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March 17, 2016

Dana Sussman
Special Counsel to the Office of the Chairperson
New York City Commission on Human Rights
P.O. Box 2023
New York, NY 10272

Via E-mail: policy@cchr.nyc.gov

RE: Proposed Rules to Amend Title 47 of the Rules of the City of New York, Related to the Fair Chance Act

Thank you for the opportunity to submit comments on the Commission on Human Rights' proposed rules to implement the Fair Chance Act.

The National Employment Law Project (NELP) is a non-profit law and policy organization with more than 45 years of experience advocating for the employment and labor rights of the nation's workers. NELP fights for policies to create good jobs, expand access to work, and strengthen protections and support for low-wage workers and the unemployed.

One of NELP's key programs focuses on fair hiring policies that reduce barriers to employment for people with arrest and conviction records. NELP has worked closely with advocates and policymakers throughout the country, including New York City, to ensure that fair hiring policies contain the strongest protections possible for job-seekers, and that the laws are vigorously enforced.

NELP commends the Commission for its strong proposed rules to implement the robust Fair Chance Act, a model in many respects for other cities and states. Some of the most effective features of the Fair Chance Act and the proposed rules are:

- Delaying the inquiry into criminal history until the **conditional offer stage**. Doing so makes job application violations more straightforward to investigate. Waiting until the final hiring stage clarifies the rationale for an employer's adverse decision, which facilitates enforcement.
- Providing **clear guidance for employers** on what factors they may consider when evaluating a job applicant's criminal record, and how they must communicate an adverse employment action to an applicant. Doing so helps employers focus only on factors relevant to the job, and consider the applicant as an individual, not merely as someone with a record.
- Providing a **tiered penalty structure** that takes into account employer size and past violations of the law.
- Clarifying that **exemptions** to the Fair Chance Act are **narrow**, and that only federal, state and local laws that *require*, not laws that simply *authorize*, background checks

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are exempted. This distinction, as well as the **guidance for licensing agencies** in Section 8 of the proposed rules, should help open opportunities for jobseekers in fields where licensing or certification are required.

NELP's research has documented many of challenges that workers throughout the country face, including wage theft, employment discrimination due to a criminal record, and employer retaliation against vulnerable workers. We have consolidated our findings into a series of best practices recommendations to ensure strong enforcement of worker protection laws, in the context of fair hiring as well as other labor standards.¹

In addition to the strong elements included in the Fair Chance Act and the proposed rules, we suggest the following provisions be considered for incorporation into the final rules wherever possible.

- Define strong penalties that provide **incentives for complainants**, such as directing some portions of the penalty funds or damages to complainants, to encourage jobseekers to come forward. The proposed rules could specify what damages might be available to successful complainants, and under what circumstances. This is especially important because effective enforcement relies heavily on applicants and workers coming forward and filing complaints.
- Adopt additional remedies that apply specifically to **employers with City contracts**. For example, a remedy of rescission of City contracts with employers that continue to violate the Fair Chance Act would acknowledge the benefits that City contractors receive through their dealings with the City, and their obligations to follow City law.
- Clarify that the law applies to **independent contractors** as well as employees. The Fair Chance Act and proposed rules helpfully explain how the law applies to temporary help firms. The rules could also make clear in the definitions section that the Fair Chance Act applies to employers who hire independent contractors, not just employees.
- The **complaint process** should be accessible and transparent, and ensure **anonymity and protection from retaliation**. The proposed rules should clarify the complaint process from the point of view of a jobseeker who wishes to report violations of the Fair Chance Act. Specifically, the rules should outline the protections that jobseekers can expect if they decide to come forward, to protect their anonymity and to ensure that they do not experience retaliation for coming forward.

¹ See NELP publications “Best Practices in Fair-Chance Enforcement: Ensuring Work Opportunity for People with Convictions” (June 2015, <http://www.nelp.org/publication/best-practices-in-fair-chance-enforcement/>) and “The Top 5 Enforcement Tools for Local Minimum Wage Laws, (December 2015, <http://www.nelp.org/publication/the-top-5-enforcement-tools-for-local-minimum-wage-laws/>).

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- Make clear that the Commission will leverage **community resources and relationships**. The language of the Fair Chance Act calls for the Commission to engage in outreach and education efforts; an effective outreach and education strategy would include providing regular trainings for community-based leaders and service providers on all the laws within the Commission’s purview using a “train the trainers” framework. Armed with this information, these trained individuals serve as a trusted source of information for jobseekers. Local community groups have deep local ties and skills in popular education that are critical to connecting with hard-to-reach jobseekers. In addition, these trainings facilitate connections between community-based organizations and agency staff, which promotes transparency and reciprocity.
- **Track complaints and document compliance**. The rules should describe the processes and procedures the Commission will implement to document the complaints received, including demographic information, the type of complaint, industry, and method and time spent to resolve the complaint. The Commission should identify opportunities to collect information on compliance through other enforcement activities. For example, if the Commission conducts any site visits or conducts surveys for other laws within the Commission’s purview, we recommend it take advantage of these opportunities to gauge compliance around the Fair Chance Act as well.
- Require that **employers retain** all documentation and forms related to their consideration of applicants with criminal records for a specified period of time. If, during the course of an investigation, an employer does not produce the documentation they are required to keep, there should be a presumption that the employer was in violation of the law unless it can prove otherwise. A requirement for employers to retain documentation would aid the Commission in enforcement, and provide an opportunity to survey compliance of employers. For example, the agency that enforces the San Francisco Fair Chance Ordinance conducts a yearly survey of employers to assess compliance, in combination with monitoring and compliance for other ordinances that the agency enforces.
- Lay out the requirements and frequency of the Commission making reports of its investigations and enforcement public. The Commission should produce an **annual compliance report, available to the public**, to allow policymakers, advocates and jobseekers to assess how the law is working and what adjustments may be helpful to strengthen effectiveness. Additionally, the Commission should adopt rules that create compliance work groups with community members to identify ongoing issues with the law, as both Seattle and San Francisco have done.



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Thank you for your consideration of our comments and for your commitment to protecting the rights and increasing employment opportunities for New Yorkers with records.

Sincerely,

Nayantara Mehta
Senior Staff Attorney