



**BROOKLYN  
DEFENDER  
SERVICES**

**TESTIMONY OF:**

**Keren Farkas, Esq. - Supervising Attorney**  
***BROOKLYN DEFENDER SERVICES***

**Presented before**

**The New York City Commission on Human Rights**  
**Public Hearing on Fair Chance Act Proposed Rules**

**March 21, 2016**

My name is Keren Farkas and I am a Supervising Attorney at Brooklyn Defender Services. BDS provides innovative, multi-disciplinary, and client-centered criminal, family, and immigration defense as well as civil legal services, social work support and advocacy for 45,000 clients in Brooklyn every year.

We thank the New York City Commission on Human Rights for the opportunity to testify about the proposed rules implementing the new requirements of the Fair Chance Act. At Brooklyn Defender Services, we believe the legislation is incredibly significant with tremendous potential to level the employment playing field for our clients. In the short time since its enactment, we have already seen its impact on employer hiring practices and the opportunity for our clients to be fairly considered for job opportunities.

As an illustration, I would like to highlight our client's recent path to employment as a train operator for the MTA New York City Transit:

Krystal was arrested for an alleged altercation between her and a neighbor in a NYCHA housing complex. She was charged with misdemeanor assault based on allegations that were exaggerated and a misrepresentation of what actually occurred. Krystal's assigned criminal

defense attorney was confident that the case would ultimately get dismissed but, due to typical court delays, it would likely take some time.

Several weeks after Krystal was arraigned on the charges, she was invited for an interview with the MTA for a train operator position. She was very excited about the opportunity, but also worried that the pending case would frustrate her chances for employment. However, because the MTA is following the new requirements created by the Fair Chance Act, Krystal was not asked about her arrest or conviction history during her initial interviews. Rather, she was only assessed based on her qualifications. She performed well and received a conditional offer letter. She was then invited for a second round assessment which, among other things, included a criminal history check. Fortunately, her BDS criminal defense attorney successfully resolved her case with immediate sealing prior to Krystal's second round interview. Krystal has now been working as a train operator for three weeks. But for the Fair Chance Act, she may have missed that opportunity.

We commend the NYC Commission on Human Rights for proposing rules to facilitate uniform and fair application of the Fair Chance Act. We have signed on to the written comments submitted by the Coalition of Reentry Advocates (CoRA) and share their recommendations for additional guidance and clarification to enhance understanding of the Act amongst employers, employees and advocates. We believe the rules will significantly inform compliance, but want to emphasize that regular and targeted trainings for employers and employees alike are a necessary piece to ensuring the Fair Chance Act reaches its potential.

For the remainder of this testimony, I would like to briefly draw attention to several areas of the proposed rules of particular interest to BDS' client population:

**(1) Application to Pending Cases** – We strongly support the clarity the rules bring to the breadth of the Fair Chance Act's application. The added definitions and consistent language throughout Section 2-04 elucidate that the Fair Chance Act protections extend to individuals facing pending charges. We believe this clarification will finally ensure that individuals who have not been found guilty of any crime, like Krystal, will receive fair consideration by employers before any inquiries into present or previous criminal cases. Notably, it will protect our clients who have unsealed Adjournments in Contemplation of Dismissals and, previously, had been excluded from Article 23-A protections and experienced unnecessary barriers to stable employment.

**(2) Including unsealed violations in the definition of "criminal history"** – Similarly, we share in CoRA's recommendation to include unsealed violations within the definition of "criminal history." Clients who have pled to non-criminal convictions with a sentence of Conditional Discharge may face confusion or resistance from employers. The explicit inclusion of "unsealed violations" in the definition of criminal history would ensure

those clients are also protected by the Fair Chance Act. Because these are non-criminal convictions, however, we ask that an educational note be included in the rules to ensure employers understand the distinction between violations and misdemeanors and felonies.

**(3) Application to Current Employees** – Another clarification provided in Section 2-04(5) we would like to highlight is the Act’s application to current employees when facing pending charges or convictions. In our office, we frequently hear from clients who have been suspended or terminated from their job due to an arrest or conviction. The employer’s decisions often seem mechanical, without regard to the particular charges, job duties, the client’s professional history or any consideration comparable to the Article 23-A analysis. As a result, we have sadly seen numerous clients lose employment and financial stability due to completely attenuated circumstances. Now, with the protections and transparent procedures clarified in the rules, particularly Section 2-04(5), these individuals will receive an Article 23-A analysis and be spared unwarranted loss of employment. Further, they will finally have an available recourse and remedy when employers take unjustified adverse action.

**(4) Clarification regarding FCA’s application to statutorily mandated background checks** – A significant portion of our employed clients work in positions and have licenses where state, federal or local law require criminal background checks and dictate disqualifying convictions. While FCA clearly exempts those employers from following FCA when it directly conflicts with such laws, there are many circumstances that do not directly conflict, and the employers should be held to the Fair Chance Process. For instance, we recently had a client who was suspended from his position as a building service aide at a nursing home upon being arrested for Driving While Intoxicated. We believe the language of the Fair Chance Act did not exempt his employers from abiding by the Fair Chance Process when considering the new arrest, and he was entitled to an Article 23-A analysis before they took adverse action. We ask that the rules clarify the limitations of the exemption for these employers to ensure that individuals, like our client, receive the FCA protections when appropriate.

**(5) Fair Chance Process:** We appreciate the clarity provided around the “Fair Chance Process,” and also share CoRA’s recommendation for improvement. The standardized forms and required paper trail will ensure that applicants are privy to an employer’s decision-making process and can knowingly determine whether the employer engaged in an actionable discriminatory employment practice. We share CoRA’s recommendation that an employer should share responsibility to both obtain information to conduct a thorough Article 23-A analysis and address suspected RAP

sheet errors. While we are encouraged by the explicit requirements that employers provide applicants with reasonable time to address an employer's concerns, we are concerned that, in many cases, three days will be insufficient. Accordingly, we strongly share CoRA's recommendation that the timeframe be extended, especially when suspected rap sheet errors are the concern.

Thank you again for the opportunity to submit testimony today. I would be happy to answer any questions you may have.