

An Employer's Guide to Compliance with New York Correction Law, Article 23-A



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INTRODUCTION

When I was approached about the idea of writing this guide, my initial reaction was to pass the opportunity on to someone else. But, then I thought about a very close friend I'll call Jamie. Early in her adult life Jamie experienced a personal tragedy that, right or wrong, turned into criminal charges and a felony conviction. After serving her prison sentence Jamie began the daunting task of rebuilding her personal and professional life.

When I met Jamie several years later, we became friends almost immediately. It was obvious that, beyond being intelligent and funny, she was a great mother and spouse, and extremely dedicated to everything she did...especially her job.

I found out about Jamie's conviction when an anonymous "concerned citizen" sent me a letter demanding that I use my influence to have Jamie removed from a volunteer position. I did contact Jamie immediately, not to demand an explanation and her resignation, but to express my support, which she continues to have today.

There are a couple of reasons I decided to write this guide. First, I want to provide every employer in New York State an opportunity to read, understand, and take seriously their rights and responsibilities under this important law. Secondly, I want to encourage employers to treat every applicant and employee with fairness and respect. And finally, I want to remind employers that there are thousands of people just like Jamie—great human beings—who only need a fair and equal chance to prove they are great employees too.

Frank A. Cania, M.S.Emp.L., SPHR

BIOGRAPHIES

Frank A. Cania, M.S.Emp.L., SPHR

Frank Cania is the president & CEO of CaniaHR, LLC, a Rochester, NY-based human resource consulting firm he founded in 2006, and CPE Workshops, a professional education and training company established in 2012. An HR professional for more than 15 years, Frank's professional passion and primary focus is helping business owners and managers navigate the complex waters of the human resource function, such as state and federal employment laws and regulations, compensation and overtime, disabilities, harassment, discrimination, retaliation, family and medical leave, and terminations.

In 2011 Mr. Cania graduated summa cum laude from the Shepard Broad Law Center at Nova Southeastern University with a Master's Degree in Employment Law, and has been certified by the HR Certification Institute as a Senior Professional in Human Resources (SPHR) since 2006.

Well-established as a subject matter expert, Frank is a frequent speaker on HR-related topics, and has presented at a number of workshops and conferences sponsored by local and national business organizations, as well as several chapters of the Society for Human Resource Management. In addition, he is often quoted in publications such as the *Rochester Business Journal*, contributed a case study to a recently-published HR textbook, and is completing a 35-hour web-based HR training series for an international e-Learning company.

A dedicated husband, and father of a son and daughter, Frank believes strongly in sharing his time and talents through active volunteer roles, including past treasurer and current president of the Genesee Valley Chapter of SHRM, board member of the NYS SHRM Council, and team captain for the SHRM National Legislative Advocacy Team. Frank also serves as a member of the executive compensation and human resource committees for the YMCA of Greater Rochester and is involved with the Fairport Raiders Cheerleading booster club.

Paul F. Keneally, Esq.

Paul Keneally is a partner with the Rochester, NY-based law firm Underberg & Kessler, LLP, and chairs the firm's Labor & Employment Practice Group. One of Paul's core areas is employment, where he provides astute and practical advice to clients in matters involving executive compensation; overtime; workplace violence; non-compete/non-solicit agreements; sexual harassment; race, sex, and age discrimination; family and medical leave; and disabilities.

A 1993 cum laude graduate of Fordham University School of Law, Paul was Associate Editor of the Fordham Law Review. In addition to receiving the Rochester Business Journal's "Forty Under 40" Award, he has been selected an Upstate New York Super Lawyer each year since 2007. He is also a member of the New York State and American Bar Associations.

Paul's community involvement includes serving as the legislative director for the Genesee Valley Chapter of SHRM, and serves on the Board of Directors of Wilson Commencement Park, Career Development Services, and the Tennis Club of Rochester, as well as coaching his four sons in youth sports.

BACKGROUND

According to the National Employment Law Project (“NELP”), “millions of Americans—one in four adults—have arrest or conviction records that often follow them throughout their lives.”¹ Worse, these records may be inaccurate or concern only minor offenses.²

Individuals with one or more criminal conviction are often disqualified by law from many jobs and occupations, particularly those involving children, the elderly, and the disabled. In addition, these individuals may be denied occupational licenses, such as those required to be an Emergency Medical Technician (“EMT”), a Notary Public, a Real Estate Agent, and even a tow truck operator. In some cases, individuals may be restricted from returning to the jobs they had before going to jail, or taking jobs they were trained to do while in prison. To put that into perspective, there are over 100 occupations in New York State requiring a license, registration, or certification by a state agency.³ Of those occupations, there are more than thirty from which individuals with one or more criminal convictions are either barred or may be rejected by the state licensing authorities.⁴ In some cases an eligible offender can receive a *Certificate of Relief from Disabilities* or a *Certificate of Good Conduct*.⁵ These documents may provide the offender with a “presumption of rehabilitation” and remove some of the legal barriers to occupational licensing automatically put in place because of a criminal conviction or specific offense. However, neither certificate guarantees the individual will be licensed.⁶

According to the National Employment Law Project (“NELP”), “millions of Americans—one in four adults—have arrest or conviction records that often follow them throughout their lives.” Worse, these records may be inaccurate or concern only minor offenses.

Some restrictions are appropriately related to the offense of which the job applicant has been convicted (i.e., an individual convicted of certain felony sex offenses may not be employed as a bus driver), while other restrictions make little or no sense (i.e. an individual convicted of embezzlement may not be hired as an Emergency Medical Technician).

In addition, a number of federal laws, many of which were put in place after September 11, 2001, restrict employment of individuals with criminal convictions.

¹ National Employment Law Project, http://www.nelp.org/site/issues/category/criminal_records_and_employment/

² *Id.*

³ New York State Occupational Licensing Survey, Legal Action Center of the City of New York, Inc. (2006).

⁴ *Id.*

⁵ Certificates of Relief From Disabilities and Certificates of Good Conduct – Licensure and Employment of Offenders, <http://dpca.state.ny.us/pdfs/certificatesofrelieffromforfeituresanddisabilitiesqanda.pdf>

⁶ *Id.*

However, regardless of the often confusing and sometimes nonsensical statutory barriers to employment for those with a criminal record, the most difficult barrier for these individuals may be the simple but generally unfounded reluctance of many employers to hire someone with a criminal past. Some common reasons employers give for their reluctance include:

- Concerns about liability and risk
- Fear of being sued for “negligent hiring” if another crime is committed by the person
- The burden of compliance with state and/or federal regulatory mandates⁷

Certainly there can be some complexities in hiring individuals with criminal conviction records, but the same can be said for hiring decisions in a number of other contexts as well. The reasons employers give for their reluctance in this situation can often be reduced down to three factors:

- Fear of the unknown
- A lack of understanding of the laws and regulations
- A lack of time and resources to overcome the first two factors

With all of these obstacles in place, and with a substantial number of private employers conducting criminal background checks on applicants for jobs at every level, the efforts of millions of potentially qualified workers to rebuild their lives may be cut short. In addition, employers are missing the opportunity to hire and employ some unquestionably qualified workers.

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PURPOSE OF THIS GUIDE

The purpose of this employers’ guide is to:

- Explain the New York State law regarding employment of people with one or more criminal convictions, Article 23-A of the New York Correction Law, as well as a brief review of related federal anti-discrimination laws
- Provide guidelines on what is necessary for compliance with Article 23-A in the workplace
- Define “negligent hiring” and show how a business can protect against claims of negligent hiring
- Confirm your understanding of information related to Article 23-A
- Answer a number of frequently asked questions regarding these topics

⁷ Legal Action Center, *Standards for Hiring People with Criminal Records*.
www.lac.org/toolkits/standards/standards.htm#employment

ARTICLE 23-A: LICENSURE AND EMPLOYMENT OF PERSONS PREVIOUSLY CONVICTED OF ONE OR MORE CRIMINAL OFFENSES

For most employers, compliance with the many legal and regulatory requirements placed on businesses is often dependent on two simple factors, (1) knowing the requirements exist, and (2) understanding how to comply with them. Article 23-A of the New York Correction Law⁸ (the “Law”), which establishes certain requirements regarding applicants and employees with criminal convictions, is no exception.

I. What Is a Criminal Conviction?

Before explaining the significance of Article 23-A and the impact on you as an employer, it is important for you to know the definition of the term “criminal conviction” as it applies to this discussion. A criminal conviction is a *guilty plea*, or a *court’s finding of guilt* for a **crime** or an offense.

- **Crimes include:**

- » *Felony* – An offense which is subject to a potential prison sentence of more than one year in state or federal prison. For sentencing purposes, felonies are divided into five categories or classes: A, B, C, D, and E felonies. Class A felonies are divided into two sub-categories: A-I and A-II felonies. Class A felonies are subject to longer potential jail sentences than Class B felonies, which are subject to longer potential jail sentences than Class C felonies, etc.⁹
- » *Misdemeanor* – A specific type of offense which is subject to a potential prison sentence of between 15 days and one year in a local jail. Misdemeanors fall into three categories; Class A misdemeanors are subject to a sentence of up to 12 months, Class B misdemeanors carry a sentence of up to three months and the sentences for Class U misdemeanors vary and are set as specified in the law or ordinance.¹⁰
- » Crimes do *not* include violation-level offenses such as disorderly conduct, youthful offender adjudications, or adjournments in contemplation of dismissal (ACDs).

Compliance is often dependent on two simple factors, (1) knowing the requirements exist, and (2) understanding how to comply with them.

II. What Is Article 23-A?

Article 23-A is a broadly constructed New York State law meant to promote employment opportunities for individuals with one or more criminal convictions. It seeks to provide a level playing field for individuals with criminal convictions who are looking for work, thereby reducing recidivism by increasing employment opportunities for individuals with criminal conviction records.

⁸ New York Correction Law (Article 23-A), §§ 750 – 755.

⁹ N.Y. Penal Law, § 70.00.

¹⁰ *Id.* § 70.15.

According to the basic terms of Article 23-A, an employer may not deny or terminate employment on the basis of prior criminal convictions, except under two (2) narrowly defined circumstances:

- 1) Where there's a direct relationship between some or all of the previous criminal offenses and the specific job or position the individual is seeking or holds; or
- 2) When hiring, or continuing to employ the individual would present an unreasonable risk to the employer's property, specific individuals, or the general public.¹¹

It is also important to note that a violation of Article 23-A is considered to be an unlawful discriminatory practice in violation of the New York State Human Rights Law ("HRL").¹² The HRL goes further to say that an employer cannot inquire about or consider arrests that did not lead to a conviction, sealed violation-level offenses, or youthful offender adjudications.¹³



It is important for employers to have a clear understanding of Article 23-A and the HRL in order to avoid asking unlawful questions regarding an applicant's past offenses, violations, or arrest records. Asking unlawful questions on your employment application, or during the interview process, may lead to charges of unlawful discrimination, or at the very least cause you to miss the opportunity to employ some highly qualified and dedicated individuals.

There are a few exceptions to the requirements of Article 23-A, which will be discussed in more detail later. Generally, if state or federal law excludes individuals with a record of criminal convictions, or those with convictions for specific offenses, from being employed in certain jobs, you may not disregard those prohibitions. In addition, you have the right to disqualify an applicant, or terminate a current employee, if he or she lies or misrepresents criminal conviction information on an employment application. If you do find a discrepancy between the conviction history provided on the employment application and the information obtained through a background check, it is good practice to ask the individual about the discrepancy. There may be an error in the background check results, or another valid explanation.

III. A Closer Look at Article 23-A and the New York State Human Rights Law (HRL)

Both Article 23-A and the HRL apply to all governmental employers (state and local governments, departments, agencies, boards, and commissions) and all private employers (individuals, companies, corporations, labor organizations, and associations) operating in New York State and employing ten (10) or more individuals.¹⁴

Together, these laws offer certain protections to job applicants convicted of one or more criminal offenses in New York State, or any other jurisdiction.¹⁵

¹¹ Article 23-A § 752.

¹² N.Y. Executive Law (HRL) §296(15). Violations of Art 23-A are also violations of the New York City Human Rights Law, N.Y. Admin Code §§8-107 *et seq.*,

¹³ *Id.*

¹⁴ Article 23-A, §§ 750 & 751.

¹⁵ *Id.*, § 751.

Similarly, these laws attempt to level the playing field for individuals with criminal convictions who are seeking a license, registration, or certificate required by the state in order to work in any of more than 100 occupations. Municipalities (e.g. New York City) may also have occupational licensing requirements that work to exclude people with a history of criminal convictions. Some common occupations requiring licensure include:

- Bus Driver
- Barber/Hairdresser
- Certified Nursing Assistant
- Certified Public Accountant
- Emergency Medical Technician
- Engineer
- Licensed Practical Nurse
- Registered Nurse
- Teacher

In situations where licensure is necessary for employment, the responsible state or municipal agency is required to follow the provisions of Article 23-A in the same manner as employers. It will benefit you, as an employer, to be aware of this information in order to assist applicants and employees who may need some type of licensure to work for you.

In order to apply Article 23-A to the workplace, it is necessary to look at the requirements of some other laws, including the New York Labor Law and New York General Business Law

APPLYING ARTICLE 23-A TO YOUR WORKPLACE

In order to apply Article 23-A to the workplace, it is necessary to look at the requirements of some other laws, including the New York Labor Law¹⁶ and New York General Business Law,¹⁷ which were amended to include specific Article 23-A requirements.

I. Notification and Disclosure Requirements

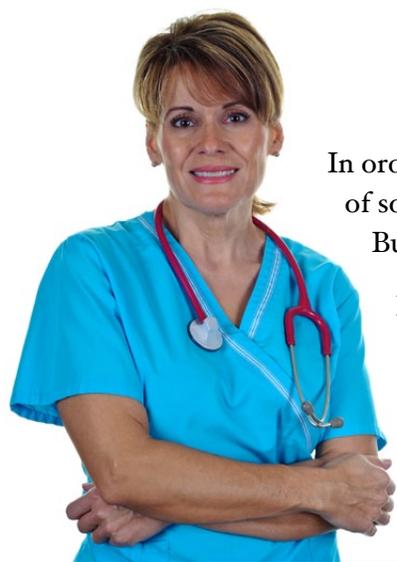
The first step in compliance is posting Article 23-A in your workplace. As an employer in New York, you are required to post a copy of the Law in one or more areas where your employees can see it and have easy access to it.¹⁸ Generally, posting can be done along with, or as part of the other state and federal required postings in your workplace.¹⁹

16 N.Y. Code – Labor, Article 7 General Provisions.

17 N.Y. Code – General Business, Article 25 Fair Credit Reporting Act.

18 N.Y. Labor Law § 201-f.

19 <http://www.labor.ny.gov/workerprotection/laborstandards/employer/posters.shtml>



Next, employers are required to provide a copy of Article 23-A to any applicant subject to a background check.²⁰ This requirement can be fulfilled at the beginning of the application process by attaching a copy of the Law to your employment application or as part of the background check consent and disclosure process. In either case, the applicant should be required to acknowledge in writing that he or she received a copy of Article 23-A.

Finally, applying Article 23-A to your workplace is a matter of understanding the Law's requirements, and knowing what you can and cannot ask and do as an employer when recruiting, interviewing, making hiring decisions, and employing individuals with a history of criminal convictions.

II. Finding Job Applicants

When you have a job opening in your company you may find applicants in a number of different ways. Advertising online or in the newspaper; using social media sites like LinkedIn, Facebook and/or Craig's List; asking employees, peers, friends, and neighbors for referrals; or just putting up a sign in the front window of the business are just a few of the ways employers find applicants. Now consider what is in your advertisements and what you say when you spread the word about an open position.

*Position available for an honest, hard-working individual with experience...
"ANYONE WITH A CRIMINAL BACKGROUND NEED NOT APPLY."*

Hopefully you do not feel this way, or at least are aware of the implications of putting such a message in an advertisement. Or, maybe you do not realize you are putting up barriers for qualified applicants with a criminal history to apply and be hired. Could you be sending coded messages to set up these barriers? While there is nothing illegal about using words and phrases like, "honest, trustworthy, good character, a history of making good decisions" you must be careful not to automatically eliminate individuals with criminal convictions. Doing so would likely violate Article 23-A.

Here are some DOs and DON'Ts to help you find qualified applicants without intentionally or unintentionally discriminating against someone with a criminal record:

DO:

- Search for applicants through a number of various sources
- Contact the New York State Jobs Bank at <http://www.jobcentral.com/ny/> to post job openings and search for qualified applicants
- Use job advertisements and postings that are factual and provide the job title, a description of the primary duties, any specific educational and/or experience requirements, and the expected work hours.



²⁰N.Y. General Business Law § 380-c.

DON'T:

- Set the job requirements artificially high, such as requiring a college degree for all positions in the company
- Use “code” words and phrases like, “honest, trustworthy, good character, a history of making good decisions” in your job advertisements without regard to the actual impact of Article 23-A
- Use statements which clearly eliminate anyone with a criminal record from consideration, such as, “anyone with a criminal background need not apply,” or “applicants with any record of misdemeanors or felonies will not be considered”

III. Your Employment Application

There is no single best employment application used by employers in New York. However, when it comes to asking for information regarding criminal offenses on your company’s employment application, the parameters are clear.

- Employment applications may only ask about the applicant’s criminal convictions. For example:
 - » Have you ever been convicted of a misdemeanor or felony that was not dismissed, expunged, or sealed?
- As mentioned above, it is *unlawful* to ask for information regarding arrests, sealed violation convictions, or youthful offender adjudications. The following examples are all illegal questions:
 - » Have you ever been arrested?²¹
 - » Did you ever plead guilty to any offense? or
 - » Have you ever been convicted of any offense?
- Questions regarding criminal convictions should be accompanied by disclaimers informing the applicant that a criminal conviction will not automatically eliminate him or her from consideration for the job. For example:
 - » Criminal convictions do not automatically make you ineligible for employment; or
 - » A criminal conviction will not necessarily result in disqualification for employment. Rather, such factors as any relationship to the job, your age at the time of the conviction, the length of time since the conviction, the seriousness and nature of the crime, and any rehabilitation will be considered.



²¹ Potential employees with a pending, unresolved arrest receive no protections under Article 23-A. However, this situation presents unique issues, so employers should consult an employment attorney.

IV. Applicant Screening and Interviewing

The applicant screening and interviewing process is where most violations of Article 23-A occur. Remember, this Law, coupled with the HRL, prohibits you from discriminating against an applicant based his or her criminal convictions record.²² That means automatically eliminating an applicant from consideration for a job based solely on his or her criminal record is generally unlawful. (While an applicant may be discriminated against in a number of ways during this process, our focus is on discrimination based on the applicant's criminal conviction status.) Article 23-A does provide some narrow exceptions, which will be discussed later in this section.

As an employer you want to hire the most qualified applicant for each job. In order to get the most information out of each interview it is important to have your interview questions prepared before you sit down with the applicants. Questions concerning criminal convictions may be included as long as they are appropriately worded and stay within the legal parameters of Article 23-A and the HRL.

The primary purpose of your questions in this area should be to make two important determinations. First, is there a *direct relationship* between the available job and one or more of the applicant's previous criminal offenses? Or, secondly, would employing the applicant cause an *unreasonable* risk to your property or the safety of others?²³

Article 23-A actually provides you with some guidance in structuring your questions, as well as setting criteria for the decision of whether to hire an applicant with one or more criminal convictions.

Factors to be considered

1. *What effect, if any, does the specific criminal offense(s) have on the applicant's ability to fulfill the primary duties and responsibilities of the job?* Employers should consider whether any part(s) of the job, or job responsibilities, are related to the circumstances that resulted in the conviction. For example, an individual convicted of credit card fraud may not be appropriate for a job as the lone overnight front desk attendant at a hotel. Does the offense make the applicant unsuitable for the job? If so, be sure to document and explain your conclusion(s) in specific, clear, and reasonable terms.
2. *How much time has passed since the applicant's criminal conviction(s)?* Some research suggests that someone with a criminal conviction, who remains conviction-free for a relatively short period of time (four to seven years or longer), is about as likely to be arrested as someone never convicted of a crime.

...automatically eliminating an applicant from consideration for a job based solely on his or her criminal record is generally unlawful.

²² Article 23-A, § 752.

²³ *Id.*

3. *What was the applicant's age when he or she was convicted?* Poor judgment is often a hallmark of youth. However, it's common for individuals who exhibited poor judgment when they were young to grow and mature into adults who are hard-working, trustworthy, law-abiding citizens and employees.
4. *How serious was the offense(s)?* The title of the criminal conviction is not the end of the story. Questioning the circumstances of an offense will often provide greater insight into the seriousness of the conviction. A reckless, inexperienced driver who causes a fatal accident is quite different than someone who, under the influence of illegal drugs, chooses to go on a joyride that ends in a fatal crash, even though both may receive a similar criminal conviction.
5. *What information may be available regarding the applicant's rehabilitation and good conduct since the conviction(s)?* Employers should ask for and consider all evidence that demonstrates the applicant's rehabilitation and dedication to a positive future. References from past employers and job counselors can provide insight into the applicant's knowledge, skills, and abilities as well as work habits and commitment to good work performance. Evidence of participation in counseling for issues that directly or indirectly led to the conviction, as well as educational certificates and diplomas may show the applicant has recognized past issues and is actively working to build a better future.
6. *What is the true degree of risk the applicant poses to your property and the safety of others?* Employers should make an honest effort to assess the risk the applicant poses to property and safety. Examples from the courts include:
 - A court found that an applicant's nine-year old manslaughter conviction was not directly related to the position of housing caretaker, and that based on this conviction the applicant did not pose a risk to property or public safety. However, when considered in light of the applicant's three-year-old convictions for criminal possession of a narcotic drug with intent to sell and criminal possession of a controlled substance, the court held that the applicant had demonstrated a lack of rehabilitation and that his involvement in drugs and violence posed an unacceptable risk to the housing tenants.²⁴
 - A woman with nine drug possession/prostitution convictions, and one manslaughter conviction, was held to be properly employed as an eligibility specialist with the Human Resources Administration. The drug possession/prostitution convictions were over ten years old and she had since completed a detoxification program and college courses. While the manslaughter conviction was more recent, she received the minimum sentence, was considered a model parolee, and had relevant prior work experience. The judge found that had the employer properly considered the factors under Article 23-A, he could not have reasonably concluded that she should be disqualified from employment.²⁵

Employers should ask for and consider all evidence that demonstrates the applicant's rehabilitation and dedication to a positive future.

²⁴ Soto-Lopez v. New York City Civil Service Commission, 1989

²⁵ City of New York v. City Civil Service Commission, 1988

Keep in mind that the public policy in New York State, and a primary reason the Legislature passed Article 23-A, is to strongly encourage employers to hire individuals previously convicted of one or more criminal offenses.²⁶ If you cannot show and validate specific reasons for not hiring an otherwise qualified individual with a criminal record, based on the criteria above, you may be unlawfully discriminating against that person.

V. Title VII of the Civil Rights Act of 1964, As Amended

In early 2012, the U.S. Equal Employment Opportunity Commission (EEOC) issued a guidance document²⁷ on the use of arrest and conviction records by employers in employment decisions. This document is designed to be a resource for a number of groups, including employers, applicants, and employees. It reinforces the Commission's longstanding three-factor test, known as the Green factors, established by that court in 1975.²⁸ Under Green, employers must consider:

1. The nature or gravity of the offense or conduct,
2. The time elapsed since the conviction and/or completion of the sentence, and
3. The nature of the job sought or held.

As you'll notice, the *Green* factors are included in Article 23-A so compliance with that Article of New York state law will usually ensure compliance under Title VII.

The EEOC also provided insight into how the Commission expects these factors to be applied. Although many of the points included in the EEOC guidance are part of complying with Article 23-A, they are worth mentioning again:

- **Application Questions** – While the EEOC didn't adopt a "ban the box"²⁹ position, it does recommend employers adopt as a "best practice" policy of not asking about convictions on the employment application, but instead waiting until later in the application process to obtain that information. The Commission also recommends that when employers do request information about criminal convictions, that they limit the practice to positions where criminal history may be relevant, and that the questions be limited to convictions that are related to job duties.
- **Arrest Records** – Employers cannot use an arrest record alone as a reason to deny employment. In New York, the HRL expressly prohibits employers from asking about or considering arrests that did not lead to a conviction. However, in states that allow questions regarding arrest records, employment decisions may be based on the conduct leading to the arrest. Therefore, the employer in these states may terminate an employee, or refuse to hire an applicant if the conduct leading to the arrest is relevant and makes the individual unfit for the position. For example, a drug counselor arrested for selling illegal drugs could be terminated if in fact his activities leading to the arrest did involve the sale of illegal drugs.

²⁶ Article 23-A, § 753.

²⁷ http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm *Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964*

²⁸ *Green v. Missouri Pacific Railroad Company*, 23 F.2d 1158, 1160 (11th Cir. 1975).

²⁹ "Ban the box" laws prohibit employers from including a "box" on the employment application asking if the applicant has ever been convicted of a crime.



- **Individualized Assessment** – Again, nothing new for New York State employers, the concept of “individualized assessment” is an update to the Commission’s guidance on criminal background checks. In order to meet the requirements for an “individualized assessment,” employers must inform an employee or applicant that he or she is being rejected because of a criminal record. Next, the applicant or employee must be given an opportunity to respond and explain any extenuating circumstances regarding the conviction. Then, the employer must take the explanation into consideration before making a final decision.³⁰
- **Compliance with Other Federal Law** – The EEOC is clear that an employer conducting criminal background checks in order to comply with another federal law or regulation (including those governing eligibility for an occupational license or registration, or a security clearance) will not violate Title VII. However, the Guidance also indicates that any action that exceeds the scope of a federal restriction will be closely scrutinized and, if found to be unjustified, may lead to liability under Title VII.
- **Compliance with State Law** – The EEOC is also clear that Title VII preempts state and local laws that are in conflict with it, to the extent that state and local laws would mandate any act “which would be an unlawful discriminatory practice under Title VII.” Neither Article 23-A nor the HRL require any act which would violate Title VII, so employers who comply with these New York State laws have nothing to fear from this provision.



VI. Negligent Hiring Concerns

One reason employers often give for refusing to hire individuals with a criminal conviction record is the fear that they will be sued for negligent hiring if the employee later commits a crime.

In New York State, it is exceedingly difficult to successfully pursue a negligent hiring case. The key to determining liability is usually whether the employer knew or should have known the employee had a history or propensity for harmful behavior and whether the employer could have foreseen the crime against the plaintiff in question. In general, an employer’s reasonable efforts in conducting background and reference checks and then taking the results into consideration as part of the hiring decision will generally satisfy the legal requirements and largely eliminate the employer’s risk of liability.

More specifically, if an employer takes the steps outlined for compliance with Article 23-A, documents these steps, and makes informed and reasonable hiring decisions based on the facts, there is a rebuttable presumption that the applicant’s criminal conviction will not be allowed as evidence of negligent hiring.³¹ For this reason, good documentation is a vital part of a strong defense. Employers should have a clear written policy regarding Article 23-A compliance, follow the policy without exception, and document the steps taken each time the policy is applied.

³⁰ In its Guidance, the EEOC asserts that employers who consistently use the Green factors and conduct “individualized assessments” can avoid liability under Title VII. However, because the Commission states that “Title VII does not require individualized assessment in all circumstances,” and it recommends the individual assessment as a “Best Practice,” it is unclear what circumstances would lead the Commission to expect that an individual assessment be used.

³¹ HRL §296(15)

SAMPLE SCENARIO ONE

Criminal Convictions: Driving While Intoxicated (DWI) – 23 months and 15 months ago; Assault & Battery – 15 months ago

Job Applied For: Firefighter

Job Responsibilities: Respond to emergency incidents; drive and operate apparatus and assists in the suppression of fires, conduct rescues, entry, ventilation, salvage and overhaul work and administers EMS care to patients; respond to rescue calls and administer proper emergency medical aid; respond to hazardous materials incidents and executes appropriate mitigation measures; assist with and conduct fire prevention inspections within fire districts as directed; conduct public safety programs; administer EMS skills to patients as prescribed by protocol; perform as a member of the Hazardous Materials Response Team and perform emergency activities in the mitigation of hazardous materials incidents.

Article 23-A Evaluation:

Facts in support of hiring:

- NYS public policy encourages the employment of individuals with prior criminal convictions.
- The applicant provided letters from a drug and alcohol counselor and psychologist confirming the successful completion of two treatment programs for alcohol and drug abuse and ongoing participation in an anger management program. The counselor and psychologist both encouraged the employer to hire the individual.

Facts that support denying employment:

- Multiple DWI convictions within eight months are very serious.
- The applicant also has a conviction for violent behavior, fifteen (15) months ago.
- The applicant was 29 at the time of the most recent conviction.
- The employer's mission and reason for existence are the protection of property and the safety of the general public.

Employment Denied – The fire department's overriding responsibility is to the protection of property and the safety of the general public. The applicant was 29 at the time of the most recent convictions for DWI and assault and battery. The unfavorable factors support the fire department's decision to deny employment to the individual.



SAMPLE SCENARIO TWO

Criminal Conviction: Possession with the Intent to Distribute Narcotics (five years ago)

Job Applied For: Accounts Receivable / Accounts Payable Clerk

Job Responsibilities: Apply daily cash receipts and investigate short payments; balance and verify daily credit card transaction amounts; customer invoicing; set customer credit limits by checking credit references and reviewing D&B reports; perform all collection calls on overdue accounts; prepare monthly sales commission reports; and prepare all month-end closing reports in a timely manner and submit to the Controller for review.

Article 23-A Evaluation:

Facts in support of hiring:

- NYS public policy encourages the employment of individuals with prior criminal convictions.
- The most recent conviction was five years ago, when the applicant was age 19.
- The individual successfully completed drug abuse counseling, earned a High School General Equivalency Diploma (GED), and earned an Associate's Degree (AAS) majoring in accounting and finance and graduated with a grade point average of 3.91 out of 4.00.
- The applicant provided letters of recommendation from a college professor and former employer strongly encouraging the employer to hire the applicant based on her good character and knowledge of accounting.
- The offense has no relationship with the applicant's ability to perform the essential functions of the job.

Facts that support denying employment:

- Possession of narcotics with the intent to sell the illegal drugs is a serious offense.
- The applicant will have access to the company's bank account information and the credit card numbers of customers (the employer's interest in protecting its own property and its customers' property).

Hire the Applicant – The decision to hire this applicant is supported by the amount of time that has passed since the conviction, successful completion of the GED and college coursework, and the strong recommendations of a former teacher and former employer. The favorable factors far outweigh any negative considerations.



SAMPLE SCENARIO THREE

Criminal Convictions: Second Degree Assault (five years ago); Third Degree Burglary (three years ago);

Job Applied For: Grounds Maintenance Technician

Job Responsibilities: Responsible for daily maintenance and upkeep of the property, buildings, and grounds; the care, maintenance, and inventory of all supplies and equipment; mowing lawns and trimming around all buildings, fences, sidewalks, gardens, and other areas; plowing snow in all parking areas, shoveling all walkways and spreading ice melter on all concrete and blacktop surfaces; spring and fall clean-up of all grounds; and planting and caring for all gardens.

Article 23-A Evaluation:

Facts in support of hiring:

- NYS public policy encourages the employment of individuals with prior criminal convictions.
- Three years have passed since the most recent conviction.
- The applicant successfully completed a jobs training program and an anger management program.
- The offense has no connection to the applicant's ability to perform the essential functions of the job.

Facts that support denying employment:

- The applicant has multiple convictions for violent behavior.
- The applicant was age 32 at the time of the most recent conviction.
- The employer has some legitimate interest in the safety and welfare of its tenants, as well as an interest protecting their property.

Hire the Applicant – The decision to hire this applicant is supported by the amount of time that has passed since the most recent conviction, the completion of a job training program and anger management program, and the fact that the offenses have no bearing on the applicant's ability to perform the essential functions of the job. The favorable factors outweigh the negative considerations.



TEST YOUR KNOWLEDGE OF ARTICLE 23-A AND THE HRL

Answer the following multiple choice and true/false questions to test your knowledge of the information related to Article 23-A and the HRL. (Answers are on page 20)

1. Individuals with one or more criminal convictions are banned by law from many jobs and occupations, particularly those involving:
 - (a) Planes, trains, and automobiles
 - (b) Children, the elderly, and the disabled
 - (c) Dogs, cats, and fish
 - (d) Lawn mowers, snow plows, and rakes
2. One reason employers say they are reluctant to hire individuals with a criminal conviction record is:
 - (a) Fear the individual will bring friends to work
 - (b) Fear the police will spend more time parked outside the business
 - (c) Fear of a negligent hiring claim
 - (d) Fear the individual will scare the other employees
3. What does Article 23-A seek to provide for people with criminal convictions who are looking for work?
 - (a) Transportation to and from work every day
 - (b) A higher hourly wage than for people without a criminal conviction
 - (c) A 15 minute break every morning and afternoon
 - (d) A “level playing field”
4. One step in complying with Article 23-A is to:
 - (a) Post a copy of Article 23-A on the front door of the business
 - (b) Post a copy of Article 23-A in one or more places where employees can easily find and read it
 - (c) Include a copy of Article 23-A with every paycheck
 - (d) Read Article 23-A out loud at the beginning of all employee meetings

5. When filling an open job, employers should:
 - (a) Use code words like honest and trustworthy in job advertisements
 - (b) Refuse to interview anyone with a criminal conviction record
 - (c) Set job requirements higher than necessary to attract only the best applicants
 - (d) Use several sources to find qualified applicants
6. The Green factors include the nature or gravity of the offense or conduct, the nature of the job sought or held, and:
 - (a) The time elapsed since the conviction and/or completion of the sentence
 - (b) The time of day the offense occurred
 - (c) Whether the conviction was a felony or misdemeanor
 - (d) The employer's record of environmental concern
7. It is lawful for an employer to ask an applicant if he or she has ever been arrested as long as it is not on the employment application.
 - (a) True
 - (b) False
8. The age of the person at the time he or she was convicted should never be considered by the employer when making an employment decision.
 - (a) True
 - (b) False
9. Article 23-A applies to people convicted of a felony but not people convicted of a misdemeanor.
 - (a) True
 - (b) False
10. "Ban the box" laws do not allow employers to include a "box" on the employment application for the applicant to check if he or she has ever been convicted of a crime.
 - (a) True
 - (b) False

Answers: 1) b 2) c 3) d 4) b 5) d 6) a 7) b 8) b 9) b 10) a

FREQUENTLY ASKED QUESTIONS:

Q: I run a small company with one full-time employee and 15 part-time employees. Does Article 23-A apply my business?

A: Yes. Article 23-A applies to all governmental and private employers with 10 or more employees, regardless of whether the employees are full- or part-time.

Q: If an applicant voluntarily discloses that he was recently arrested and that his case is pending, is he protected under Article-23-A?

A: No. Applicants and employees with a pending, unresolved arrest receive no protections under Article 23-A.

Q: Do background checks report all of an applicant's criminal convictions or only those that occurred in the last seven years?

A: It depends. Under New York State Law, if the job has an annual salary of less than \$25,000, then the background check may only report criminal convictions that occurred in the previous seven years. If the job has an annual salary of \$25,000 or more, then all criminal convictions may be reported.

Q: Do background checks report records of non-criminal convictions or violations?

A: No. Background checks may not report non-criminal convictions. Because the HRL bars you from considering sealed criminal and non-criminal convictions, as well as youthful offender adjudications, this does not pose a problem.

Q: Is Article 23-A the only law New York employers should be aware of concerning the use of criminal convictions when making hiring decisions?

A: No. The HRL makes noncompliance with Article 23-A an unlawful discriminatory practice. Title VII of the Civil Rights Act of 1964³² should also be given great consideration. The Equal Employment Opportunity Commission ("EEOC"), the federal agency in charge of enforcing Title VII, has consistently held the position that "an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on Blacks and Hispanics in light of statistics showing that they are convicted at a rate disproportionately greater than their representation in the population. Consequently, the Commission has held and continues to hold that such a policy or practice is unlawful under Title VII in the absence of a justifying business necessity."³³

³² 42 U.S.C. § 2000e et seq. (1982).

³³ EEOC Policy Statement on the Issue of Conviction Records under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq. (1982). (2/4/87) <http://www.eeoc.gov/policy/docs/convict1.html>

Q: What does the EEOC consider a “justifying business necessity?”

A: According to the Policy Statement regarding this issue, the EEOC requires that an employer show that it considered the following three factors in determining whether its decision was justified by business necessity:

1. The nature and gravity of the offense or offenses’
2. The time that has passed since the conviction and/or completion of the sentence, and
3. The nature of the job held or sought.³⁴

Q: Is it true that employers must comply with the Fair Credit Reporting Act (“FCRA”) if use they use a third-party to conduct background checks?

A: Yes. The FCRA covers “consumer reports.” That includes information about a person’s “character, general reputation, personal characteristics, and mode of living.” Regardless of whether a credit check is included, an employment background check is a FCRA-covered “consumer report.”

³⁴ *Id.*

NEW YORK CORRECTION LAW ARTICLE 23-A

LICENSURE AND EMPLOYMENT OF PERSONS PREVIOUSLY CONVICTED OF ONE OR MORE CRIMINAL OFFENSES

§750. Definitions. For the purposes of this article, the following terms shall have the following meanings:

- (1.) “Public agency” means the state or any local subdivision thereof, or any state or local department, agency, board or commission.
- (2.) “Private employer” means any person, company, corporation, labor organization, or association which employs ten or more persons.
- (3.) “Direct relationship” means that the nature of criminal conduct for which the person was convicted has a direct bearing on his fitness or ability to perform one or more of the duties or responsibilities necessarily related to the license, opportunity, or job in question.
- (4.) “License” means any certificate, license, permit, or grant of permission required by the laws of this state, its political subdivisions, or instrumentalities as a condition for the lawful practice of any occupation, employment, trade, vocation, business, or profession. Provided, however, that “license” shall not, for the purposes of this article, include any license or permit to own, possess, carry, or fire any explosive, pistol, handgun, rifle, shotgun, or other firearm.
- (5.) “Employment” means any occupation, vocation or employment, or any form of vocational or educational training. Provided, however, that “employment” shall not, for the purposes of this article, include membership in any law enforcement agency.

§751. Applicability. The provisions of this article shall apply to any application by any person for a license or employment at any public or private employer, who has previously been convicted of one or more criminal offenses in this state or in any other jurisdiction, and to any license or employment held by any person whose conviction of one or more criminal offenses in this state or in any other jurisdiction preceded such employment or granting of a license, except where a mandatory forfeiture, disability or bar to employment is imposed by law, and has not been removed by an executive pardon, certificate of relief from disabilities or certificate of good conduct. Nothing in this article shall be construed to affect any right an employer may have with respect to an intentional misrepresentation in connection with an application for employment made by a prospective employee or previously made by a current employee.

§752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited. No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

- (1.) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or
- (2.) The issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

§753. Factors to be considered concerning a previous criminal conviction; presumption.

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

- (a.) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.
- (b.) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.
- (c.) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his 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 behalf, in regard to his rehabilitation and good conduct.
- (h.) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

§754. Written statement upon denial of license or employment. At the request of any person previously convicted of one or more criminal offenses who has been denied a license or employment, a public agency or private employer shall provide, within thirty days of a request, a written statement setting forth the reasons for such denial.

§755. Enforcement. 1. In relation to actions by public agencies, the provisions of this article shall be enforceable by a proceeding brought pursuant to article seventy-eight of the civil practice law and rules.

2. In relation to actions by private employers, the provisions of this article shall be enforceable by the division of human rights pursuant to the powers and procedures set forth in article fifteen of the executive law, and, concurrently, by the New York city commission on human rights.