

## In This Issue:

December 2008

Beginning February 1, 2009, New York employers must add to their workplace postings and provide information to applicants and employees information regarding the state's law and regulations limiting how criminal convictions may be considered in employment decisions.

## NY Obligates Employers to Post and Disclose Laws Prohibiting Discrimination Based on Criminal Convictions

By David S. Warner and Anna Nesterova

It has long been a public policy of the State of New York to prohibit "unfair discrimination against persons previously convicted of one or more criminal offenses."<sup>1</sup> To help facilitate the reintegration of convicted criminals into the workforce, the state enacted laws requiring employers to review the person's background when making hiring decisions. The legislature recently concluded that employers are not sufficiently aware of these laws and instead frequently impose "blanket barriers to employment based solely on criminal conviction records."<sup>2</sup> To ensure the public is well informed about the laws governing discrimination in employment based on a criminal record, effective February 1, 2009, employers will be required to provide notice in the following three ways:

### Workplace Posting

New York and federal law already require employers to conspicuously post in their workplaces a host of different notices to employees. Employers must add to this list a copy of Article 23-A of the state Correction Law ("Article 23-A") and any regulations promulgated pursuant to it.<sup>3</sup> Article 23-A, which currently has no supporting regulations, sets forth the scope of New York's prohibition of discrimination relating to the employment of persons previously convicted of one or more criminal offenses.

#### Article 23-A

Article 23-A bars employers from taking an "adverse employment action" against any applicant based on a prior criminal conviction unless: (a) there is a "direct relationship" between one or more of the criminal convictions and the specific employment sought or held by the individual; or (b) granting or continuing employment would involve an "unreasonable risk" to property or to the safety or welfare of specific individuals or the general public.<sup>4</sup> In making this determination, employers must consider the following eight factors:

1. The state public policy encouraging the employment of persons previously convicted of one or more criminal offenses;
2. The specific duties and responsibilities necessarily related to the employment sought or held by the person;
3. The bearing, if any, the criminal offense(s) will have on the person's fitness or ability to perform one or more such duties or responsibilities;

4. The amount of time that elapsed since the criminal offense(s);
5. The age of the person at the time of the criminal offense(s);
6. The seriousness of the criminal offense(s);
7. Any information produced by the person, or on his/her behalf, in regard to rehabilitation and good conduct; and
8. The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

**Notice Upon Requesting an Investigative Consumer Report**

The second notice obligation will arise each time an employer requests an “investigative consumer report,” which is a report based in whole or in part on personal interviews, in connection with an offer of employment.<sup>5</sup> Presently, N.Y. General Business Law section 380-c(b) requires employers to notify prospective employees that a background check report may be sought and, upon request, advise whether it has been sought. If it has been sought, the employer must provide the name and address of the third party from whom the report was requested and advise that the report may be copied or inspected by contacting that third party. Starting February 1, 2009, the employer must also provide a copy of Article 23-A.

**Notice Upon Receiving a Report that Shows a Criminal Record**

In creating a third notice obligation, the legislature added a new subdivision (d) to N.Y. General Business Law § 380-g, which otherwise establishes certain requirements for background check providers when compiling data from public records. This new subdivision requires employers to provide the job applicant or employee with a printed or electronic copy of Article 23-A anytime the report it ordered from the background check provider contains any criminal conviction information.

**Employer Recommendations**

New York has multiple laws regulating the extent to which employers may inquire about, and use, criminal conviction information. Employers with operations in New York should be mindful of these laws and be aware that they have been amended over the last few years. In addition to complying with the new notice and disclosure requirements, employers should ensure that their forms, policies and procedures comply with Article 23-A and the related provisions of the State Human Rights Law.<sup>6</sup> As the State Division of Human Rights has recently expressed a heightened interest in enforcing these laws, and ensuring that employers follow the balancing process set forth in Article 23-A, the benefits to compliance are self-evident.

.....  
 David S. Warner is a Shareholder and Anna Nesterova is an Associate in Littler Mendelson’s New York office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Warner at dwarner@littler.com, or Ms. Nesterova at anesterova@littler.com.

<sup>1</sup> N.Y. Correction Law § 752.

<sup>2</sup> A10288 Memo to New York State Bill A10288A entitled, “An Act to amend the general business law and the labor law, in relation to the provision of criminal record conviction information in certain instances.”

<sup>3</sup> See soon-to-be-added N.Y. Labor Law § 201-f.

<sup>4</sup> This law currently applies only to applicants. Effective February 1, 2009, it will extend to employees, too.

<sup>5</sup> New York’s Fair Credit Reporting Act defines “investigative consumer report” as “a consumer report or portion thereof in which information on a consumer’s [or applicant’s] character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.” N.Y. Gen. Bus. Law § 380-a(d).

<sup>6</sup> The State Human Rights Law prohibits discrimination in violation of Article 23-A and bars employers from inquiring about, or considering, any arrest or criminal accusation that was resolved in the individual’s favor. See N.Y. Exec. Law § 296(15)-(16).