

COVID-19 and New York: Refresher on Article 23-A and Equal Opportunities for Newly Released Offenders

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As New York State reportedly is releasing additional nonviolent offenders, coinciding with the rise of COVID-19 cases in recent weeks, and newly released individuals apply for positions, New York employers should remember that “conviction status” is protected under New York’s Human Rights Law.

(Ryan Tarinelli, [*New York Will Release More Nonviolent Offenders Amid Pandemic, Top Cuomo Aide Says*](#), New York Law Journal, May 11, 2020.)

The Human Rights Law’s protection of “conviction status” means equal opportunity laws apply.

In addition, Article 23-A of the Consolidated Laws of New York expressly requires an employer to consider the following factors *before* deciding whether to refuse or terminate employment because of an individual’s prior convictions:

1. The public policy in favor of licensing or employing individuals with a criminal history;
2. The specific duties and responsibilities of the position;
3. Whether the criminal offense has any bearing on the individual’s fitness or ability to perform the necessary duties;
4. How much time has passed since the criminal offense;
5. The age of the individual at the time of the criminal offense;
6. The seriousness of the offense;
7. Any information produced by or on behalf of the individual regarding their rehabilitation and good conduct;
8. The employer’s legitimate interest in protecting property and the safety and welfare of specific individuals and the general public; and
9. Any certificate of relief from disabilities or of good conduct issued to the individual that creates a presumption of rehabilitation with regard to the offense.

Around the state, there are various ban-the-box laws and processes that may require consideration, including in Buffalo, New York City, Rochester, Westchester, and Suffolk County (beginning on August 25, 2020; see our article, [Suffolk County, New York, Follows ‘Ban the Box’ Trend](#)).

Federal and state fair credit report act laws apply if the employer is using a third-party consumer reporting agency to conduct a background check.

Advertisements or job postings attempting to exclude individuals with convictions could be challenged, unless a *bona fide occupational qualification exists* (which may be defined by statute).

New York City's Fair Chance Act has its own regulations, addressing screening requirements; and its Fair Chance Process includes a written individualized assessment an employer undertakes under Article 23-A, providing documentation, for example, relied upon as well, to give the candidate the opportunity to further respond before a final decision is made. (*See e.g.*, our article, [New York City Adopts New 'Ban the Box' Regulations, Continues Expansion of Employee Rights.](#))

New York law requires providing a copy of Article 23-A to an individual whose conviction appears in a consumer report given to the employer, which can be provided, for example, prior to discussing the record with the applicant. N.Y. Correct. Art. 23-A; N.Y. Gen. Bus. § 380-C(b).

It is also important to remember that, under state law, there is no specific requirement to provide the reason for denial in writing, unless a person whose conviction record was obtained makes a request, and then such request needs to be responded to in writing within 30 days. N.Y. Correct. Art. 23-A § 754.

Practically, well-documented decisions, fair treatment, and compliance with local and Article 23-A requirements will assist a company to minimize exposure to potential claims under state Correction Law and local laws.

Please contact the Jackson Lewis attorney with whom you regularly work if you have any questions about these and other employment issues.

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