

How to Comply With Article 23-A When Hiring

The Analysis

The law instructs employers to consider and weigh eight factors, balancing factors which support a decision to hire against factors which support a decision to reject an applicant. The balance between and among the factors is important — each one must be considered in light of the others. It is important to remember that no single factor by itself should determine the outcome of the hiring process.

FOR HIRING DECISIONS TO BE CONSIDERED FAIR, QUALIFIED JOB APPLICANTS WITH PRIOR CONVICTIONS MUST BE EVALUATED INDIVIDUALLY AND ON A CASE BY CASE BASIS.

Factors Agencies Must Consider When Evaluating an Applicant with a Prior Conviction

Article 23-A requires employers to walk through this eight-step analysis in order to determine whether or not to hire an applicant with a prior conviction:

- (1) New York State's public policy of encouraging the employment of persons with prior convictions.
- (2) The specific duties and responsibilities necessarily related to the employment sought.
- (3) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his/her ability to perform one or more such duties or responsibilities.
- (4) The time which has elapsed since the occurrence of the criminal offense or offenses.
- (5) The age of the person at the time of the occurrence of the criminal offense or offenses.
- (6) The seriousness of the offense or offenses.
- (7) Any information produced by the person, or produced on his/her behalf, in regard to his/her rehabilitation and good conduct.
- (8) The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Conviction Related Factors

1 TIME ELAPSED SINCE THE CONVICTION

Research shows that if a person is conviction-free for seven years or longer, the likelihood of future arrest is about the same as for someone who has never been convicted of a crime. Even if an applicant has a recent conviction, an employer is obligated to consider evidence of rehabilitation and other facts and circumstances that indicates that the applicant does not present a significant risk of re-offending.

2 AGE OF APPLICANT AT TIME OF THE OFFENSE

It is not uncommon for someone who exercised poor judgment during youth to mature into a productive, hard-working, law-abiding adult. When evaluating an applicant with a prior conviction, employers should consider the applicant's age at the time the offense was committed.

3 EVIDENCE OF REHABILITATION AND GOOD CONDUCT

There are a variety of ways that applicants with prior convictions can demonstrate that they have put their lives back on track and that they will be successful and valuable employees. Applicants may seek to demonstrate their rehabilitation by presenting documents from prior jobs they have held or programs they've been involved with since the time of their offense. All evidence of rehabilitation should be considered.

Some examples of items that an applicant might provide to demonstrate his/her rehabilitation are:

EDUCATION: Transcripts, diplomas, certifications or letters from teachers.

REFERENCES FROM PAST EMPLOYERS OR FROM JOB TRAINING PROGRAMS: Letters of reference from past employers and letters of support from faculty and staff of job training programs may demonstrate the applicant's suitability for employment and provide useful information about the applicant's punctuality, skills, and whether they will be a motivated employee. Even programs completed in prison are relevant. They show an applicant has made strides in changing his/her life since the time of conviction. Someone who is motivated to change his/her life would have participated in some type of work or educational program while incarcerated if it was available.

EVIDENCE OF PARTICIPATION IN COUNSELING AND OTHER WORKFORCE DEVELOPMENT OR SOCIAL SERVICE PROGRAM: Letters from counselors and other supportive service providers may demonstrate the applicant is proactively trying to identify and address whatever circumstances led to his/her prior conviction and is taking steps to change, grow, and learn from the experience.

VOLUNTEER PROGRAMS: An applicant may present a potential employer with documentation of his/her volunteer activities that indicate that he/she is responsible and willing to contribute to the well-being of others.

4 THE SERIOUSNESS OF THE CONVICTION

Not all offenses are the same and how they are defined do not always reflect the circumstances involved in a case. For example, an individual who throws an object — no matter how big or small, light or heavy — at another individual while in a heated dispute may be charged with assault with a deadly weapon. Or a youth who may have taken another youth's book bag off his/her body to toss it around can be charged with robbery. (These are real case examples.) Therefore, the circumstances of the case may more accurately reflect the seriousness of the conviction. An employer should always give consideration to the seriousness of the offense or offenses and the circumstances therein.

Factors Related to the Job Sought

An employer can consider whether or not an applicant's prior offense(s) bears upon his/her ability to perform the job for which he/she is applying.

5 SPECIFIC DUTIES AND RESPONSIBILITIES NECESSARILY RELATED TO EMPLOYMENT SOUGHT

What does the job entail? What are the responsibilities of the job? Are any special skills required? What is the job like on a day-to-day basis?

6 THE BEARING, IF ANY, THE OFFENSE HAS ON APPLICANT'S FITNESS OR ABILITY TO PERFORM JOB DUTIES/ RESPONSIBILITIES

Do the job responsibilities share any qualities with the activities that led to the conviction? For instance, a person convicted of burglary or credit card fraud may not be suitable for a job counting money at the bank. Does the offense make the applicant less suitable for the job? If so, can you articulate what makes this person less qualified?

7 PUBLIC POLICY CONSIDERATIONS

It is the policy of the State of New York to encourage employers to hire applicants with prior convictions. Article 23-A aims to eliminate bias and illegitimate obstacles people with prior convictions face when seeking work while, at the same time, protecting society's interest in hiring and employing reliable and trustworthy job candidates. Though Article 23-A does not require employers to give preferential treatment to qualified job seekers with prior convictions, it does seek to remove prejudice against such applicants in obtaining jobs.

Are There any Circumstances Where an Agency can Reject an Applicant Due to a Prior Conviction

The answer is yes, but only under very limited circumstances. Article 23-A recognizes two instances where an employer may legitimately deny employment to an applicant based on his/her prior conviction: (1) When there is a direct relationship between the prior offense and the specific employment sought, and (2) When the employment would involve an unreasonable risk to property or the safety or welfare of specific individuals or the general public.

8 LEGITIMATE INTERESTS

Recording and keeping track of the factors enumerated in Article 23-A and weighing them fairly will help employers to determine whether a direct relationship exists between the position sought and the prior offense or whether anyone's safety or welfare would be risked by hiring the applicant. If, on balance, careful consideration of all factors weigh against hiring the applicant, an employer will typically be safe in denying employment. However, if on balance, the weighing of all factors indicates that an applicant is qualified for the position sought, an employer should be prepared to demonstrate a legitimate reason not related to the prior conviction for not hiring the applicant. The conviction itself is not a legitimate reason.