Legislation Details (With Text)

File #:	Int 1314-2018 **Version:** A	**Name:**	Prohibiting discrimination based on one's arrest record, pending criminal accusations or criminal convictions.
Type:	Introduction	**Status:**	Enacted
		In control:	Committee on Civil and Human Rights
On agenda:	12/20/2018		
Enactment date:	1/10/2021	**Enactment #:**	2021/004

Title: A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one's arrest record, pending criminal accusations or criminal convictions

Sponsors: Public Advocate Jumaane Williams, Adrienne E. Adams, Brad S. Lander, Daniel Dromm, Helen K. Rosenthal, Ben Kallos, Carlos Menchaca, Antonio Reynoso, Diana I. Ayala, James G. Van Bramer, Carlina Rivera, (by request of the Mayor)

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Date	Ver.	Action By	Action	Result
12/20/2018	*	City Council	Introduced by Council	
12/20/2018	*	City Council	Referred to Comm by Council	
1/22/2020	*	Committee on Civil and Human Rights	Hearing Held by Committee	
1/22/2020	*	Committee on Civil and Human Rights	Amendment Proposed by Comm	
1/22/2020	*	Committee on Civil and Human Rights	Laid Over by Committee	
12/10/2020	*	Committee on Civil and Human Rights	Hearing Held by Committee	
12/10/2020	*	Committee on Civil and Human Rights	Amendment Proposed by Comm	
12/10/2020	*	Committee on Civil and Human Rights	Amended by Committee	
12/10/2020	A	Committee on Civil and Human Rights	Approved by Committee	Pass
12/10/2020	A	City Council	Approved by Council	Pass
12/10/2020	A	City Council	Sent to Mayor by Council	
1/10/2021	A	Administration	City Charter Rule Adopted	
1/11/2021	A	City Council	Returned Unsigned by Mayor	

Int. No. 1314-A

By the Public Advocate (Mr. Williams) and Council Members Adams, Lander, Dromm, Rosenthal, Kallos, Menchaca, Reynoso, Ayala, Van Bramer and Rivera (by request of the Mayor)

A Local Law to amend the administrative code of the city of New York, in relation to prohibiting discrimination based on one's arrest record, pending criminal accusations or criminal convictions

Be it enacted by the Council as follows:

Section 1. The definition of "employer" in section 8-102 of title 8 of the administrative code of the city of New York, as amended by local law number 172 for the year 2019, is amended, and new definitions of "conditional offer of employment," "public agency" and "relevant fair chance factors" are added to appear in alphabetical order, to read as follows:

Conditional offer of employment. The term "conditional offer of employment" means an offer of employment, promotion or transfer which may only be revoked based on one of the following:

1. The results of a criminal background check, conducted in accordance with the provisions of this chapter;

2. The results of a medical exam as permitted by the americans with disabilities act of 1990, as amended, 42 U.S.C. §12112; or

3. Other information the employer could not have reasonably known before making the conditional offer if the employer can show as an affirmative defense that, based on the information, it would not have made the offer regardless of the results of the criminal background check.

Employer. For purposes of subdivisions 1, 2, 3, 10, 11-a, and 22, subparagraph 1 of paragraph a of subdivision 21, paragraph e of subdivision 21 and subdivision 23 of section 8-107, the term "employer" does not include any employer that has fewer than four persons in the employ of such employer at all times during the period beginning twelve months before the start of an unlawful discriminatory practice and continuing through the end of such unlawful discriminatory practice, provided however, that in an action for unlawful discriminatory practice based on a claim of gender-based harassment pursuant to subdivision one of section 8-107, the term "employer" shall include any employer, including those with fewer than four persons in their

employ. For purposes of this definition, (i) natural persons working as independent contractors in furtherance of an employer's business enterprise shall be counted as persons in the employ of such employer and (ii) the employer's parent, spouse, domestic partner or child if employed by the employer are included as in the employ of such employer.

Public agency. The term "public agency" means the state or any local subdivision thereof, or any state or local department, agency, board or commission.

Relevant fair chance factors. The term "relevant fair chance factors" means:

(i) With respect to arrests or convictions preceding employment, other than arrests or criminal accusations pending at the time of application for employment, the factors set forth in section 753 of the correction law.

(ii) With respect to arrests or criminal accusations pending at the time of an application for employment and arrests or convictions that have occurred during employment:

(a) the policy of the city, as expressed in this chapter, to overcome stigma toward and unnecessary exclusion of persons with criminal justice involvement in the areas of licensure and employment;

(b) the specific duties and responsibilities necessarily related to the employment held by the person;

(c) the bearing, if any, of the criminal offense or offenses for which the applicant or employee was convicted, or that are alleged in the case of pending arrests or criminal accusations, on the applicant or employee's fitness or ability to perform one or more such duties or responsibilities;

(d) whether the person was 25 years of age or younger at the time of occurrence of the criminal offense or offenses for which the person was convicted, or that are alleged in the case of pending arrests or criminal accusations;

(e) the seriousness of such offense or offenses; and

(f) 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; and

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(g) any additional information produced by the applicant or employee, or produced on their behalf, in regards to their rehabilitation or good conduct, including history of positive performance and conduct on the job or in the community, or any other evidence of good conduct.

§ 2. Subparagraph (4) of paragraph (a) of subdivision 9 of section 8-107 of the administrative code of the city of New York, as amended by local law number 63 for the year 2018, is amended to read as follows:

(4) For any person to make any inquiry in writing or otherwise about, or deny any license, registration or permit to any applicant for, or act adversely upon any holder of a license, registration or permit, by reason of such applicant or holder having been arrested or accused of committing a crime, when such inquiry, denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law.

§ 3. Subparagraph (5) of paragraph (a) of subdivision 9 of section 8-107 of the administrative code of the city of New York is REPEALED and a new subparagraph 5 is added to read as follows:

(5) Unless specifically required by law, for any person to make any inquiry in writing or otherwise about, or deny any license, registration or permit to any applicant, or act adversely upon any applicant for or holder of a license, registration or permit by reason of:

(i) such applicant or holder having a conviction for a violation as defined in section 10.00 of the penal law;

(ii) such applicant or holder having been convicted of a non-criminal offense, as defined by a law of another state; or

(iii) an arrest or criminal accusation which was followed by a conviction described in this subparagraph.

(iv) This subparagraph does not apply to any license, registration, or permit issued by the business integrity commission.

§ 4. Subdivision 10 of section 8-107 of the administrative code of the city of New York, as amended by local law number 63 for the year 2015, paragraphs (a) and (c) as amended by local law number 63 for the year 2018, is amended to read as follows:

10. [Criminal conviction; employment] 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 [a] finding the person [of a] lacks [of] "good moral character" [which is] based on 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] 23-A of the correction law.

(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), placing an employee on unpaid leave for a reasonable time while the employer takes the steps described in such paragraphs and subdivision 11-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.

([b]f) [For purposes of this subdivision, "employment" shall not include membership in any law enforcement agency.] 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 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 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 of section 296 of article 15 of the executive law and in subdivision 11 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) 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 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

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employment is imposed by law and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct.

([c]j) [Pursuant to section 755 of the correction law, the] The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against [private] other employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. [For purposes of this paragraph only, the terms "public agency" and "private employer" have the meaning given such terms in section 750 of the correction law.]

§ 5. Subdivision 11 of section 8-107 of the administrative code of the city of New York, as amended by local law number 63 for the year 2018, is amended to read as follows:

11. [Arrest record; employment] 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[: (a) Deny] 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 [of] against such applicant or employee when such inquiry, denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the executive law[; or].

(b) [Make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of an applicant or employee when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the executive law.] 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 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) 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 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 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 paragraph (b) shall be enforceable against public agencies by a proceeding brought pursuant to article 78 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 of this title.

§ 6. Subdivision 11-a of section 8-107 of the administrative code of the city of New York, as amended by local law number 63 for the year 2018, is amended to read as follows:

11-a. Arrest and conviction records preceding and during employment; employer inquiries and fair chance process. (a) In addition to the restrictions in [subdivision] subdivisions 10 and 11 of this section, it shall be an unlawful discriminatory practice for any employer, employment agency or agent thereof to:

(1) 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

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employment based on a person's arrest or criminal conviction;

(2) Because of any person's arrest or criminal conviction, represent that any employment or position is not available, when in fact it is available to such person; or

(3) Make any inquiry or statement related to the pending arrest or criminal accusation, or criminal conviction record of any person who is in the process of applying for a position [employment] with such employer or agent thereof until after such employer or agent thereof has extended a conditional offer of employment to the applicant. For purposes of this subdivision, with respect to an applicant for temporary employment at a temporary help firm as such term is defined by subdivision 5 of section 916 of article 31 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. For purposes of this subdivision, "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 "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.

(b) 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:

([i]1) Provides a written copy of the inquiry to the applicant in a manner to be determined by the commission;

(2) Requests from the applicant information relating to the relevant fair chance factors;

([ii]3) Performs an analysis [of the applicant under article 23-a of the correction law] as required by paragraphs (a) and (c) of subdivision 10 of this section;

(4) [and provides] Provides a written copy of such analysis to the applicant in a manner to be

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determined by the commission, 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

([iii]5) After giving the applicant the inquiry and analysis in writing [pursuant to subparagraphs (1) and (2) of this paragraph], allows the applicant a reasonable time to respond, which shall be no less than [three] five business days and during this time, holds the position open for the applicant.

(c) Before taking any adverse employment action against a current employee based on a criminal conviction, or pending arrest or criminal accusation, the employer, employment agency or agent thereof shall:

(1) Request from the employee information relating to the relevant fair chance factors;

(2) Perform an analysis as required by paragraphs (b) and (c) of subdivision 10 of this section;

(3) Provide a written copy of such analysis to the employee in a manner to be determined by the commission, 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 employee; and

(4) After giving the employee the inquiry and analysis in writing, allow the employee a reasonable time to respond before taking adverse action.

(d) Paragraph (c) of this subdivision shall not apply:

(1) If a public agency takes adverse action against an employee based upon a pending arrest or criminal accusation that preceded or arose during employment or a conviction that occurred during employment, where the employee is entitled to a disciplinary process as set forth in section 75 of the civil service law, or where the public agency follows a disciplinary process set forth in agency rules or as required by law; or

(2) If 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.

([c]e) Nothing in this subdivision shall prevent an employer, employment agency or agent thereof from

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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.

([d]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 [employment] position.

[(e) This subdivision shall not apply to any actions taken by an employer or agent thereof 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.]

(g) This subdivision shall not apply to any actions taken by an employer or agent thereof [with regard to an applicant for employment]:

(1) [As]With regard to an applicant for employment or a current employee employed as a police officer or peace officer, as those terms are defined in subdivisions 33 and 34 of section 1.20 of the criminal procedure law, respectively, or at a law enforcement agency as that term is used in article [23-a] 23-A of the correction law, including but not limited to the police department, the fire department, the department of correction, the department of investigation, the department of probation, the division of child protection and the division of youth and family [services] justice of the administration for children's services, the business integrity commission, and the district attorneys' offices; or

(2) With regard to an applicant for employment or a current employee employed in any position listed in the determinations of personnel published as a commissioner's calendar item and listed on the website of the department of citywide administrative services upon a determination by the commissioner of citywide administrative services that the position involves law enforcement, is susceptible to bribery or other corruption, or entails the provision of services to or safeguarding of persons who, because of age, disability,

infirmity or other condition, are vulnerable to abuse. If the [department] employer takes adverse action against any applicant or employee based on the [applicant's] person's arrest or criminal conviction record, it shall provide to the person a written copy, [of such analysis performed under article 23-a of the correction law to the applicant] in a form and manner to be determined by the department, of an analysis considering the relevant fair chance factors and concluding that either (i) there is a direct relationship between criminal history or alleged wrongdoing 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; or

(3) Pursuant to any federal, state or local law requiring criminal background checks for employment purposes or barring employment based on criminal history. For purposes of this paragraph federal law shall include rules or regulations promulgated by a self-regulatory organization as defined in section 3(a)(26) of the securities exchange act of 1934, as amended.

([g]h) The provisions of this subdivision shall be enforceable against public agencies by a proceeding brought pursuant to article 78 of the civil practice law and rules, and the provisions of this subdivision shall be enforceable against private employers by the commission through the administrative procedure provided for in this chapter or as provided in chapter 5 of this title. [For purposes of this paragraph only, the terms "public agency" and "private employer" shall have the meaning given such terms in section seven hundred fifty of the correction law.]

§ 7. The commission on human rights shall engage in outreach and education efforts regarding the rights of current and prospective employees, and the responsibilities of employers, established by this local law. Such outreach and education shall be directed at public and private employers, and the general public.

§ 8. This local law shall take effect 200 days after its enactment, provided, however, that the commissioner shall take any actions necessary prior to such effective date for the implementation of this local law including, but not limited to, the adoption of any necessary rules.

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