



UNITED STATES OFFICE OF PERSONNEL MANAGEMENT

Washington, DC 20415

The Director

Thursday, April 25, 2024

Memorandum for Heads of Executive Departments and Agencies

FROM: Kiran A. Ahuja, Director

Subject: Issuance of Regulations on the Fair Chance to Compete for Jobs Act of 2019: Guidance on Restrictions on Preemployment Criminal History Inquiries

On September 1, 2023, the U.S. Office of Personnel Management (OPM) issued its final regulations to implement the Fair Chance to Compete for Jobs Act of 2019 (Fair Chance Act) which are accessible at <https://federalregister.gov/d/2023-18242>. The regulations assist agencies in carrying out provisions of the Fair Chance Act found in chapter 92 of title 5, United States Code. The regulations govern when, during the hiring process, a hiring agency or a Federal contractor acting on their behalf, can request information typically collected during a background investigation from an applicant for Federal employment. In addition, the regulations provide a complaint process for applicants who believe they have been subjected to a violation of 5 U.S.C. 9202 and hold accountable employees found to have committed such a violation. To assist agencies with implementation of complaint procedures, adverse actions, and appeals for criminal history inquiries prior to conditional offer, OPM provided guidance which is accessible at <https://www.chcoc.gov/content/issuance-regulations-fair-chance-compete-jobs-act-2019>.

This memorandum provides guidance on the restrictions on preemployment criminal inquiries set forth in title 5, Code of Federal Regulations, parts 302, 317, 319, 330, 731, and 920 (5 CFR).

Background

On December 1, 2016, OPM issued a final regulation at 5 CFR, parts 330, "Recruitment, Selection, and Placement (General)," and 731, "Suitability," implementing a "Ban the Box" provision for positions covered by those parts. The provision prevented agencies, unless an exception was granted by OPM, from making inquiries into an applicant's criminal or credit history unless the hiring agency made a conditional offer of employment to the applicant. The Fair Chance Act contains the same prohibition with respect to criminal history, elaborating on the methods of inquiry not permitted and providing certain exceptions to the rule.

The Fair Chance Act applies to all appointments in the Executive Branch (i.e., appointments in the competitive service, the excepted service, and the Senior Executive Service). Therefore, to implement the Fair Chance to Compete for Jobs Act of 2019, OPM updated 5 CFR parts:

- 302, "Employment in the Excepted Service,"
- 317, "Employment in the Senior Executive Service,"
- 319, "Employment in Senior Level and Scientific and Professional Positions,"

- 330, “Recruitment, Selection, and Placement (General),” and
- 731, “Suitability.”

Additionally, OPM simultaneously created new parts within 5 CFR:

- 754, “Complaint Procedures, Adverse Actions, and Appeals for Criminal History Inquiries Prior to Conditional Offer,” and
- 920, “Timing of Criminal History Inquiries.”

The provisions on the timing of criminal history inquiries are in the new part 920, rather than repeated in parts 302, 317, 319, and 330. Additionally, some agencies may have positions that are exempt from part 302 but not exempt from provisions of the Fair Chance Act.

Guidance on Timing of Collection

Under the Fair Chance Act, the prohibition on collecting criminal history information prior to conditional job offer does not apply with respect to an applicant for appointment to a position that:

- Requires a hiring agency, by statutory authority, to make inquiries into an applicant’s criminal history prior to extending an offer of employment to the applicant;
- Requires a determination of eligibility for access to classified information;
- Has been designated as a sensitive position under the Position Designation System issued by OPM and the Office of the Director of National Intelligence;
- Is a dual-status military technician position in which an applicant or employee is subject to a determination of eligibility for acceptance or retention in the armed forces, in connection with concurrent military membership; or
- Is a Federal law enforcement officer position meeting the definition in section 115(c) of title 18, U.S. Code.

With the changes, agencies can no longer request job-related exceptions by OPM for positions that are not exempt from the requirements of the Fair Chance Act. However, exceptions previously granted by OPM pursuant to 5 CFR part 330 subpart M (i.e., the Ban the Box provisions) continue to be valid.

Methods of Collection

The limitations for collecting criminal history information include requests made in oral or written form. Agency employees, or contractors working on behalf of the agency, may not request criminal history information at the point of initial application, upon receipt of an application, or prior to, during, or after a job interview.

Agencies commonly collect the Optional Form (OF) 306, Declaration of Employment¹, from applicants. If using this form prior to the point of conditional offer, agencies must keep in mind that the questions related to criminal history contained in the “background information” section of that form may not be asked. This is true when the form, or other forms that contain questions on or intended to collect criminal history, is

¹ On August 31, 2023, the OF 306 was approved by the Office of Management and Budget for renewal with changes: <https://www.opm.gov/media/dxrbwvmb/declaration-for-federal-employment-optional-form-august-2023.pdf>

collected via shared service or other automated system. Agencies must ensure proper controls are in place within automated systems so as to prevent the untimely collection of criminal history information. For agencies that use shared services, such as USA Staffing, they must ensure they are applying proper protocol within the system, to avoid the OF 306 being made available for completion by an applicant before a conditional offer of employment is made. Questions on system settings in USA Staffing may be directed to: usastaffing@opm.gov.

Notification Requirements

As required by 5 CFR 920.201(c), agencies are required to publicize to applicants the prohibition against an employee of an agency requesting, in oral or written form, criminal history information prior to a conditional job offer. The notification must be publicized in job opportunity announcements, including on agency websites/portals for positions that do not require posting on USAJOBS, such as excepted service positions. This notification must also direct readers to where the agency has posted complaint intake procedures, as required by part 754 of this regulation. This could be accomplished, for example, by including links to the agency webpage where this information is addressed. Agencies may also consider providing a link to the notification in email distributions announcing job postings or job fairs. Agencies must begin posting by this notification by June 25, 2024, roughly 60 days from the issuance of this memo. If your agency has any questions about implementing these procedures, please contact Workforce Policy and Innovation at employ@opm.gov.

Best Practices for Agency Compliance

Agencies must establish and publish well-documented procedures for meeting this requirement and share them widely with human resources or security personnel in roles that may cause them to engage with applicants during the pre-offer stage. Agencies should educate their workforce and contractors about their responsibilities under the Act. This will help prevent employees from violating provisions of the Act, which would violate the applicant's rights and potentially subject the employee to a complaint, and, if founded, adverse action.

Agencies may also consider presenting conditional job offers to applicants, in writing, if the initial conditional offer was made verbally. This will help establish clear recordkeeping as to when an offer is made. Having communications and dates well documented is helpful in the event an applicant raises a claim about the timing of the collection of criminal history information.

Additional information is attached. Agency Chief Human Capital Officers and Human Resources Directors with questions should contact OPM using the following contact information: SuitEA@opm.gov or (202) 599-0090, with respect to 5 CFR part 731; employeeaccountability@opm.gov or (202) 606-2930, with respect to 5 CFR part 754; or Michael.Gilmore@opm.gov or (202) 936-3261, for all other parts. Employees should contact their agency human resources offices for assistance.

cc: Chief Human Capital Officers (CHCOs), Deputy CHCOs, and Human Resources Directors

Attachment:
Frequently Asked Questions

Attachment: Frequently Asked Questions

Q: If my agency has an approved exception for collecting criminal history information from applicants for a particular position, is there anything else we need to do?

- A. No. Exceptions previously granted by OPM remain valid for the position (title, series, and grade) for which they were approved. With the approved exception, agencies are permitted to collect criminal history from applicants for the position ahead of conditional offer, at the point specified in the agency's request, so long as the job-related need for which the request was made continues to exist.

Q: If my agency is hiring for a position that is exempt from the provisions of the Fair Chance Act (e.g., a law enforcement position as defined in 115(c) of title 18, U.S. Code), are we required to coordinate or communicate plans to OPM for collecting criminal history information from applicants during the hiring process?

- A. No. After the effective date of the rule (October 2, 2023), agencies are permitted by law to collect criminal history information from positions that are exempt from the Fair Chance Act, as outlined in 5 CFR 920.201(b)(1) & (2).

Q: What if an applicant provides information on criminal history voluntarily ahead of receiving a conditional job offer?

- A. For positions subject to the requirement of the Fair Chance Act, if an applicant provides criminal history information prior to conditional job offer, an agency should consider the intent of the Fair Chance Act which is to better ensure that applicants from all segments of society, including those with prior criminal histories, receive a fair opportunity to compete for Federal employment. This also supports the Administration's priority to advance comprehensive equity. Agency qualification or hiring decisions should not take into account an individual's criminal history, unless specifically authorized to collect the criminal history information prior to conditional job offer. After acceptance of a job offer, individuals are subject to personnel vetting, as prescribed in regulation and policy, and at that point, agencies may consider the impact, if any, past issues may have on the government's ability to trust the individual to protect people, property, information, and mission.

Q. Is the provision on the timing of collection of credit history information still in effect?

- A. Yes. Agencies are prohibited from making specific inquiries concerning an applicant's credit background in oral or written form unless the hiring agency has made a conditional offer of employment to the applicant. Agencies may request an exception to the provision for making credit inquiries in advance of a conditional offer in accordance with the provision in 5 CFR part 330, subpart M which provides agencies the ability to request an exception from this prohibition when necessary to make inquiries into an applicant's criminal and/or adverse credit history earlier in the hiring process. Guidance provided in the February 15, 2017, memorandum "Guidance on Requests for Exceptions to Timing of Suitability Inquiries Rule" at: <https://www.chcoc.gov/content/guidance-requests-exceptions-timing-suitability-inquiries-rule> remains in effect with respect to the collection of credit history.

Q: Why is it important for an agency to have well documented procedures aligned with Fair Chance Act and OPM requirements?

A. There are a number of reasons agencies should document and make available internal procedures related to the Fair Chance Act requirement. First, it ensures that employees understand how to properly perform their work functions which can avoid violations of the Fair Chance Act from occurring and protect employees from complaints that may lead to adverse action. Additionally, it protects the public when agency employees carry out their duties in alignment with legal and Executive requirements. Furthermore, OPM delegates to agencies, authority for receiving and investigating complaints made by applicants of the agencies under the Fair Chance Act. In accordance with the delegation, agencies are required to follow performance standards established by OPM. Delegated functions are subject to oversight by OPM in accordance with 5 U.S.C. 1104(b) to ensure that activities are in accordance with merit system principles and performance standards. If during oversight, OPM determines an agency is not in compliance, the agency will be presented a finding for which it will be required to provide corrective actions. Failure to comply may result in a revocation of the delegation by OPM.

Q. Does my agency have to notify potential applicants of requirements around collection of criminal history, as established by the Fair Chance Act?

A. Yes. The Fair Chance Act regulations require notification to applicants on the prohibition of collecting criminal history information prior to conditional job offer and its complaint intake process. In accordance with 5 CFR 920.201(c), agencies must publicize to applicants the prohibition against requesting in oral or written form, criminal history record information regarding the applicant before a conditional offer of employment has been extended. This notification must also refer readers to the location for finding the publicized accessible program for the agency to receive a complaint, or any other information, from an applicant as is required by 5 CFR 754.102.