

Background Checks



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CRIMINAL RECORD CHECKS

New York employers may consider and, in some cases, are required to consider, an applicant's criminal record in making a hiring decision. For example, the following employers must conduct criminal background checks on prospective employees: schools, childcare providers, residential healthcare facilities, home healthcare agencies, licensed home care agencies, nursing facilities, security agencies, mental health facilities, and operators of children's camps.

As a general matter, absent industry-specific exceptions, the New York Correction Law prohibits employers from denying or terminating employment because of a conviction that occurred prior to employment, unless the offense has a direct bearing on the individual's fitness or ability to perform the job or employment would present an unreasonable risk to property or the safety or welfare of specific individuals or the general public. Notably, an arrest or a conviction that occurs in the course of employment is not encompassed within this restriction. Thus, it is simply that at the time of hiring, an employer may not improperly consider an applicant's pre-hiring criminal conviction in the hiring decision.

When using a candidate's prior criminal history in making a decision regarding employment, employers are to consider: (a) the specific duties/responsibilities related to the job held or sought; (b) the seriousness of the offense; (c) the time that has elapsed since the criminal offense; (d) the person's age at the time of the offense; (e) the seriousness of the offense; (f) evidence of successful rehabilitation; and (g) the state's public policy of encouraging employment of previously convicted persons.

New York law protects individuals with an arrest record resolved in their favor, certain sealed records or youthful offender adjudications, and individuals who have been convicted of a criminal offense. If an individual has an arrest that was resolved in his/her favor, a sealed record, or a youthful offender adjudication, the individual cannot be asked about it in any application form or discriminated against based on those grounds in connection with employment or licensing. Notably, these protections do not apply to governmental agencies involved in the employment of police officers or peace officers. There, the agency may ask about and consider an arrest resolved in the individual's favor, a sealed record, or a youthful offender adjudication.

Further, the EEOC has taken the position that considering arrests has an adverse impact on minorities, which can expose employers to potential discrimination claims if too many background checks result in minority applicants being disqualified from being hired or promoted.

To avoid EEOC or New York Human Rights Law violations, employers should carefully document the underlying behavior and conduct that caused an arrest or a conviction. Thus, a distinction should be made between the fact of a conviction and the conduct that led to the conviction. To the extent underlying behavior by the candidate/applicant renders him/her unsuitable for the job, the employer may make the decision to move forward with the adverse employment action, despite risks of incurring an EEOC complaint or a Human Rights Law charge.

There are several procedural obligations that will apply to New York employers who conduct a background check on current employees or job applicants. First, employers who check criminal convictions are required to first obtain approval for doing so from the employee. In addition, the employer must provide all applicants a copy of Article 23-A of New York's Correction Law after the background check has been completed. Employers must also post a copy of the law in a visually conspicuous area for all employees to see. A copy of this law can be downloaded from the internet.

Next, at the request of a job applicant who has been denied employment based on the results of a background check, an employer must provide a written statement setting forth the reason(s) for the denial of a job or promotion. This explanation must be provided within 30 days of the request.

Additionally, employers doing business in New York City should note that, under the city's Fair Chance Act, private employers, with certain exceptions, may not conduct direct or indirect criminal background checks until a conditional offer of employment has been extended to the applicant. The city's law also limits employers on how they may use information that is discovered on a job applicant's conviction record.

Further, the New York City Commission on Human Rights takes the position that the following are per se violations of the city's law:

- Declaring, printing or circulating any solicitation or ads for employment that state any limitation regarding criminal history, even if no adverse action follows, including ads and employment applications containing phrases such as: "no felonies," "background check required" and "must have clean record."

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- Inquiring about an applicant's criminal history before a conditional offer of employment is made, even if no adverse action follows.
 - Taking an adverse employment action because of an applicant's non-conviction.
 - Withdrawing a conditional offer of employment based on an applicant's criminal history where an employer has failed to:
 1. disclose to the applicant a written copy of any inquiry an employer conducted into the applicant's criminal history,
 2. share with the applicant a written copy of the employer's Article 23-A analysis, and
 3. hold the prospective position open for at least three business days, from an applicant to respond.

Similar to the New York City law, Buffalo, Rochester, Syracuse and Westchester Counties have all adopted similar laws regarding background checks in hiring municipal employees and contractors. With the rise of state and local legislation limiting the use of criminal convictions in connection with hiring decisions, employers should monitor their local municipalities for new ordinances on this topic.

CONSUMER REPORTS

Employers wishing to obtain and use a consumer report must inform an applicant in writing that a consumer report may be requested in connection with the application. The applicant, upon request, will be informed whether a consumer report was requested and the name and address of the consumer reporting agency that furnished the report.

Additionally, as discussed in the following paragraphs, if the employer uses a third-party company to obtain this information, both the federal Fair Credit Reporting Act (FCRA) and the New York General Business Law may be implicated.

New York City employers should also be aware that employers with four or more employees are prohibited from requesting or using the consumer credit history of an applicant or employee for the purpose of making employment decisions, including hiring, compensation and other terms and conditions of employment. The law contains certain exemptions, including for: employers required by state or federal law or regulation or by the Financial Industry Regulatory Authority to use an individual's consumer credit history for employment purposes; police officers and peace officers; positions requiring bonding under federal, state or city law; positions requiring security clearances under federal or state law; nonclerical positions having regular access to trade secrets, intelligence information or national security information; positions having signatory authority over third-party funds or assets valued at \$10,000 or more or with a fiduciary responsibility to the employer with the authority to enter financial agreements valued at \$10,000 or more; and positions with regular duties that allow an employee to modify digital security systems established to prevent the unauthorized use of the employer's or client's networks or databases.

COMPLYING WITH THE FAIR CREDIT REPORTING ACT

The FCRA imposes procedural requirements on employers who use a "consumer reporting agency" to obtain and use "consumer reports" in making employment-related hiring, promotion and termination decisions. The term "consumer report" is defined very broadly by the FCRA. It includes reports on criminal background information, credit history, and driving records prepared by background check vendors, private investigators and detective agencies.

New York has its own state version of the FCRA allowing an employer to use a consumer report for the purpose of evaluating an individual for employment, promotion, reassignment or retention as an employee. The employer must inform the individual that a consumer report may be requested. Upon request of the individual, the employer must advise whether a report was requested and the name and address of the consumer reporting agency furnishing the report.

The following is suggested language to be included on New York disclosure forms:

You have the right, upon request, to be informed of whether a consumer report was requested and, if one was requested, the name and address of the consumer reporting agency furnishing the report. Upon written request, you will be informed about whether or not an investigative consumer report was requested and if such report was requested, the name and address of the consumer reporting agency to whom the request was made. You may inspect and receive a copy of such a report by contacting such an agency.

Companies using a consumer reporting agency to procure background history information are required to adhere to FCRA's steps for compliance, including disclosure and authorization, certification and advance notice of adverse action. This includes:

- Providing written disclosure to the employee/applicant explaining that a consumer report and/or investigative consumer report will be obtained. This disclosure statement must be in a separate, "stand-alone" document and cannot be combined with other employment application forms.
- Securing the employee's signed authorization for the background check in a document separate from an employment application or an employee handbook. This authorization form can be combined with the disclosure form.
- Certifying to the consumer reporting agency that the previous steps have been followed and that the employer is complying with the FCRA.
- Providing a pre-adverse action notice of any intended adverse action to the applicant/employee and providing him or her a copy of the background check

report, along with the "Summary of Your Rights under the Fair Credit Reporting Act" written by the Consumer Financial Protection Bureau. The purpose is to give the individual an opportunity to dispute or explain any inaccurate or incomplete information in the background check report.

- Supplying the applicant/employee with an adverse action notice that includes a copy of the report, the "Summary of Your Rights" document, the contact information for the consumer reporting agency that furnished the report and a statement that the consumer reporting agency did not make the adverse decision and cannot explain why it was made. While there is no time period specifically required in the FCRA, guidance suggests that employers should wait a minimum of five business days after sending the pre-adverse action notice and before sending the final adverse action notice

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