

LEGAL UPDATES

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Fair Chance Act: Restricting Timing of Criminal History Inquiries Begins to Take Effect

When Congress enacted the National Defense Authorization Act for Fiscal Year 2020 in December 2019, Congress included the Fair Chance to Compete for Jobs Act of 2019 (the Act). The Act, in relevant part, restricts federal contractors from requesting criminal history information from certain job applicants until after the applicant has received a conditional offer of employment. While the Act was enacted back in 2019, it applies only “to contracts awarded pursuant to solicitations issued after” December 20, 2021. As contractors are now starting to be awarded contracts subject to the Act, now is a good time for a reminder of the Act’s requirements.

Federal contractor hiring obligations under the Act

The purpose of the Act is to delay inquiries into the criminal history record information of certain job applicants until later in the hiring process to provide a better opportunity for job applicants with a criminal history to compete for a federal job.

The Act provides that a “contractor may not verbally or through written form request the disclosure of criminal history record information regarding an applicant for a position related to work under such contract before such contractor extends a conditional offer to the applicant.” The term “criminal history record information” refers to information about individuals collected by the criminal justice agencies regarding arrests, indictments, information or other criminal charges, dispositions, sentencing, correction and release.

Under the plain language of the statute, it currently does not appear that subcontractors are subject to these “ban the box” requirements, nor are there

any statutory requirements for prime contractors to monitor or enforce the hiring practices of their subcontractors.

Job positions exempted from the Act's restrictions

Exemptions from the Act's restrictions are provided for certain positions identified below. The positions exempted from the Act's prohibition on pre-employment criminal history inquiries are as follows:

Positions in which applicants are required by law to provide criminal history information prior to a conditional offer of employment;

Positions that require access to classified information, or involve sensitive law enforcement or national security duties; and

Any position identified in regulations issued by the Administrator of General Services or the DoD pursuant to the provisions of the Act, such as positions involving interaction with minors, access to sensitive information or managing financial transactions.

The Act also provides the GSA and the DoD with broad authority to exempt additional categories of positions from the requirements of the Act.

Penalties for violation of the Act

For a "first violation" of the Act, federal agencies are authorized to issue notices of violation, provide 30 days for contractors to appeal, and also provide written warnings to contractors describing the alleged violation and future penalties that could be imposed for subsequent violations.

For subsequent violations, federal agencies are required to provide the same notice and appeal rights, but also "depending on the severity of the infraction and the contractor's history of violations" take additional remedial action against the contractor, including but not limited to: "(A) providing written guidance to the contractor that the contractor's eligibility for contracts requires compliance with this section; '(B) requiring that the contractor respond within 30 days affirming that the contractor is taking steps to comply with this section; and '(C) suspending payment under the contract for which the applicant was being considered until the contractor demonstrates compliance with this section." Given the wording of the Act and the Act's direction to the Federal Acquisition Regulatory Council to develop regulations and FAR clauses (despite the plain language of the Act setting strict deadlines, no Notice of Proposed Rulemaking has been issued and there currently are no regulations in place), the foregoing "subsequent violation" language suggests that careful attention should be paid to these future regulations, because it is likely that the regulations will "fill in the gaps" left by Congress in the

Act and potentially set forth “responsibility” requirements as well as explain the full panoply of government contracts remedies available to federal agencies to remedy contractor noncompliance.

The Act does not create any private right of action for applicants or employees. Instead, the Act establishes an administrative complaint process for job applicants of federal contractors to report a violation of the Act.

The important takeaway is that the Act only applies to federal contracts awarded under solicitations issued after December 20, 2021. In other words, the Act should not apply to existing contracts, but only to new ones issued in 2022 and beyond.

What this means to you

To comply with the Act, federal contractors should take the following actions:

Advise and train all HR and other employees involved in the hiring process to refrain from requesting disclosure of criminal history information prior to a conditional offer of employment for job applicants who apply for a federal contract covered position;

Review and revise all hiring applications and other documents for compliance with the Act; and

Continue to monitor FAR regulations for further anticipated regulatory action on this topic.

Numerous states and localities also have enacted similar laws, known as “ban the box” laws, that restrict inquiries regarding criminal history information during the hiring process by private employers and government contractors. Federal contractors should be knowledgeable of state and local “ban the box” laws and ensure compliance with the state and local requirements applicable to their workplaces in addition to the requirements of the Act.

Contact us

If you have questions regarding your obligations under the new federal Fair Chance Act or state and local “ban the box” laws, contact Sonni Nolan, Michael Schrier, Tracey O’Brien or your Husch Blackwell attorney.