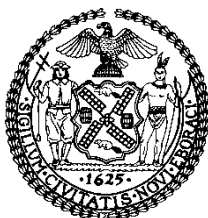


Committee on Civil Rights  
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## **THE COUNCIL**

### **REPORT OF THE GOVERNMENTAL AFFAIRS DIVISION**

Matthew Gewolb, Legislative Director  
Rachel Cordero, Deputy Director

### **COMMITTEE ON CIVIL RIGHTS**

Council Member Darlene Mealy, Chair

**June 9, 2015**

**INT. NO. 318-A:**

By Council Members Williams, Johnson, Torres, Miller, Gibson, Chin, Palma, the Public Advocate (Ms. James), Arroyo, Cornegy, Dromm, Koo, Levine, Reynoso, Richards, Espinal, Levin, Menchaca, Dickens, Barron, Rosenthal, Cumbo, Rose, Rodriguez, King, Koslowitz, Wills, Mendez, Kallos, Lander, Eugene, Cabrera Constantinides, Ferreras-Copeland, Maisel, (by request of the Manhattan Borough President)

**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 or criminal conviction.

## **I. Introduction**

On Tuesday, June 9, 2015, the Committee on Civil Rights, chaired by Council Member Darlene Mealy, will hold a hearing to vote on Proposed Introductory Bill Number 318-A (“Int. No. 318-A”), 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 or criminal conviction. The Committee held a hearing on Introductory Bill Number 318 on December 3, 2014 and heard testimony from the New York City Commission on Human Rights (“the commission”), advocates, the business community and other interested parties.

## **II. Background**

### *a. Seeking Employment after an Arrest or Conviction*

The barriers to employment for individuals with a criminal record present a myriad of public safety and equity concerns, which affect those who have been arrested or convicted of a crime, as well as their families and the general public. According to the National Employment Law Project, there are approximately 70 million adults residing in the United States who have been arrested or convicted of a crime.<sup>1</sup> In 2013, approximately 700,000 people were released from prison in the United States.<sup>2</sup> In New York State, more than 27,000 people are released from prison every year.<sup>3</sup> Upon being

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<sup>1</sup> “Ban the Box is a Fair Chance for Workers With Records,” National Employment Law Project, available at [http://nelp.3cdn.net/9950facb2d5ea29ece\\_jsm6i6jn8.pdf](http://nelp.3cdn.net/9950facb2d5ea29ece_jsm6i6jn8.pdf) (last visited December 1, 2014).

<sup>2</sup> “The Effect of Collateral Consequence Laws on State Rates of Returns to Prison,” Tracy WP Sohoni. Dissertation submitted to the Faculty of Graduate School of the University of Maryland, College Park, in partial fulfillment of requirements for the degree of Doctor of Philosophy, (2013, p. 1).

<sup>3</sup> “Once Locked Up, Now Locked Out of Jobs and College,” Community Service Society, available at <http://www.cssny.org/news/entry/once-locked-up-now-locked-out-of-jobs-and-college1> (last visited December 1, 2014).

released, these individuals face an enormous challenge in achieving a successful and productive reintegration into society. One of the most daunting barriers to reintegration faced by formerly incarcerated individuals is finding employment. The U.S. Equal Employment Opportunity Commission and Department of Labor estimate that one in three adults have an arrest history that may be revealed during a criminal background check done by a prospective employer.<sup>4</sup> Such criminal background checks can greatly impede gainful employment for a person who has been arrested or convicted of a crime—no matter the type of crime or when such arrest or conviction took place. Further, these background checks may occur during the early stages of the hiring process, sometimes before an in-person interview or before an employer has reviewed the applicant’s credentials.

Last year, the New York Times published an article highlighting issues formerly incarcerated individuals face in obtaining and maintaining employment.<sup>5</sup> The article contained personal stories of formerly incarcerated individuals such as Marilyn Scales, a 52 year old New York City resident who was convicted of selling drugs in the 1990s, a crime for which she was released from prison 17 years ago, but has made her “virtually unemployable.”<sup>6</sup> The stories in the article demonstrate the issues that many, if not all, arrestees and convicted individuals have with gaining meaningful employment that provide financial support and help reintegrate into their communities.

The issues regarding reintegration for those with criminal records have a disproportionate and overwhelmingly negative impact on communities of color. Studies

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<sup>4</sup> U.S. Department of Labor (2013).

<sup>5</sup> “Plan to Cut Costs and Crime: End Hurdle to Job After Prison,” The New York Times. Available at [http://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html?\\_r=1](http://www.nytimes.com/2014/10/24/us/a-plan-to-cut-costs-and-crime-curb-bias-against-ex-convicts.html?_r=1) (last visited December 2, 2014).

<sup>6</sup> *Id.*

and data consistently demonstrate that people of color, namely African Americans and Latinos, are more likely to be arrested, convicted, and sentenced.<sup>7</sup> African-American males are six times more likely to be incarcerated than white males and 2.5 times more likely than Hispanic males.<sup>8</sup> According to the Sentencing Project, “if current trends continue, one of every three black American males born today can expect to go to prison in his lifetime, as can one of every six Latino males- compared to one of every seventeen white males.”<sup>9</sup>

Studies have consistently shown that unemployment and recidivism are closely linked.<sup>10</sup> Arguably, it follows that meaningful employment leads to less offending and lower rates of re-offending, which in turn perpetuates a safer and more productive society. In order to create more equitable hiring practices and prevent recidivism by way of law making, a number of states and localities have enacted “Ban the Box” laws. “Ban the Box” laws typically remove the section on an application that inquires about an individual’s criminal history and prohibits such inquiries until later in the hiring process.<sup>11</sup> Other such laws limit the way in which employers may consider prior convictions in hiring practices.

*b. Applicable New York State Correction Law Article 23-A*

*1. Article 23-A*

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<sup>7</sup> “Report of The Sentencing Project to the United Nations Human Rights Committee Regarding Racial Disparities in the United States Criminal Justice System,” The Sentencing Project, (August 2013, p.3), available at [http://sentencingproject.org/doc/publications/rd\\_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf](http://sentencingproject.org/doc/publications/rd_ICCPR%20Race%20and%20Justice%20Shadow%20Report.pdf) (last visited December 1, 2014).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> “Executive Summary: Research Supporting Employment as an Important Component of Evidence-Based Practices,” U.S. Probation Office, Eastern District of Missouri, (January 20, 2009), available at <http://nicic.gov/library/028146> (last visited December 1, 2014).

<sup>11</sup> “Ban the Box: U.S. Cities, Counties, and States Adopt Fair Hiring Policies to Reduce Unfair Barriers to Employment of People with Criminal Records.” National Employment Law Project. (September 2014, p. 3).

Article 23-A of the New York State Correction Law (“article 23-a”) entitled “Licensure And Employment Of Persons Previously Convicted Of One Or More Criminal Offenses” is one of the many state laws across the Country that prohibits certain criminal background inquiries by employers as a way to enhance economic growth and increase public safety.<sup>12</sup> Article 23-a established standards for public agencies and private employers to use in appraising fitness of individuals with a criminal record for a particular job or license.”<sup>13</sup> Pursuant to article 23-a it is unlawful in the State of New York for any public or private employer to deny any license or employment application by reason of an individual having been previously convicted of one or more criminal offenses.<sup>14</sup> The policy concerns that fueled the passage of article 23-a involved the encouragement of licensure and employment of persons with prior criminal convictions and the promotion of reentry and rehabilitation of people with convictions.<sup>15</sup> Specifically, article 23-a section 753(a)(1)states: “The public policy of this state, as expressed in this act, [is] to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.”<sup>16</sup>

Article 23-a protects applicants for licenses and employment, as well as employees and licensees, from discrimination in the form of adverse action “by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of ‘good moral character’ when such finding is based upon the fact that the individual has previously been convicted of one or more criminal

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<sup>12</sup> N.Y.S. Correction Law §§ 750-755.

<sup>13</sup> *Acosta v. New York City Department of Educ.*, 16 N.Y.3d 309, 921 N.Y.S.2d 633 (2011); *see also Brown v. Berry*, 151 A.D.2d 882, 543 N.Y.S.2d 179 (3<sup>rd</sup> Dept. 1989).

<sup>14</sup> *Id.*

<sup>15</sup> N.Y.S. Correction Law § 753(a)(1).

<sup>16</sup> *Id.*

offenses.”<sup>17</sup> Article 23-a applies to both public agencies<sup>18</sup> and private employers<sup>19</sup> and allows rejection or termination of a license or employment only if: “(1) there is a direct relationship<sup>20</sup> between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or 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.”<sup>21</sup>

Pursuant to article 23-a, when making the determination of whether there is a direct relationship between the offense and license or employment, or an unreasonable risk to property, persons, or the general public, the employer or licensor must consider the following factors:

- “The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.
- The time that has elapsed since the occurrence of the criminal offense or offenses.
- The age of the person at the time of the occurrence of the criminal offense or offenses.

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<sup>17</sup> N.Y.S. Correction Law § 752.

<sup>18</sup> “Public agency” means the state or any local subdivision thereof, or any state or local department, agency, board or commission. N.Y. Correct. Law § 750(1).

<sup>19</sup> “Private employer” means any person, company, corporation, labor organization or association which employs ten or more persons.” N.Y. Correct. Law § 750(2).

<sup>20</sup> “Direct relationship” means that the nature of the criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question. N.Y. Correct. Law § 750(3).

<sup>21</sup> N.Y.S. Correction Law § 752.

- The seriousness of the offense or offenses.
- Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- 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.”<sup>22</sup>
- “In making a determination . . . the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.”<sup>23</sup>

Pursuant to article 23-a section 754, if a “person previously convicted of one or more criminal offenses who has been denied a license or employment [requests so], a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.”<sup>24</sup> Article 23-a does not apply to intentional misrepresentation in an employment application or where a mandatory forfeiture, disability or bar to employment is imposed by law.<sup>25</sup> Further, for purposes of article 23-a protections, “employment” does not include “membership in any law enforcement agency.”<sup>26</sup>

## *2. New York City Executive Order 151*

On August 4, 2011, Mayor Bloomberg issued Executive Order 151 in an effort to further the policy goal of providing individuals with criminal convictions better access to employment, which, according to the Mayor, reduces recidivism and helps reintegrate

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<sup>22</sup> N.Y.S. Correction Law §753(1).

<sup>23</sup> N.Y. S. Correction Law § 753(2).

<sup>24</sup> N.Y.S. Correction Law § 754.

<sup>25</sup> N.Y.S. Correction Law § 751.

<sup>26</sup> N.Y.S. Correction Law § 750(5).

such individuals back into their communities.<sup>27</sup> Executive Order 151 only applies to New York City Agencies and, therefore, the City is the only employer affected by the Order.<sup>28</sup>

Pursuant to Executive Order 151, agencies are prohibited from asking questions regarding an applicant's prior criminal convictions on any preliminary employment applications<sup>29</sup> or during an applicant's first interview.<sup>30</sup> However, agencies are able to make inquiries about and consider prior criminal convictions after the first interview.<sup>31</sup> An agency's inquiries and consideration must be limited to felony convictions, unsealed misdemeanor convictions, and pending charges.<sup>32</sup> The following exceptions apply to the inquiry and consideration rules of the Order:

- Agencies hiring for positions requiring licensure may ask applicants the same questions the licensing body would ask<sup>33</sup>;
- “Agencies hiring for positions where certain convictions or violations are a bar to employment in that position under the law, shall not be constrained from asking questions about those convictions or violations<sup>34</sup>.”
- “The New York City Police Department, the New York City Fire Department, the New York City Department of Correction, the New York City Department of Investigation, the New York City Department of Probation, and the Division of Youth and Family Services of the Administration for Children's Services may ask about any criminal records of applicants on pre-employment job applications and in initial interviews. Any other organization hiring officers or peace officers within the meaning of NYS CPL §§ 1.20 and 2.10 may” also do so<sup>35</sup>; and
- The application and initial interview requirements for the New York City Housing Authority, Department of Education, and New York City Health

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<sup>27</sup> N.Y.C. Office of Mayor, Executive Order 151: Consideration of Criminal Convictions in Hiring (August 4, 2011), available at [http://www.nyc.gov/html/om/pdf/eo/eo\\_151.pdf](http://www.nyc.gov/html/om/pdf/eo/eo_151.pdf) (last visited December 1, 2014).

<sup>28</sup> *Id.*

<sup>29</sup> The Comprehensive Personnel Document is excluded from §1 requirements. E.O. 151 §1.

<sup>30</sup> E.O. 151 § 1.

<sup>31</sup> E.O. 151, §2.

<sup>32</sup> E.O. 151, §3.

<sup>33</sup> E.O. 151, §4.

<sup>34</sup> E.O. 151, §5.

<sup>35</sup> E.O. 151 §8.



and Hospitals Corporation were contingent upon written concurrence of those entities.<sup>36</sup>

Executive Order 151 also required the Department of Citywide Administrative Services' Human Capital Division to undertake a two-year pilot program to review agencies' compliance with the Executive Order.<sup>37</sup>

### **III. Summary of Proposed Int. No. 318-A**

Proposed Int. No. 318-A, also known as “the Fair Chance Act,” would prohibit any employer<sup>38</sup> from inquiring about a job applicant’s criminal history until after the employer makes the applicant a conditional offer of employment.

Section two of Proposed Int. No. 318-A would amend subdivisions 9, 10 and 11 of section 8-107 of title eight of the Administrative Code and add new subdivisions 11-a and 11-b. The amendments to subdivisions 9, 10 and 11 would almost entirely be for purposes of restructuring section 8-107 or making the City’s Human Rights Law uniform with certain provisions of relevant State law.

The bill would add the term “registration” throughout subdivision nine, which pertains to unlawful discriminatory practices in licensing and permitting, wherever the terms “license” or “permit” are used. The bill would also amend subdivision nine to prohibit denying any license, registration or permit to any applicant, or acting adversely upon any holder of a license, registration or permit because he or she was convicted of one or more criminal offenses, or because he or she lacks good moral character based on one or more criminal convictions, when such denial or adverse action is in violation of

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<sup>36</sup> E.O. 151, §§ 4-5, 8, 12.

<sup>37</sup> E.O. 151, §11.

<sup>38</sup> The term “employers” refers to employers, employment agencies or agents thereof.

the provisions of article 23-a. Further, the bill would add subparagraph four to relettered paragraph a of subdivision nine, which would prohibit denying any license, registration or permit to any applicant, or acting adversely upon any holder of a license, registration or permit because he or she was arrested or accused of committing a crime when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law<sup>39</sup>. The bill would add subparagraph five to relettered paragraph a of subdivision nine, which would prohibit any person from making any inquiry, in writing or otherwise, regarding any arrest or criminal accusation of an applicant for any license, registration or permit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law.<sup>40</sup> Relettered paragraph c of subdivision nine would clarify that the provisions of subdivision nine do not apply to licensing activities in relation to the regulation of explosives, pistols, handguns, rifles, shotguns, or other firearms and deadly weapons.

The bill would amend subdivision 10 to clarify that employers are prohibited from denying employment to an applicant or taking adverse action against an employee

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<sup>39</sup> N.Y.S. Executive Law § 296(16): “It shall be an unlawful discriminatory practice, unless specifically required or permitted by statute, for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to make any inquiry about, whether in any form of application or otherwise, or to act upon adversely to the individual involved, any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law, in connection with the licensing, employment or providing of credit or insurance to such individual; provided, further, that no person shall be required to divulge information pertaining to any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual, as defined in subdivision two of section 160.50 of the criminal procedure law, or by a youthful offender adjudication, as defined in subdivision one of section 720.35 of the criminal procedure law, or by a conviction for a violation sealed pursuant to section 160.55 of the criminal procedure law, or by a conviction which is sealed pursuant to section 160.58 of the criminal procedure law.”

<sup>40</sup> *Id.*

by reason of such applicant or employee having been convicted of a crime if such denial or adverse action is in violation of article 23-a. In relation to current employees, article 23-a protections apply to convictions that preceded employment.<sup>41</sup> The bill would also clarify that for purposes of subdivision 10, “employment” would not include membership in any law enforcement agency.

The bill would amend subdivision 11 to clarify that employers may not deny employment to any applicant or act adversely upon any employee by reason of an arrest or criminal accusation of such applicant or employee when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law<sup>42</sup>. Subdivision 11 would be further amended to clarify that employers may not, in writing or otherwise, make any inquiry 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 New York State Executive Law<sup>43</sup>.

New subdivision 11-a would prohibit employers from making any inquiry<sup>44</sup> or statement<sup>45</sup> related to a pending arrest or criminal conviction record, for the purposes of obtaining information related to a job applicant’s criminal history, before extending the applicant a conditional offer of employment. The bill would also prohibit an employer from declaring, printing or circulating any employment information that expresses any

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<sup>41</sup> N.Y.S. Correction Law § 751: “The provisions of [article 23-a of the New York State Correction Law] shall apply to . . . any employment held by any person whose conviction of one or more criminal offenses in this state or any other jurisdiction preceded such employment.”

<sup>42</sup> N.Y.S. Executive Law § 296(16) *supra* note 39.

<sup>43</sup> *Id.*

<sup>44</sup> “Inquiry” would be defined as 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.

<sup>45</sup> “Any statement” would be defined as 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.

limitation or specification in employment based on a person's arrest or criminal conviction—this would include any materials used for purposes of advertising an open position. Such inquiries, statements, declarations, printing or circulation would be an unlawful discriminatory practice under the City's Human Rights Law.

After extending a conditional offer of employment, an employer would be permitted to make such inquiries or statements and commence a criminal background check. If the employer were to take any adverse action based on the applicant's criminal history, the employer would first be required to: (i) provide a written copy of the inquiry to the applicant in a manner to be determined by the commission; (ii) perform an analysis pursuant to article 23-a; and (iii) in a manner to be determined by the commission, provide a written copy of the analysis, which would include but not be limited to supporting documents that formed the basis for the adverse action and the employer's reason for taking adverse action. Supporting documents would include court records or other sources of criminal history information as determined by the commission. After providing the applicant with a written copy of the inquiry and analysis, the employer would be required to hold the position open for no less than three business days to allow the applicant to respond. Of note, an earlier version of Proposed Int. No. 318-A would have required the position to be held open for seven days, but the business community expressed concern that seven days would place an undue burden on employers seeking to expeditiously fill open positions.

For purposes of extending a conditional offer of employment as it relates to temporary help firms, an offer to be placed in the firm's applicant pool would constitute a conditional offer of employment. This specification is intended to address the unique

nature of temporary help firms, commonly referred to as “temp agencies,” which add employees to a roster from which they make selections as necessary for various types of employment.

Further, the bill would permit applicants to refuse to respond to an inquiry or statement that violates the provisions of the law and would prohibit disqualification of an applicant from prospective employment based on such refusal.

An employer would not be prohibited from taking adverse action against an employee or applicant for reasons other than the employee or applicant’s arrest or criminal conviction record. Additionally, no employer would be required to hire any person despite their criminal history. Notably, an earlier version of Proposed Int. No. 318-A would have prohibited an employer from considering any convictions for a felony committed more than ten years ago or for a misdemeanor committed more than five years ago. This provision was removed to maintain the employer’s right to do a complete article 23-a analysis in determining whether or not to hire someone with a criminal record.

The provisions of the new subdivision 11-a would not apply to any actions taken by an employer that were done pursuant to any federal, State, or local law that requires criminal background checks for employment, or bars employment based on criminal history. This would include rules and regulations of self-regulatory organizations as defined in the Securities Exchange Act of 1934, as amended. Further, the new subdivision would not apply to hiring procedures with regard to the following types of employment:

- Police and peace officers, as defined in the New York State Criminal Procedure Law;
- Law enforcement agencies, including, but not limited to, the New York City Police and Fire Departments, the Departments of Correction, Investigation and Probation, the Division of Youth and Family Services, the Business Integrity Commission, and the City’s District Attorneys’ offices; and
- Positions, as determined by the Commissioner of Citywide Administrative Services, that involve law enforcement, are susceptible to bribery or other corruption, or entail the provision of services to or safeguarding of people who, because of age, disability, infirmity or other conditions, are vulnerable to abuse.<sup>46</sup>

The bill would add new subdivision 11-b, which would include language related to the consideration of criminal history for purposes of issuing credit—language that the bill would remove from subdivision 11 of section 8-107 of title eight of the Administrative Code and contains updates in order to reflect protections under State law. New subdivision 11-b would require that for purposes of issuing credit, it would be an unlawful discriminatory practice, unless specifically required or permitted by any other law, to: (i) deny or act adversely upon any person seeking credit by reason of an arrest or criminal accusation of such person when such denial or adverse action is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law<sup>47</sup>; or (ii)

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<sup>46</sup> If the Department of Citywide Administrative Services takes adverse action against an applicant based on the applicant’s arrest or criminal conviction record, it must provide a written copy of its analysis under article 23-A in a manner to be determined by the Department of Citywide Administrative Services.

<sup>47</sup> N.Y.S. Executive Law § 296(16) *supra* note 39.

make any inquiry in writing or otherwise, regarding any arrest or criminal accusation of a person seeking credit when such inquiry is in violation of subdivision 16 of section 296 of article 15 of the New York State Executive Law<sup>48</sup>.

Section one of Proposed Int. No. 318-A would amend subdivision five of section 8-102 of title eight of the Administrative Code for purposes of defining “employer” as an employer with four or more employees where the term employer is used in new subdivision 11-a. Therefore, only employers with four or more employees would be subject to the provisions of the new subdivision 11-a.

Finally, section three of the bill would require the commission to do outreach and education targeted at the business community and the general public related to the rights and responsibilities established by the bill.

The bill would take effect one hundred and twenty days after its enactment into law.

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<sup>48</sup> *Id.*