

New York Employers Face New Background Check Requirements

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A new law affecting New York State employers who use background checks for employment purposes goes into effect on February 1, 2009. The new law amends the New York State General Business Law and the New York State Labor Law and contains both a notice requirement and a posting requirement. Specifically, when an employer requests a consumer report about an employee/applicant that seeks information containing criminal conviction information, the employer must provide the employee/applicant with a copy of Article 23-A of the New York State Corrections Law ("Article 23-A"). Additionally, when a consumer reporting agency provides a consumer report containing criminal conviction information to an employer, the employer must provide a copy of Article 23-A to the subject of the consumer report. Finally, the law requires employers to post a copy of Article 23-A in a visually conspicuous manner in an accessible location at the workplace.

What is Article 23-A?

Generally, Article 23-A makes it unlawful for private employers that employ at least 10 employees to deny an applicant employment or to take an adverse action against an employee because of the applicant/employee's prior criminal conviction(s) or a finding that the applicant/employee does not have "good moral character" as a result of the his or her previous criminal conviction(s). There are only two exceptions to this general rule. First, employment may be denied if there is a direct relationship between one or more of the prior criminal offenses and the specific employment sought or held by the person. Second, employment may be denied if the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific persons or the general public.

Article 23-A lists a number of factors that an employer must consider in determining whether employment may be denied or adverse action may be taken based on an individual's past criminal conviction(s). These factors are:

- (a) The public policy of New York to encourage the employment of persons previously convicted of one or more criminal offenses;
- (b) The specific duties and responsibilities necessarily related to the employment sought;
- (c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
- (d) The time which has elapsed since the occurrence of the criminal offense or offenses;
- (e) The age of the person at the time of occurrence of the criminal offense or offenses;
- (f) The seriousness of the offense or offenses;
- (g) Any information produced by the person, or produced on his or her behalf, in regard to his or her rehabilitation and good conduct; and
- (h) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

Employer Protections Also Passed

In addition to the above law, and in order to further encourage employers not to discriminate against persons with criminal convictions, the New York State Human Rights Law has been amended. This amendment, in effect since September 4, 2008, provides that, so long as it is determined that the employer made a reasonable and good faith determination that, due to the factors outlined in Article 23-A, the applicant should have been hired, the employee's criminal record is inadmissible in any negligent hiring or retention case pertaining to the employee that may be brought against the employer.

Conclusion

Based on the requirements set forth above, New York employers should review their workplace postings, as well as their background check forms and procedures, and, as always, ensure that they conscientiously analyze the factors set forth in Article 23-A when making employment decisions.

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