

Further Guidance on Complying with New York’s Article 23-A Notice Obligations in Connection with Criminal Background Checks

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On December 16, 2008, Morgan Lewis issued a LawFlash on New York’s recent criminal background check legislation creating additional employer obligations that are scheduled to go into effect February 1, 2009. Since that LawFlash was distributed, we have received numerous inquiries seeking more detailed information, many of which were prompted by the lack of clarity in the amendments themselves. In response, this supplemental LawFlash analyzes the legislation in more detail and summarizes our efforts to seek informal clarification from the New York State Department of Labor (NYDOL).

In our experience, most employers follow the notice and authorization requirements of the federal Fair Credit Reporting Act when procuring background checks because courts have held the results of a criminal background check to be a “consumer report” under the federal legislation. The federal requirements include:

- Notifying the job applicant in writing, in a document containing only the notice, that a criminal background check may be obtained and used
- Obtaining a signed authorization from the applicant
- Once a criminal background check is obtained, providing the job applicant with notice and an opportunity to discuss or dispute the report before the employer takes any “adverse action”

These procedures remain unaffected by New York’s new legislation. However, as discussed below, this new legislation creates additional requirements depending upon the type of consumer report requested by an employer.

More specifically, the new legislation imposes different notice requirements depending on whether an employer requests an “investigative consumer report” or a “consumer report” in connection with a hiring or employment-related decision. Under New York’s Fair Credit Reporting Act, a “consumer report” gathers information on an individual’s creditworthiness, credit standing, credit capacity, character, and general reputation from a credit reporting agency, but does not utilize personal interviews to gather such information. *See* N.Y. Gen. Bus. Law § 380-a(c)(1). In contrast, an “investigative consumer report” utilizes personal interviews, in addition to gathering available information from a consumer reporting agency. *See* N.Y. Gen. Bus. Law § 380-a(d). If there is any uncertainty as to the type of report an

employer has prepared, the safest approach is to follow the protocols for an “investigative consumer report” discussed below.

Pre-Background Check Article 23-A Notice

Whenever an employer requests an “investigative consumer report,” the new legislation requires the employer to provide a copy of New York Corrections Law Article 23-A to an employee or applicant for employment *prior to* obtaining such report. The NYDOL has informally advised that if an employer utilizes only a “consumer report,” *see* N.Y. Gen. Bus. Law § 380-a(c)(1), this pre-background check notice requirement does not apply.

Post-Background Check Article 23-A Notice

If an employer seeks only to have a “consumer report” prepared for a hiring or employment-related decision, the new legislation requires the employer to provide the individual subject of the report with a copy of Article 23-A only if the report reveals criminal record information.

Application of Notice Obligations to New York Residents

The new legislation does not make clear whether the notice obligations apply to New York residents who apply in New York for out-of-state positions or are already employed and work outside the state. The NYDOL has informally advised that the notice requirements apply only to individuals who apply for employment or are employed in New York. Nevertheless, it is possible that a court could conclude that the new requirements apply beyond employees working in New York because the new legislation amends New York’s Fair Credit Reporting Act, which simply defines “consumers” as “individuals.” Thus, employers—particularly employers based in New York—may want to consider applying the Article 23-A notice requirements to New York residents regardless of the site of employment or potential employment.

Practical Guidance

This new legislation is far from clear. As explained in our initial LawFlash, the cautious approach is for employers to provide individuals with a copy of Article 23-A *prior to* seeking any background check consent from an individual, regardless of whether the employer plans to run a consumer report or an investigative consumer report. Employers may also wish to consider providing such individuals with a second copy of Article 23-A whenever the report reveals criminal record information.

If a company uses criminal background checks, it should take steps to ensure compliance with this new legislation. Employers that use vendors to conduct criminal background checks should confirm that the vendor’s practices comply with these new requirements.

As a reminder, if an employer makes a hiring or employment-related decision based on an individual’s criminal background information, Article 23-A sets out specific factors that an employer must consider. These factors include:

- New York’s public policy encouraging the employment of individuals who have previously been convicted
- The job responsibilities of the position

- The relevance of any prior conviction to the individual's ability to perform the job responsibilities
- The time elapsed since the conviction
- The individual's age at the time of the conviction
- The seriousness of the offense
- Information provided by the individual about his or her rehabilitation since the conviction

How We Can Help

If you have additional questions about the impact of the legislation discussed in this Morgan Lewis LawFlash on your policies and procedures, please contact any of the following attorneys:

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