

Client Alert: New Laws Govern Hiring/Retention of People with Criminal Convictions

New York employers have long struggled with complying with the state's public policy of encouraging employers to hire applicants with past convictions, and the threat of being sued for negligent hiring. A recently passed law will provide employers with some level of protection from such lawsuits if they make a good faith, reasonable determination to hire a person with a criminal record in accordance with Article 23-A, the state's current law governing previous convictions.

The new Human Rights law, effective September 2008, creates a rebuttable presumption in favor of excluding evidence of prior conviction(s) in a negligent hiring case where the employer considered the various factors set forth in Article 23-A of the Corrections Law and hired or retained the applicant/employee despite the conviction. The Corrections Law applies to employers with ten or more employees and sets forth the following factors employers should weigh:

- New York's public policy to encourage the employment of persons previously convicted of one or more criminal offenses;
- the specific duties and responsibilities related to the employment sought or held;
- the bearing the criminal offense(s) will have on the person's ability or fitness to perform the job;
- how much time has elapsed since the conviction(s);
- the age of the person at the time of the conviction;
- the seriousness of the conviction(s);
- information regarding the person's rehabilitation; and
- the employer's legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public.

Lawmakers point to the employment application as a disincentive to hire ex-offenders because most applications ask whether an applicant has been convicted of a crime. Although acknowledging that employers are "forced" to ask the question to protect against a negligent hiring claim, the purpose of the new law is to remove barriers to employment for those who have been previously convicted, while at the same time, limit the employer's legal exposure.

Another justification behind the law is the correlation between unemployment and recidivism. According to the Act's findings, 83% of individuals who violate the terms of their probation are unemployed at the time of the violation in New York.

Posting Requirement and New Background Check Obligations

Effective February 1, 2009, employers must post a copy of Article 23-A and any related regulations in a place "accessible" to employees and "in a visually conspicuous manner." If an applicant with a previous conviction is denied employment, then, upon request, the employer must provide a written statement setting forth the reasons for the denial within thirty days of the request.

Also effective February 1, 2009, if an employer performs a background check that involves an investigative consumer report, the employer must provide the applicant or employee with a copy of Article 23-A as part of the notice requirement prior to obtaining the report. If the employer uses a consumer reporting agency and the consumer report contains information concerning a criminal conviction, the employer must provide the applicant/employee with an additional copy of Article 23-A.

Employers should update their hiring checklists to ensure they are compliant with the recent changes in the law. It also is critical that employers weigh the above factors when hiring or retaining applicants/employees with criminal convictions to protect themselves from claims of unlawful hiring/retention, or from a negligent hiring suit should something happen as a result of the hiring/retention. Click [here](#) for a copy of the New York Correction law Article 23-A.

If you have any questions regarding this Client Alert, please contact **Kimberly Klein** at 212.554.7853 or at kklein@mosessinger.com.

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