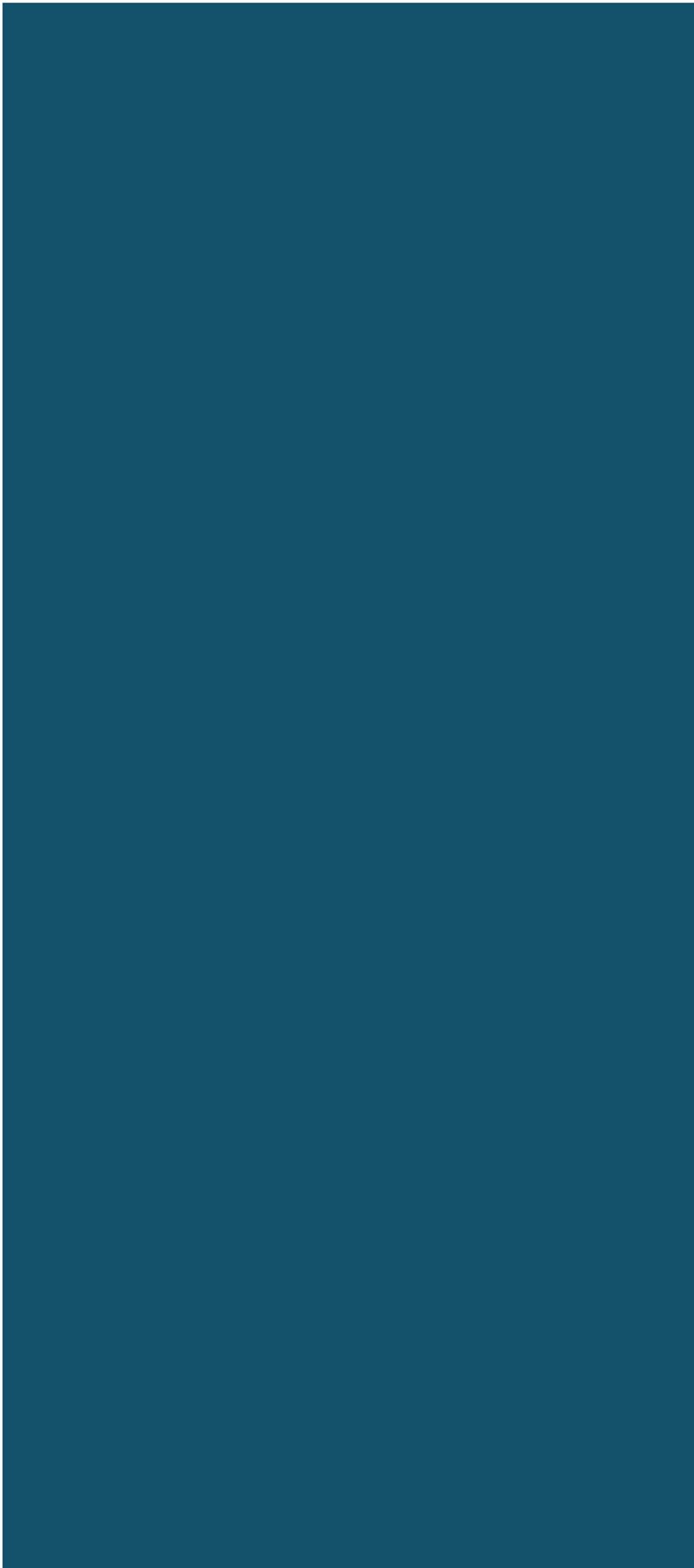


An Employer's Guide to Interviewing and Hiring People with Criminal Conviction Histories







Introduction

No matter what their business or service, today's employers seek a well-qualified, diverse workforce. A "diverse workforce" in the 21st Century means not only a cross section of people of different races, ethnicities, ages, and abilities, but also those with criminal conviction histories. Simply having a conviction history does not mean a person is not qualified to work.

That said, you may well have questions about what the law permits, and how to be fair to the job applicant, while at the same time considering what is best for your company or business. This guide provides an overview of the law and answers to many questions that may arise when considering hiring people with criminal convictions.

Discriminatory Practices

New York State has enacted a series of laws that prohibit employment discrimination against people with criminal conviction histories. First and foremost is the New York State Human Rights Law, N.Y. EXEC. LAW § 296. New York City has also enacted a human rights law, which provides similar guidance and protections. See N.Y.C. ADMIN. CODE § 8-107.

Under the New York State Human Rights Law (which also governs the issuance of occupational licenses), it is considered unlawful discrimination to deny a person a job or to fire a person from an existing job simply because the person has a criminal conviction history or by finding that his or her criminal record indicates a lack of “good moral character,” where such a denial violates Article 23-A of the New York Correction Law, which is discussed below.

This means that an employer cannot have a flat ban on hiring people with criminal conviction histories. Instead, the employer must consider each applicant (or job holder) individually, and determine whether:

1. there is a direct relationship between the previous criminal offense(s) and the specific employment sought or held by the individual; or
2. the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific people or the general public. N.Y. CORREC. LAW § 752.

When considering whether to hire a person with a criminal conviction history, an employer must consider:

1. New York’s policy is to encourage the licensure and employment of persons previously convicted of criminal offenses;
2. the specific duties and responsibilities of the job;
3. the relationship between the crime and the duties or responsibilities;

4. the time which has elapsed since the crime was committed;
5. the age of the applicant when the crime was committed;
6. the seriousness of the offense;
7. a legitimate interest in protecting property, and the safety and welfare of specific individuals or the general public;
8. any information produced by the person or on the person's behalf in regard to rehabilitation and good conduct; and
9. a Certificate of Relief from Disabilities or a Certificate of Good Conduct presented by the applicant. N.Y. CORREC. LAW § 753.

It is also illegal for an employer to consider or act upon arrests that did not lead to a conviction. See N.Y. EXEC. LAW § 296(15).

Job applicants who have criminal conviction histories may well have made great strides since their convictions and taken steps to change their lives. Consistent with #8 in the list above, an employer should consider this “rehabilitation,” and review any documents or proof the applicant may present, such as letters of recommendation, diplomas or certificates from training programs. Another form of proof of rehabilitation is a Certificate of Relief from Disabilities or a Certificate of Good Conduct, both issued by New York State.

A Certificate of Relief from Disabilities or a Certificate of Good Conduct creates a *presumption of rehabilitation* in regard to the offense or offenses listed on the Certificate. These Certificates remove any bar to employment otherwise automatically imposed by law due to a conviction of the crime or offense specified, by treating the holder as not having the conviction listed thereon. N.Y. CORREC. LAW §§ 701, 703-a.

These Certificates are not issued automatically; depending on his or her conviction history, a person is eligible to apply for one or the other document.

To obtain a Certificate, a person can apply to the Sentencing Court or the New York State Parole Board, which issue the Certificates at their discretion. A person with no more than one felony and any number of misdemeanors can obtain a Certificate of Relief from Disabilities, which can take up to one year to receive, while a person with two or more felonies and any number of misdemeanors can obtain a Certificate of Good Conduct, which can take up to 1 ½ years to receive.

If an employer rejects an applicant who has been convicted of prior criminal offenses, the applicant has the right to request a written statement that sets forth the reason for the denial of employment. That statement must be given within 30 days from receipt of such a request. N.Y. CORREC. LAW § 754.

Hiring Practices/ Background Checks

Under New York State and City law, it is illegal to ask whether an applicant has ever been arrested, charged with a crime, convicted of a sealed noncriminal offense, or adjudicated as a youthful offender. N.Y. EXEC. LAW § 296 (16); see also N.Y.C. ADMIN. CODE § 8-107.

To obtain a background check, also called a “consumer report,” on a person for employment purposes, a company must first inform the applicant, in writing:

1. that a consumer report may be requested in connection with the application;
2. that the applicant, upon request, will be informed within 30 days if a consumer report was requested, along with the name and address of the consumer reporting agency; and
3. that he or she may review the report by contacting the agency. N.Y. GEN. BUS. LAW §§ 380-b, 380-c; 15 U.S.C.S. § 1681d.

Additionally, beginning February 1, 2009, if a company requests a report with respect to an offer of employment, the company must also provide the applicant with a copy of Article 23-A of the New York Correction Law. N.Y. GEN. BUS. LAW § 380-c. Also beginning February 1, 2009, a company must post a copy of Article 23-A of the New York Correction Law in a place accessible to employees and in a visually conspicuous manner. N.Y. LAB. LAW § 201-f.

The employer also must obtain the applicant’s written authorization to obtain a report, and certify to the background check company, also called a “consumer reporting agency,” that the employer has:

1. provided the required notifications;
2. received permission in writing to obtain the report; and
3. certified that information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation. 15 U.S.C.S. § 1681b.

After having provided proper notification to the applicant and acquiring his or her permission to obtain a background check, the employer may contract with a consumer reporting agency to produce the report. There are many of these agencies to choose from, some more reputable than others. The consumer reporting agency has a legal duty to prepare a report that is accurate and up-to-date, and that does not include information about arrests that did not lead to a *criminal* conviction. 15 U.S.C. § 1681; N.Y. GEN. BUS. LAW § 380-j. The report should present the information in a format that is easy to read and understand; New York law prohibits the company from presenting information in a deceptive fashion. N.Y. GEN. BUS. LAW § 349.

If the employer decides not to hire the applicant based on information obtained in a background check, before denying the job the employer must furnish:

1. notice of the adverse action to the applicant;
2. the name, address, and telephone number of the consumer reporting agency that furnished the report;
3. a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the applicant the specific reasons why the adverse action was taken;
4. notice of the consumer's right to obtain a free copy of the consumer report from the consumer reporting agency; and
5. notice of the consumer's right to dispute the accuracy or completeness of any information in a consumer report furnished by the agency. 15 U.S.C.S. § 1681m.

The employer should provide the applicant with a short period of time (five days may be both practical and legally acceptable) to review the report and contact the employer with any comments or information to refute the report.

Generally, an employer may not fingerprint an applicant as a condition of securing employment, unless the employer is a New York State agency authorized by law to do so, such as the New York State Office of Mental Health, or a law enforcement agency such as the New York City Police Department. N.Y. EXEC. LAW § 845-b; N.Y. LAB. LAW § 201-a. Banking institutions governed by the FDIC, airports and ports also are permitted to require fingerprints in order to obtain FBI-generated rap sheets.

Negligent Hiring Concerns

New York State recently amended its Human Rights Law to provide some protection to employers from negligent hiring claims, so long as the employer complied with Article 23-A of the Correction Law, discussed above.

Specifically, an employer is granted a rebuttable presumption in favor of excluding, in any case alleging negligent hiring, negligent retention, or negligent supervision of a hiring manager, evidence of an employee or applicant's prior conviction(s) or incarceration(s), *so long as* the employer has complied with Article 23-A.

Thus, employers who make a good faith, reasonable determination that the factors outlined in Article 23-A militate in favor of hiring or retaining an ex-offender are afforded additional protection against lawsuits.

General Guidelines when Considering an Applicant with a Criminal Conviction History

REMEMBER New York State has a policy of encouraging employers to hire people with criminal conviction histories who are otherwise qualified for the job.

DO NOT ask about prior arrests or criminal charges.

DO NOT ask about a youthful offender adjudication, sealed violations or legal convictions that did not lead to criminal convictions.

DO NOT refuse employment based on a prior criminal conviction unless there is a relationship between the crime and the job duties, or there is an unreasonable safety risk.

YOU CAN obtain a background check with proper notification and permission from the applicant.

Other Resources

A host of workforce development agencies operate in New York State to help people with criminal conviction histories get and keep jobs. These agencies not only provide training in "hard skills," they also train job applicants in "soft skills" such as interviewing and job readiness. Many of them continue to monitor the applicant once she or he is hired and will work with the employer to address any concerns. For more information about workforce development agencies, see

http://www.nycbar.org/pdf/report/Task_Force_Report08.pdf

The Legal Action Center has a number of publications that may be helpful to you, all available free of charge at the organization's Web site, www.lac.org (consult the "free publications/criminal justice" section). Among these publications are:

"Certificates of Relief from Disabilities and Certificates of Good Conduct: What You Can Do About Criminal Convictions When Looking for Work"

http://lac.org/doc_library/lac/publications/Certificates%20of%20Relief%202007.pdf

"Are You ... Somebody With HIV/AIDS, an Alcohol or Drug History, or a Criminal Record?"

http://lac.org/doc_library/lac/publications/LAC--AreYou.pdf

New York State Occupational Licensing Survey

http://lac.org/doc_library/lac/publications/Occupational%20Licensing%20Survey%202006.pdf

The Legal Action Center's subsidiary, the National H.I.R.E. Network, has a variety of resources for employers who are considering hiring people with criminal conviction records. All are available for free at the organization's Web site, www.hirenetwork.org. Among these publications are:

"Protect Yourself When Using Criminal Background Checks,"
http://hirenetwork.org/crim_back_check.html

"Negligent Hiring Concerns,"
http://hirenetwork.org/negligent_hiring.html

For a copy of Article 23-A of the New York Correction Law, visit <http://www.labor.state.ny.us/workerprotection/laborstandards/>

