

## **GOVERNOR CALVO SIGNS FAIR CHANCES HIRING PROCESS ACT AND AMENDMENTS TO THE GUAM FAMILY AND MEDICAL LEAVE ACT**

**STAY TUNED** . . . The Guam SHRM Chapter plans to discuss hiring practices and the Guam Family and Medical Leave Act (“Guam FMLA”) at the November 2017 Breakfast Briefing.

For now, please see the following information provided by Dana A. Gutierrez, Esq., SHRM Vice President of Legislative Affairs and *Of Counsel* at Calvo Fisher & Jacob LLP, on the Fair Chances Hiring Process Act (the “FCHPA”) and the Guam FMLA.

### **THE FAIR CHANCES HIRING PROCESS ACT, PUBLIC LAW 34-22**

More than a year after it was initially introduced, the FCHPA was signed into law on July 13, 2017 as Public Law 34-22. The FCHPA delays a Guam employer’s ability to ask about an applicant’s criminal history until later in the hiring screening process. The delay is intended to prevent employers from relying on an applicant’s criminal history as grounds for disqualification at the initial hiring stage. Therefore, the FCHPA does not prevent an employer from considering criminal history information completely as such information may still be relevant to determine an applicant’s qualifications to perform the duties of the position.

A copy of the FCHPA can be found on the Guam Legislature’s website at [http://www.guamlegislature.com/Public\\_Laws\\_34th/P.L.%20No.%2034-22.pdf](http://www.guamlegislature.com/Public_Laws_34th/P.L.%20No.%2034-22.pdf).

As the FCHPA is not effective immediately, an employer has time to review its current hiring practices to ensure that the practices are in line with provisions of the FCHPA.

#### **When does the FCHPA become effective?**

The FCHPA is effective “two hundred ten (210) days after enactment,” or on February 8, 2018. See 22 G.C.A. § 6108.

#### **Who is an applicant under the FCHPA?**

An applicant is any person considered for, or who requests to be considered for, employment or for another employment position with the employer. 22 G.C.A. § 6101(a).

#### **Who is an employer under the FCHPA?**

An employer is any person company, corporation, general contractor, firm, labor organization, or association, including the Government of Guam, that employs more than fifteen (15) employees. 22 G.C.A. § 6101(e).

**Can I still request information about an applicant's criminal history?**

Yes, but you cannot request that an applicant provide a police clearance or court clearance as part of the application for employment. 22 G.C.A. § 6102(a).

**When can I inquire into an applicant's criminal history?**

An employer may only inquire into an applicant's criminal history or require the disclosure of an applicant's criminal history or pending cases after or upon making a conditional offer of employment. 22 G.C.A. § 6102(d).

**What type of information can I obtain about an applicant's criminal history?**

An employer may inquire into any conviction, plea of nolo contendere, or deferred adjudication arising from felony criminal accusations, or any misdemeanor criminal accusation, made under local or federal law, or a comparable law of a state of the United States. 22 G.C.A. § 6101(d). However, an employer shall not make any inquiry about, or require the disclosure of, an applicant's arrest record or criminal cases which resulted in dismissal, expungement, sealing, or did not result in a conviction. 22 G.C.A. § 6102(c). But this prohibition shall not apply into inquiry about pending criminal cases against the applicant in accordance with the FCHPA. 22 G.C.A. § 6102(d).

**Are there any exceptions to the prohibition against inquiring into an applicant's criminal history pre-offer?**

The prohibition against inquiring into an applicant's criminal history shall not apply in the following situations:

- (1) Where any federal or local law or regulation requires the consideration of an applicant's criminal history for the purpose of employment;
- (2) To any position designated by the employer as part of a federal or local government position or obligation that is designed to encourage the employment of those with criminal histories; or
- (3) To any position which requires that employee to work in close proximity of or provide programs, services, or direct care to minors.

22 G.C.A. § 6102(e).

**Under what circumstances can an employer withdraw the conditional offer to an applicant?**

After the extension of a conditional offer of employment, an employer may only withdraw the conditional offer to an applicant for a legitimate business reason. The employer's determination of a legitimate business reason must be reasonable in light of the following factors:

- (1) The specific duties and responsibilities necessarily related to the employment sought or held by the person;

- (2) The bearing, if any, that the open criminal case or criminal history will have on the applicant's fitness or ability to perform one or more such duties;
- (3) The time which has elapsed since the occurrence of the pending criminal case or criminal history;
- (4) The age of the person at the time of the pending criminal case or criminal history;
- (5) The frequency and severity of the pending criminal case or criminal history; and
- (6) Any information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct since the occurrence of the pending criminal case/history.

22 G.C.A. § 6102(f).

**Upon termination of a conditional offer on the basis of a pending criminal case or criminal history, what information may an applicant request?**

If an applicant's conditional offer is terminated or an adverse action is taken against an applicant on the basis of the pending criminal case or criminal history, the applicant may request that the employer provide the following within thirty (30) days:

- (1) A copy of any and all records procured by the employer, including criminal records; and
- (2) A written Statement of Denial which:
  - (a) Articulates a legitimate business reason for denial;
  - (b) Specifically demonstrates consideration of each of the factors set forth in the FCHPA; and
  - (c) Advises the applicant of his or her opportunity to file an administrative complaint with the Guam Department of Labor ("GDOL").

22 G.C.A. § 6102(g)(1) & (2). The above information constitutes an employer's written Statement of Denial.

**What happens if an employer fails to provide the applicant with the written Statement of Denial?**

The failure to provide the Statement of Denial upon request shall create a rebuttable presumption that no legitimate business reason exists for denying the applicant employment or taking an adverse action against an employee on the basis of a criminal history. 22 G.C.A. § 6102(g)(3).

**What remedies are available to an applicant who believes an employer has violated the FCHPA?**

A person claiming to be aggrieved may file an administrative complaint with the GDOL. 22 G.C.A. § 6103(a). Any administrative complaint must be made within ninety (90) days of notification of denial of employment by an employer. 22 G.C.A. § 6103(c). The remedies provided for in the FCHPA are exclusive and the person claiming to be aggrieved shall not have a private cause of action in any court. 22 G.C.A. § 6103(b).

The GDOL shall accept, investigate, and adjudicate complaints. 22 G.C.A. § 6104(a).

**Can the GDOL issue fines for violations of the FCHPA?**

The GDOL is authorized to issue fines for violations in accordance with the following monetary caps:

- (1) For employers that employ fifteen (15) to thirty (30) employees, a fine of up to, but not more than, one thousand dollars (\$1,000.00) per violation;
- (2) For employers that employ thirty-one (31) to ninety-nine (99) employees, a fine of up to, but not more than, two thousand dollars (\$2,000.00) per violation;
- (3) For employers that employ one hundred (100) or more employees, or for any government of Guam agency, a fine of up to, but not more than, four thousand dollars (\$4,000.00) per violation.

22 G.C.A. § 6104(b). The GDOL may refer any unpaid penalties to the Department of Revenue and Taxation, or other appropriate licensing entities, who shall require that all penalties be paid in full before renewing a business license. 22 G.C.A. § 6104(a)(3).

Additionally, in the event an employer is found to have more than one (1) violation, the GDOL shall post the name of the employer on the GDOL official website, which shall remain on the website for a period of seven (7) years. 22 G.C.A. § 6105.

**AMENDMENTS TO THE GUAM FMLA,  
PUBLIC LAW 34-40 AND PUBLIC LAW 34-41**

On June 30, 2016, Public Law 33-170, also known as the Guam Family and Medical Leave Act (the “Guam FMLA”), became law. Public Law 33-170 also enacted Leave for Child School-Related Purposes to Guam law.

A copy of Public Law 33-170 can be found on the Guam Legislature’s website at [http://www.guamlegislature.com/Public\\_Laws\\_33rd/P.L.%20No.%2033-170.pdf](http://www.guamlegislature.com/Public_Laws_33rd/P.L.%20No.%2033-170.pdf).

On August 7, 2017, Governor Calvo signed two bills into law, Public Law 34-40, which amended the Guam FMLA to include job-protected bereavement leave and Public Law 34-41, which clarified the employee threshold for coverage under the Guam FMLA. As there is no effective date in the public laws, the laws take effect upon passage, or on August 7, 2017.

A copy of Public Law 34-40 can be found on the Guam Legislature’s website at [http://www.guamlegislature.com/Public\\_Laws\\_34th/P.L.%20No.%2034-40.pdf](http://www.guamlegislature.com/Public_Laws_34th/P.L.%20No.%2034-40.pdf).

A copy of Public Law 34-41 can be found on the Guam Legislature’s website at [http://www.guamlegislature.com/Public\\_Laws\\_34th/P.L.%20No.%2034-41.pdf](http://www.guamlegislature.com/Public_Laws_34th/P.L.%20No.%2034-41.pdf).

**What is job-protected bereavement leave under the amended Guam FMLA?**

Public Law 34-40 provides for unpaid job-protected leave “for reason of the death of a family member of the employee.” 22 G.C.A. § 3603(c)(4).

**What bereavement leave is required under the amended Guam FMLA?**

An employee eligible to take Guam FMLA is entitled to a total of, not to exceed, fourteen (14) calendar days of family leave upon the death of a family member of the employee within any twelve (12) month period. 22 G.C.A. § 3610. The fourteen (14) calendar days are included in the total period of family leave authorized under the Guam FMLA, or twelve (12) weeks, in a twelve (12) month period.

Leave taken for purposes of bereavement leave must be completed within sixty (60) days of the date on which the eligible employee receives notice of the death of a family member. 22 G.C.A. § 3610.

**Who is a family member under the amended Guam FMLA?**

The amended Guam FMLA includes a new definition of family member. A family member is defined as:

- (1) The spouse of the employee;
- (2) The biological, adoptive or foster parent or child of the employee;
- (3) A person with whom the employee was or is in a relationship of *in loco parentis*;
- (4) A parent or child of the spouse of the an employee;
- (5) A sibling; or
- (6) A person within one degree of consanguinity or affinity.

22 G.C.A. § 3603(e).

**What documentation can an employer require from an employee to support a request for bereavement leave?**

An employer may require that a request for bereavement leave be supported by a death certificate or obituary. 22 G.C.A. §3611.

**Has the definition of employer changed under the amended Guam FMLA?**

Public Law 34-41 clarified the threshold number of employees required to trigger employer coverage under the Guam FMLA. Previously, Guam’s FMLA law contained a language that made it unclear if the employee threshold was twelve (12) or more employees, or twenty-five (25) or more employees. With the passage of Public Law 34-41, the threshold number of employees required for employers to be covered by the Guam FMLA was clarified to be twenty (20) or more employees.

Specifically, employer is defined as the government of Guam or:

[a]ny person (including any individual, association, partnership, corporation, company, entity, or organized group of persons acting directly or indirectly in the interest of an employer in relation to an employee) who directly employs twenty (20) or more persons to perform services for a wage or salary . . .

*See* 22 G.C.A. §3603(b)(1). Further, the Public Law clarifies that “it *shall not* be an unlawful employment practice for an employer to refuse to grant a request for family care and medical leave by an employee if the employer employs fewer than twenty (20) employees in Guam.” *See* 22 G.C.A. §3602(b).

**Are any other Guam laws affected by Public Law 34-41?**

Yes, Guam’s Leave for Child School-Related Purposes is affected. Because this law borrows its definition of employer from the Guam FMLA, the amendment to the Guam FMLA changes the employee threshold for Child School-Related leave. *See* 22 G.C.A. § 3702(a)(2). Therefore, the prior employee threshold of twenty-five (25) for employer coverage has been lowered to twenty (20) employees, in line with the amended Guam FMLA.