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Criminal Convictions and Employment Rights In New York State

Abstract

New York has a strong policy toward preventing discrimination based on prior criminal convictions and its progressive policy outlook should be encouraged. In 2007 a report concluded that New York employees were largely unfamiliar with State laws regulating an employer's use of prior criminal convictions for employment-related decisions, and in response, the legislature amended Section 296 of New York Executive Law to require employers to post and disseminate information regarding a job applicant's or current employee's rights with respect to an employer's use of prior criminal convictions. With one in five adults having a criminal record in the United States, legislation such as this is vital to keeping the work force in New York strong.

Keywords

Buffalo, Poverty/Low Wage Work/Income Inequality, Equality/Civil Rights, Workforce Development, Low Wage Work, Policy Brief, PPG, PDF

Criminal Convictions and Employment Rights In New York State

Robert D. Strassel



Executive Summary

New York has a strong policy toward preventing discrimination based on prior criminal convictions and its progressive policy outlook should be encouraged.

In 2007 a report concluded that New York employees were largely unfamiliar with State laws regulating an employer's use of prior criminal convictions for employment-related decisions, and in response, the legislature amended Section 296 of New York Executive Law to require employers to post and disseminate information regarding a job applicant's or current employee's rights with respect to an employer's use of prior criminal convictions.ⁱ

With one in five adults having a criminal record in the United States, legislation such as this is vital to keeping the work force in New York strong.ⁱⁱ

What are New York's Laws on Employment Discrimination?

In 1945, New York became the first state in the nation to enact a law against discrimination.ⁱⁱⁱ The New York State Division of Human Rights

enforces New York's human rights laws in administrative adjudications, with appeals to a New York State Supreme Court for adverse decisions .

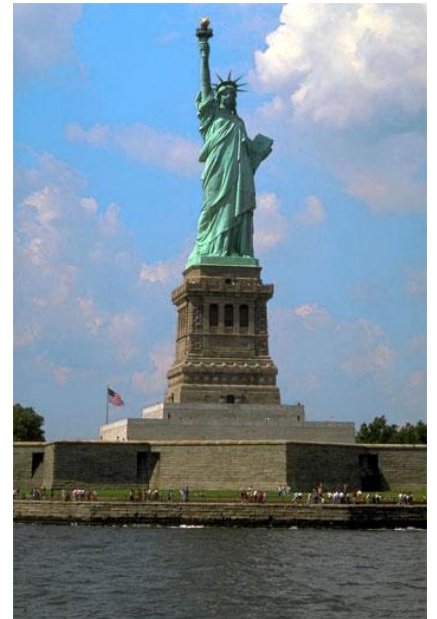
Effective July 6, 2009, the Division of Human Rights can assess civil rights and penalties in cases in which the Commissioner finds a respondent liable for an unlawful discriminatory practice.^{iv} These fines may be imposed in an amount up to \$50,000, or up to \$100,000 where the conduct is found to be willful, wanton or malicious and will not reduce or offset any compensatory damages awarded to a prevailing complainant.^v Signed into law by Governor Paterson on April 7, 2009, this addition to the Human Rights Law will apply in all cases of discrimination, including cases of employment discrimination, which comprise over 80% of the Division's cases.^{vi} Previously, the imposition of civil fines under the Human Rights Law was limited to cases of housing discrimination.^{vii}

New York Executive Law §296(15)

New York Executive Law §296(15) provides the basis of New York's policy concerning employers and persons with criminal convictions looking for employment. It reads as follows:

“It shall be an unlawful discriminatory practice for any person, agency, bureau, corporation or association, including the state and any political subdivision thereof, to deny any license or employment to any individual by reason of his or her having been convicted of one or more criminal offenses, or by reason of a finding of a lack of “good moral character” which is based upon his or her having been convicted of one or more criminal offenses, when such denial is in violation of the provisions of article twenty-three-A of the correction law. Further, there shall be

a rebuttable presumption in favor of excluding from evidence the prior incarceration or conviction of any person, in a case alleging that the employer has been negligent in hiring or retaining an applicant or employee, or supervising a hiring manager, if after learning about an applicant or employee's past criminal conviction history, such employer has evaluated the factors set forth in section seven hundred fifty-two of the correction law, and made a reasonable, good faith determination that such factors militate in favor of hire or retention of that applicant or employee.”^{viii}



New York Correction Law Article 23-A

New York Correction Law Article 23-A provides specific guidelines for employers to follow in deciding whether to hire a person with a criminal conviction. It reads as follows:

§752. Unfair discrimination against persons previously convicted of one or more criminal offenses prohibited:

No application for any license or employment, and no employment or license held by an individual, to which the provisions of this article are applicable, shall be denied or acted upon adversely by reason of the individual's having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of "good moral character" when such finding is based upon the fact that the individual has previously been convicted of one or more criminal offenses, unless:

(1) There is a direct relationship between one or more of the previous criminal offenses and the specific license or employment sought or held by the individual; or

(2) the issuance or continuation of the license or the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.



§753. Factors to be considered concerning a previous criminal conviction; presumption:

1. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall consider the following factors:

(a) The public policy of this state, as expressed in this act, to encourage the licensure and employment of persons previously convicted of one or more criminal offenses.

(b) The specific duties and responsibilities necessarily related to the license or employment sought or held by the person.

(c) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more such duties or responsibilities.

(d) The time which has elapsed since the occurrence of the criminal offense or offenses.

- (e) The age of the person at the time of occurrence of the criminal offense or offenses.
- (f) The seriousness of the offense or offenses.
- (g) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- (h) 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.

2. In making a determination pursuant to section seven hundred fifty-two of this chapter, the public agency or private employer shall also give consideration to a certificate of relief from disabilities or a certificate of good conduct issued to the applicant, which certificate shall create a presumption of rehabilitation in regard to the offense or offenses specified therein.

Rehabilitation and Reintegration into the Work Force^{ix}

As noted by an article published by The Sentencing Project, New York was the only state as of 2005 that requires a public agency or private employer to give consideration to an administrative certificate of rehabilitation, which creates a presumption in regard to rehabilitation of the offenses that the person was convicted of.^x Currently, New York has two types of administrative certificates of rehabilitation. They are a “Certificate of Relief From Disabilities”, found at New York Correction Law §§ 700-05, and a “Certificate of Good Conduct”, found at New York Correction Law §§ 703-a and 703-b. As of 2006, only six jurisdictions in the United States have similar types of certificates of rehabilitation.^{xi}

According to the Division of Criminal Justice Services, an average of 3,200 of both kinds of certificates are issued each year.^{xii} Approximately 1000 applications are made to the Parole Board for both kinds of certificates annually and approximately half are issued.^{xiii} The bulk of the remaining certificates are issued by the courts.^{xiv} A New York State Bar Association committee has speculated that the low amount of certificate applications is due to the fact that most offenders are not told of them.^{xv}



Certificate of Relief From Disabilities

To relieve an eligible offender of any forfeiture or disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate

may be limited to one or more enumerated forfeitures, disabilities or bars, or may relieve the eligible offender of all forfeitures, disabilities and bars. Provided, however, that no such certificate shall apply, or be construed so as to apply, to the right of such person to retain or to be eligible for public office.

Certificate of Good Conduct:

A certificate of good conduct may be granted as provided in this section to relieve an individual of any disability, or to remove any bar to his employment, automatically imposed by law by reason of his conviction of the crime or of the offense specified therein. Such certificate may be limited to one or more enumerated disabilities or bars, or may relieve the individual of all disabilities and bars.

The state board of parole, or any three members thereof by unanimous vote, shall have the power to issue a certificate of good conduct to any person previously convicted of a crime in this state, when the board is satisfied that:

- (a) The applicant has conducted himself in a manner warranting such issuance for a minimum period in accordance with the provisions of subdivision three of this section;
- (b) The relief to be granted by the certificate is consistent with the rehabilitation of the applicant; and
- (c) The relief to be granted is consistent with the public interest.



Why Should this Legislation be Encouraged?

Adverse Effects of Criminal Convictions

According to a New York State Bar Association committee, approximately 60% of people formerly incarcerated are unemployed one year after release, and approximately 80% of people who violate the terms of their probation are unemployed at the time of their violation.^{xvi} Additionally, a study conducted by Professor Devah Pager concluded that a criminal record reduced the chances of a callback after a job application

has been submitted by 50%.^{xvii} Even more alarming, study concluded that “black men whose job applications stated that they had spent time in prison were only about one-third as likely as white men with similar applications to receive a positive response”.^{xviii}

Adverse Effects of Hiring a Person with a Criminal Conviction::

Like most jurisdictions in the United States, New York recognizes negligent hiring as a theory of liability and this threat of liability creates an incentive for employers to avoid hiring individuals with criminal convictions.

ⁱ Employment Law Watch, “New Legislation Modifying New York Law Governing Use of Criminal Background Checks” (2009),

<http://www.employmentlawwatch.com/2009/01/articles/employment-us/new-legislation-modifying-new-york-law-governing-use-of-criminal-background-checks-in-employment-taking-effect-posting-date-february-1-2009/>

ⁱⁱ National Employment Law Project, “Criminal Records and Employment” (2010), <http://www.employmentlawwatch.com/2009/01/articles/employment-us/new-legislation-modifying-new-york-law-governing-use-of-criminal-background-checks-in-employment-taking-effect-posting-date-february-1-2009/>

ⁱⁱⁱ New York State Division of Human Rights, “Mission Statement” (2010), <http://www.dhr.state.ny.us/mission.html>

^{iv} New York State Division of Human Rights, “Division Accomplishments” (2009), http://www.dhr.state.ny.us/pdf/division_accomplishments_7_10_2009.pdf

^v Id.

^{vi} Id.

^{vii} Id.

^{viii} “New York courts have recognized that the guidelines of Article 23-A are in tension with the threat of liability posed by the negligent hiring theory. In deference to the public policy concerns embodied in Article 23-A, the courts have restrained the reach of negligent hiring by putting limits on the element of proximate causation”. New York State Bar Association, “Collateral Consequences of Criminal Proceedings”.

^{ix} National Employment Law Project, “Criminal Records and Employment”.

^x Love, Margaret, “Relief From the Collateral Consequences of a Criminal Conviction: A State by State Resource Guide”, (Oct. 2005),

<http://www.sentencingproject.org/doc/File/Collateral%20Consequences/execsumm.pdf>

^{xi} Safer Foundation, “Certificates of Rehabilitation and Other Forms of Relief From the Collateral Consequences of a Criminal Conviction”, (2006),

http://www.saferfoundation.org/docs/AllStates-BriefingSheet91906_2_.pdf

^{xii} New York State Bar Association, “Collateral Consequences of Criminal Proceedings”, (2006),

<http://www.nysba.org/AM/Template.cfm?Section=Home&CONTENTID=11415&TEMP LATE=/CM/ContentDisplay.cfm>

^{xiii} Id.

^{xiv} Id.

^{xv} Id.

^{xvi} Id.

^{xvii} Devah Pager, “The Mark of a Criminal Record”, 108 AM. J. SOC. 5, 937-75 (Mar. 2003).

^{xviii} New York State Bar Association, “Collateral Consequences of Criminal Proceedings”

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