

NY REQUIRES EMPLOYERS TO POST LAWS PROHIBITING DISCRIMINATION

Labor & Employment Alert
February 13, 2009

Practices & Industries

Labor & Employment

Since February 1, 2009, New York State requires employers of 10 or more persons to provide anyone subject to a background investigation for employment purposes with notice of Article 23-A of the Correction Law, which governs the employment and licensure of persons previously convicted of one or more criminal offenses. Article 23-A prohibits the denial of employment or a license to a person convicted of a crime unless there is a “direct relationship” between the crime and the employment or license or “an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.” The law sets out several factors that must be considered in making these decisions.

Notice of Article 23-A must be given in the following three ways.

1. Post Article 23-A in the workplace.

First, employers must post a copy of Article 23-A of the Corrections Law in a conspicuous manner at a place accessible to their employees. (N.Y. Labor Law §201-F).

2. Give the subject a copy when requesting an investigative consumer report.

Second, a copy of Article 23-A must be provided to the subject of a report when an employer requests a background check, or, more accurately, an investigative consumer report (ICR). An “investigative consumer report” is a report in which “information on a consumer’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.”¹

3. Give the subject a copy when an ICR reveals a conviction.

Third, when a consumer reporting agency reports one or more criminal convictions, the employer must provide the subject of the report with a printed or electronic copy of Article 23-A.

Employers who want to use an ICR for “employment purposes” are already required to notify subjects of that intention and to obtain their written consent to the investigation. This is usually done as part of the employment application form. Including a copy of Article 23-A with the employment application form, therefore, would be a convenient way to notify applicants of 23-A when an employer may

NY REQUIRES EMPLOYERS TO POST LAWS PROHIBITING DISCRIMINATION

request an ICR.

But, it is important to remember that use of an ICR for “employment purposes” covers not only “evaluating a consumer for employment” but also for “promotion, reassignment or retention.”² Notice of 23-A must be given each time such a background investigation reveals a criminal conviction.

Finally, another recent amendment to the New York Human Rights Law provides employers who make a reasonable and good faith determination to hire a former offender by applying the factors in Article 23-A a defense against law suits for negligent hiring, retention or supervision. N.Y. Exec. Law §296.15 creates a “rebuttable presumption” that evidence of the employee’s past criminal record cannot be admitted into evidence and used against the employer.

The Bottom Line for Employers: In New York State, employers of 10 or more persons must now post a copy of Article 23-A of the Corrections Law in a conspicuous manner at a place accessible to their employees, and they must also provide a copy to the subject of an ICR when the report is requested as well as when an ICR reveals a conviction.

¹ According to N.Y. Gen. Bus. Law §380-a(d), such information does not include “specific factual information on a consumer’s credit record obtained directly from a creditor of the consumer or from a consumer reporting agency when such information was obtained directly from a creditor of the consumer or from the consumer.”

² N.Y. Gen. Bus. Law §380-g(d).