

# Applicants with criminal conviction records: An overlooked protected class

One of the most basic tenants of employment law is that employers are prohibited from discriminating against applicants and employees based on protected characteristics like race, gender, religion, national origin, and age.

By way of well-publicized legislation and court decisions, other characteristics such as gender identity, genetic history, familial status, domestic violence victim status, and reproductive health decision making have been added to this protected list in New York. None of this likely comes as a surprise to any of our well-informed RBJ readers.

However, many employers I speak with are often surprised to learn of another protected status that has been on the books in New York for years: criminal conviction status.

Specifically, under the New York State Human Rights Law and Article 23-A of the New York State Correction Law, it is illegal for an employer to deny employment to an individual based solely on “his or her having been convicted of one or more criminal offenses.” In other words, employers cannot terminate a current employee or refuse to hire an applicant simply because of a pre-employment criminal conviction record. In addition, when making employment decisions, employers cannot consider an individual’s arrest record



that has been resolved in his or her favor, certain sealed records, or youthful offender adjudications.

The admirable purpose of this prohibition is to provide second chances to individuals who have been convicted of crimes and to decrease the potential of reoffending. There are countless stories of individuals who have been able to turn their lives around thanks to a post-incarceration job opportunity.

Some of you may be thinking, “This sounds all well and good, but is Ben telling me that I have to hire Charles Manson if he shows up at our job fair!?” Let me assure you this is not the case. First, this prohibition is superseded by any other laws or regulations that require an employer to disqualify individuals based on certain convictions (e.g., federal security clearance requirements).

Second, the New York State law also provides an important exception to the prohibition discussed above. Specifically, employers may still deny employment based

on a criminal conviction record if they can establish that:

- There is a direct relationship between one or more of the previous criminal offenses and the specific employment sought; or
- The granting of employment would involve an unreasonable risk to the property or to the safety or welfare of specific individuals or the general public.

Obvious examples that would fit within the “direct relationship” or “unreasonable risk” exceptions would include hiring a convicted child molester to work in a day-care center or promoting someone convicted of embezzlement to the role of CFO. In real life, however, making these determinations is not always so clear. For example, is there a “direct relationship” between a DUI conviction and working as a cashier? Does the fact that an applicant has a seven-year-old conviction for misdemeanor assault create an “unreasonable risk” if he or she were hired as a web developer?

In order to make a determination of whether such a “direct relationship” or “unreasonable risk” exists, the law requires employers to consider these eight factors:

1. The public policy of New York to encourage the employment of persons pre-

viously convicted of one or more criminal offenses.

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 or her fitness or ability to perform one or more such duties or responsibilities.
4. The time which has lapsed 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 or her behalf, in regard to rehabilitation and good conduct; and
8. The legitimate interest of the employer in protecting property and the safety and welfare of specific individuals or the general public.

Failure to analyze each of these eight factors – even in a seemingly obvious scenario – will result in a finding of unlawful discrimination under the New York State Human Rights Law. Although the law does not specifically require that this eight-factor analysis be documented in writing, the New York State Division of Human Rights generally treats an employer’s failure to produce written

documentation as evidence that it never actually completed the required analysis.

Here are a few suggestions on how to stay compliant:

1. Review your job postings to make sure nothing states (or even infers) that individuals with criminal convictions will not be hired. This can be obvious (“Convicts need not apply”) but also subtle (“Must pass background check”). There are actually people who make a living by scanning Indeed.com and Craigslist for job statements like these and immediately file discrimination suits, even if they did not intend to apply for the job.
2. If you are going to ask about an applicant’s criminal conviction history, try to wait until a later stage of the employment application process, preferably until after an initial offer has been made. In Rochester, Buffalo, New York City, and other cities who have adopted “Ban the Box” laws, it is already illegal to ask about conviction records during an initial job interview. Even if you are not located in one of these cities, waiting until later in the process will help you show that your final decision, whether you hire or not, was not tainted by the knowledge of an applicant’s conviction.
3. If you do ask about convic-

tions or conduct background checks, set up a formal process to conduct the required analysis and to document your results. Your favorite employment attorney can likely provide you with a template form to document your analysis in writing. If possible, have an additional employee, other than the person making the final hiring decision, review the background check information.

4. Make sure that you are conducting background checks in compliance with the Fair Credit Reporting Act and similar state laws. Conducting background checks in a manner that does not meet these laws’ complicated notice and authorization requirements can lead to class action lawsuits with enormous damages.
5. Finally, be aware that you will likely face some tough decisions. Don’t be afraid to consult with legal counsel if you encounter a particularly close call.

Finding and hiring good employees is a challenge for just about every business. When looking for your next team member, make sure your process doesn’t unwittingly put you on the wrong side of the law.

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