasons for taking any adverse action against such applicant; and

(c) after giving the applicant the inquiry and analysis in writing pursuant to paragraphs (a) and (b) of this subdivision, allows the applicant a reasonable time to respond, which shall be no less than seven business days and during this time, holds the position open for the applicant.

3. Nothing in this section shall prevent an employer, employment agency or agent thereof from taking adverse action against any employee or denying employment to any applicant for reasons other than such employee or applicant's arrest or criminal conviction record.

4. An applicant shall not be required to respond to any inquiry or statement that violates subdivision one of this section and any refusal to respond to such inquiry or statement or any response in the negative to such inquiry shall not disqualify an applicant from the prospective employment.

5. This section shall not apply to any actions taken by an employer or agent thereof that are required pursuant to any state, federal or local law that requires criminal background checks for employment purposes or bars employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended. A person who is required to perform a criminal background check pursuant to federal, state or local law may inform the applicant that the prospective license, permit, or employment is subject to a background check and that the person is prohibited by law from licensing, permitting, or employing individuals with certain criminal convictions, though such prohibition may be lifted

by a certificate of relief from disabilities or certificate of good conduct under article twenty-three of this chapter.

6. This section shall not apply to any actions taken by an employer or agent thereof with regard to an applicant for employment:

(a) as a police officer or peace officer, as defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; or

(b) in a position that involves law enforcement, is susceptible to bribery or other corruption, as determined by the state police or other agency selected by the governor, or entails the provision of services to or safeguarding of persons who, because of age, disability, infirmity or other condition, are vulnerable to abuse, as determined by the Justice Center for Persons with Special Needs or other agency selected by the governor. If an employer takes adverse action against any applicant for such position based on the applicant's arrest or criminal conviction record, it shall still provide a written copy of such analysis performed under this article to the applicant in a form and manner to be determined by the division.

7. The provisions of this section shall be enforceable against public agencies and against private employers by a proceeding brought pursuant to article fifteen of the executive law. For purposes of this subdivision only, the terms "public agency" and "private employer" shall have the meaning given such terms in section seven hundred fifty of this article.

§ 13. Section 755 of the correction law, as added by chapter 931 of the laws of 1976, is renumbered 756 and amended to read as follows:

§ 756. Enforcement. [~~1. In relation to actions by public agencies, the provisions of this article shall be enforceable by a proceeding brought pursuant to article seventy-eight of the civil practice law and rules.~~

~~2. In relation to actions by private employers, the~~] The provisions of this article shall be enforceable by the division of human rights pursuant to the powers and procedures set forth in article fifteen of the executive law, and, concurrently, by the New York city commission on human rights.

§ 14. Subdivision 8 of section 170.55 of the criminal procedure law, as added by chapter 134 of the laws of 1982 and renumbered by chapter 683 of the laws of 1990, is amended to read as follows:

8. (a) The granting of an adjournment in contemplation of dismissal shall not be deemed to be a conviction or an admission of guilt. No person shall suffer any disability or forfeiture as a result of such an order. Upon the dismissal of the accusatory instrument pursuant to this section, the arrest and prosecution shall be deemed a nullity and the defendant shall be restored, in contemplation of law, to the status he occupied before his arrest and prosecution.

(b) For purposes of employment and licensing, the granting of an adjournment in contemplation of dismissal shall be considered a termination of the matter in the defendant's favor and no adverse employment action may be based on a case that has been adjourned in contemplation of dismissal.

§ 15. Section 170.56 of the criminal procedure law is amended by adding a new subdivision 5 to read as follows:

5. For purposes of employment and licensing, the granting of an adjournment in contemplation of dismissal shall be considered a termination of the matter in the defendant's favor and no adverse employment action may be based on a case that has been adjourned in contemplation of dismissal.

§ 16. Subdivision 16 of section 296 of the executive law, as amended by section 2 of subpart O of part II of chapter 55 of the laws of 2019, is amended to read as follows:

16. It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55, 170.56, 210.46, 210.47, or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.59 or 160.58 of the criminal procedure law, in connection with the licensing, housing, employment, including volunteer positions, or providing of credit or insurance to such individual**, or by the granting of an adjournment in contemplation of dismissal pursuant to article one hundred seventy of the criminal procedure law**; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by an order adjourning the criminal action in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law**, or by the granting of an adjournment in contemplation of dismissal pursuant to article one hundred seventy of the criminal procedure law**. An individual required or requested to provide information in violation of this subdivision may respond as if the arrest, criminal accusation, or disposition of such arrest or criminal accusation did not occur. The provisions of this subdivision shall not apply to the licensing activities of governmental bodies in relation to the regulation of guns, firearms and other deadly weapons or in relation to an application for employment as a police officer or peace officer as those terms are defined in subdivisions thirty-three and thirty-four of section 1.20 of the criminal procedure law; provided further that the provisions of this subdivision shall not apply to an application for employment or membership in any law enforcement agency with respect to any arrest or criminal accusation which was followed by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 or 160.59 of the criminal procedure law. For purposes of this subdivision, an action which has been adjourned in contemplation of dismissal, pursuant to section 170.55 or 170.56, 210.46, 210.47 or 215.10 of the criminal procedure law, shall not be

considered a pending action, unless the order to adjourn in contemplation of dismissal is revoked and the case is restored to the calendar for further prosecution**, or by the granting of an adjournment in contemplation of dismissal pursuant to article one hundred seventy of the criminal procedure law**.

(b) Any person subjected to an inquiry concerning any arrest or criminal accusation in violation of the provisions of this section shall be entitled to respond in the negative to such question if responding otherwise would require disclosures relating to a case that has been sealed or otherwise terminated in favor of the person, and such negative response, even if technically false, may not be used as a basis for adverse employment action.

§ 17. Subdivision 7 of section 390-e of the social services law, as added by chapter 459 of the laws of 2006, is amended to read as follows:

7. Upon the request of any person [~~previously~~] **charged with or** convicted of one or more criminal offenses who has been denied employment pursuant to subdivision six of this section, the mentoring program shall provide, within thirty days of such request, a written statement setting forth the reasons for such denial. Any such person denied employment pursuant to subdivision six of this section shall be afforded the opportunities for enforcement available pursuant to section seven hundred [~~fifty-five~~] **fifty-six** of the correction law.

§ 18. This act shall take effect on the ninetieth day after it shall have become a law; provided, however, that if local law number 4 of the city of New York for the year 2021 shall not have taken effect by such date, the amendments to subdivisions 10, 11 and 11-a of section 8-107 of the administrative code of the city of New York made by sections two and three of this act shall take effect on the same date and in the same manner as local law number 4 of the city of New York for the year 2021 takes effect. Effective immediately the addition, amendment and/or repeal of any rule or regulation necessary for the implementation of this act on its effective date are authorized to be made and completed on or before such date.