

February 2, 2009

New York State Legislative Amendments Concerning Employer Background Checks

The New York State Legislature has enacted several pieces of legislation designed to encourage the employment of rehabilitated convicts.

Effective February 1, 2009, New York state employers who conduct background checks of their employees must now post a copy of the New York Correction Law Article 23-A ("Article 23-A") conspicuously, in a workplace location accessible to employees. N.Y. Lab. L. § 201-f. A copy of Article 23-A is attached for your convenience.

The Legislature has also amended the New York General Business Law requirement that employers who procure investigative consumer reports on employees or candidates for employment provide certain information to these employees or candidates. The General Business Law prohibits persons from obtaining investigative consumer reports unless they first provide the individual with notice of the procurement and receive an authorization from the individual to do so. The notice shall be in writing if a candidate for employment makes a written application, or may be oral or written absent a written application from the candidate. The notice shall inform the candidate or employee that: (1) an investigative report may be made on the employee; and (2)

upon written request, he or she will be informed whether the employer requested the report, the name and address of the reporting agency, and that he or she may contact the agency to inspect and obtain a copy of the report. Effective February 1, 2009, if such report was requested as part of an employment offer, the employer shall provide to the employee or candidate a copy of New York Correction Law Article 23-A in the notice. N.Y. Gen. Bus. L. § 380-c.

Article 23-A prohibits an employer from denying or acting adversely upon an applicant for a license or employment, or from renegeing such license or employment if already held, because the individual has been previously convicted of one or more criminal offenses or because the employer finds that the employee lacks "good moral character" because of the criminal convictions. The employer may, however, deny a license or employment to an applicant or renege those already held if: (1) there is a direct relationship between one or more criminal offenses and the specific license or employment sought or held by the individual; or (2) the issuance or continuation of the license or employment would constitute an unreasonable risk to property, safety, or welfare. Article 23-A covers any applicant or employee who has

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previously been convicted of one or more criminal offenses. A private employer means any person, company, corporation, labor organization, or association that employs ten or more persons.

In making these determinations, an employer must consider several factors, including:

- (1) New York's public policy encouraging licensure and employment of previously convicted persons;
- (2) The specific duties and responsibilities related to the license and employment sought or held by the individual;
- (3) The bearing, if any, the offense(s) will have on the applicant's or employee's fitness or ability to perform those duties and responsibilities;
- (4) The amount of time elapsed since the conviction;
- (5) The age of the person at the time of the offense(s);
- (6) The seriousness of the offense(s);
- (7) Any information produced by the individual regarding rehabilitation and good conduct; and
- (8) The legitimate interest of the agency or employer in protecting property, safety, and welfare.

N.Y. Correct. L. § 753. In addition, the employer shall consider a certificate of relief from disabilities and a certificate of good conduct issued to the applicant, if any. *Id.* Any person previously convicted and who has thereby been denied a license or employment may request a written statement setting forth the reasons for the denial. This statement shall be provided within thirty days of the request. N.Y. Correct. L. § 754.

The New York Human Rights Law provides that there is a rebuttable presumption favoring the exclusion from evidence a prior incarceration or conviction in a case alleging negligent hiring or retaining if the employer reviewed the criminal record and made a good faith determination to hire or retain the individual. N.Y. Exec. L. § 296.

If you have any questions or need further guidance to ensure your business complies with this new law, please contact [Tonianne Florentino](#) at (212-758-7782) or any other attorney at the Firm.

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