

## **New York Enacts New Criminal Background Check Obligations for Employers**

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New York has enacted several new laws affecting an employer's ability to conduct criminal background checks on applicants and employees. These laws also provide employers additional protection against claims of negligent hiring.

This new legislation modifies New York Correction Law Article 23-A. Article 23-A applies to both public and private employers, and prevents employers from making adverse hiring or termination decisions based on an individual's conviction record unless: (1) there is a direct relationship between the prior criminal offenses and the specific employment sought or held by the individual; or (2) hiring or continuing to employ the individual poses an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

Article 23-A currently requires employers to consider numerous factors when considering whether to deny employment to or terminate the employment of individuals with criminal conviction records. 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.

The new legislation, which goes into effect February 1, 2009, requires employers to provide a copy of Article 23-A to individuals subject to background checks. Employers are also required to post a copy of Article 23-A in a "visually conspicuous manner" accessible to all employees. If a background check reveals a criminal record, the employer must provide the individual with a second copy of Article 23-A.

New York has also passed legislation, which became effective in September 2008, to protect employers from claims for negligent hiring in connection with individuals with criminal conviction records. If an employer makes a reasonable and good faith determination using Article 23-A's factors in hiring an individual with a criminal record, the law provides a "rebuttable presumption" that the employee's criminal record cannot be admitted into evidence in a negligent hiring suit against the employer.

## Conclusion

Employers should review their policies and procedures on criminal background checks to ensure compliance with Article 23-A and the new obligations imposed by these recent enactments.

If you have additional questions about the impact of the legislation on your company's policies and procedures, please contact any of the following Morgan Lewis attorneys:

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