

Northeast Claim Service recognizes that employers have legitimate concerns about hiring job applicants with criminal records. We also understand that although a job applicant may be highly qualified, a conviction history may make the applicant appear to be more of a liability rather than an asset. Below is information to provide you with guidance to keep in mind when reviewing a job applicant's criminal record. Adhering to this guidance will help ensure you are compliant with relevant federal and New York State law, minimize liability risks, and assist you in developing fair and appropriate hiring practices.

Laws Governing an Employer's Use of Criminal Background Checks

May an employer use a background check when evaluating a job applicant in New York State?

YES. New York State allows employers to use background checks for employment purposes. Background check companies and the production and use of these reports are governed by New York State's Fair Credit Reporting Act (N.Y. GEN. BUS. LAW § 380) and the federal Fair Credit Reporting Act (15 U.S.C. § 1681).

May a background check contain records of criminal convictions in New York State?

It depends. If the job position an applicant is seeking has an annual salary of less than \$25,000, then the background check may only report criminal convictions that occurred in the previous seven years. If the job position has an annual salary equal to or greater than \$25,000, then all criminal convictions may be reported.

May a background check contain a record of arrests or charges in New York State?

NO. A background check is not allowed to contain information about arrests or charges, unless the charges are still pending when the background check is conducted.

May a background check contain records of non-criminal convictions (violations) in New York State?

NO. A background check MAY NOT report non-criminal convictions regardless of how long ago they occurred.

Does an employer need to notify a job applicant before running a background check?

YES. It is illegal for an employer to conduct a background check without first notifying the applicant.

What type of notification is required?

The applicant must be informed in writing, or in the same manner in which the application is made, that the employer intends to request a consumer report in connection with the application.

What information must be included in the notification to the applicant?

The applicant must be informed that: (1) the applicant's background check may be requested from a reporting agency and (2) the applicant may request to be notified whether or not the background check was requested, and that if it was requested, then the applicant will be informed of the name and address of the reporting agency that provided the background check.

Why should an applicant be notified that an employer is conducting a background check?

Applicants are legally entitled to review their background checks because many background checks are often inaccurate. For example, in a study the Legal Action Center conducted in 1995 ("Study of Rap Sheet Accuracy and Recommendations to Improve Criminal Justice Recordkeeping"), 87% of all records contained at least one mistake or omission. Also, many background checks are only based on name and date of birth instead of fingerprints. Since many people share the same name and birth date, their records may be switched. Applicants have the right to dispute and correct records.

Laws Governing Employers' Inquiries About Applicants' Arrests

What may an employer ask about an applicant's prior arrests?

NOTHING. Under New York state and city law, it is illegal to ask: "Have you ever been arrested?"

What may an employer ask about an applicant's past criminal charges that were dismissed or terminated in the applicant's favor?

NOTHING. Under New York state and city law, it is illegal to ask: "Have you ever been charged with a crime?"

What may an employer legally ask about an applicant's criminal background?

New York state and city law does not prohibit employers from asking: “Have you ever been convicted of an offense?”

When are criminal charges “favorably terminated”?

When a criminal action is terminated in favor of the accused, the arrest and prosecution of that individual is deemed a nullity, and he or she is restored to the legal status occupied before the arrest or prosecution.

There are many ways in which a criminal action can be favorably terminated:

- The complaint, accusation or charges were dismissed;
- The individual was acquitted by a jury;
- A guilty verdict was set aside by the court;
Example: The trial court determines—after a guilty verdict has been rendered, but before sentencing—that new evidence or a new legal ground warrants dismissal of the charges against the defendant and does not order a new trial.
- An unfavorable judgment was vacated by the court;
Example: The trial court determines—after a finding of guilt has been officially rendered—that the defendant’s constitutional rights were violated, new evidence has come to light, evidence was misrepresented during trial, etc., and the judge dismisses the charges and does not order a new trial.
- Prior to filing of a complaint or information, the prosecutor elects not to prosecute the individual; or
The arresting police agency elects not to proceed further.

May an employer ask about an applicant’s arrest record or past criminal charges that were favorably terminated if it does not *act upon* this information?

NO. New York State and City law state that an employer *may not inquire* about and *may not act upon adversely* information pertaining to an applicant’s prior arrests or criminal charges that were terminated favorably.

May an employer look at an applicant’s *out-of-state* arrest record or past criminal charges that were favorably terminated?

NO.

May an employer inquire about the arrest or prosecution that resulted in the filing of criminal charges that were eventually terminated in the applicant's favor?

NO.

Laws Governing Employers' Consideration of Conviction Records

Can I refuse to hire an applicant because he or she has a criminal record?

NO. Article 23-A of the New York Correction Law prohibits employers from denying an applicant employment because the applicant was previously convicted of one or more criminal offenses. There are a few areas of employment where Article 23-A does not apply, such as job positions in any law enforcement agency. Otherwise, all private employers with ten employees or more are subject to this law.

Are there *any* instances where I could use an applicant's criminal record to deny employment?

There are only two exceptions under Article 23-A where employment may be denied based on an applicant's past criminal convictions.

- First, employment may be denied if there is a direct relationship between the criminal offense committed and the employment sought. A "direct relationship" exists if the nature of the criminal conduct directly bears on the fitness or ability of the applicant to perform the duties or responsibilities of the job.
- Second, employment may be denied if the applicant would pose an unreasonable risk to property or the safety or welfare of others. This includes a risk to specific individuals or the general public.

How do I determine whether either of these exceptions apply?

Article 23-A requires that employers consider several factors in determining whether an applicant may be denied employment based on past criminal convictions. The employer must consider:

- The state's public policy of encouraging the employment of individuals previously convicted of criminal offenses.

- The duties and responsibilities related to the job sought.
- What bearing, if any, the criminal offense or offenses for which the applicant was convicted has on the applicant's fitness or ability to perform these duties or responsibilities.
- The amount of time that has elapsed since the occurrence of the criminal offense or offenses. This refers to how long it has been since the applicant committed the offense, not how long it has been since the applicant was convicted. In some instances, the date of the conviction may be years after the applicant actually committed the offense.
- The applicant's age at the time of the criminal offense or offenses.
- The seriousness of the offense or offenses.
- Any information produced by the applicant, or on the applicant's behalf, regarding his or her rehabilitation and good conduct.
- The interest in protecting property, and the safety and welfare of specific individuals or the general public.

Also, if the applicant has been issued a certificate of relief from disabilities or a certificate of good conduct, the employer must take that into consideration. The certificate creates a presumption of rehabilitation, meaning that the employer must take it as evidence that the applicant has been rehabilitated.

What is the difference between a certificate of relief from disabilities and a certificate of good conduct?

- Individuals who have no more than one felony conviction (and any number of misdemeanor convictions), may apply for a certificate of relief from disabilities. Each certificate applies to only one offense, so an applicant may have more than one certificate of relief from disabilities.
- Individuals who have two or more felony convictions (and any number of misdemeanor convictions) may apply for a certificate of good conduct. An applicant will not have more than one certificate of good conduct, as it applies to all previous convictions. In order to receive this certificate, the individual must have remained out of prison for at least 3 to 5 years.
- Both types of certificates are granted only after a parole officer conducts an

investigation and determines that the individual has been rehabilitated.

How do I weigh the factors?

Past employment discrimination cases provide guidance for weighing the Article 23-A factors. Examples from these cases demonstrate that a greater number of convictions, or convictions of criminal offenses that sound more serious, do not necessarily disqualify a job applicant. Instead, greater consideration is often given to the amount of time that has elapsed since the offense occurred. However, it is important to remember that the employer must consider each applicant on a case-by-case basis.

- *A woman with nine drug possession/prostitution convictions, and one manslaughter conviction, was held to be properly employed as an eligibility specialist with the Human Resources Administration. The drug possession/prostitution convictions were over ten years old and she had since completed a detoxification program and college courses. While the manslaughter conviction was more recent, she received the minimum sentence, was considered a model parolee, and had relevant prior work experience. The judge found that had the employer properly considered the factors under Article 23-A, he could not have reasonably concluded that she should be disqualified from employment. (City of New York v. City Civil Service Commission, 1988)*
- *An applicant for a firefighter position was found to be an unreasonable risk to property and the welfare and safety of the general public based on his drunken driving convictions and disciplinary actions received in past employment. The court held that he was properly denied employment. (Grafter v. New York City Civil Service Commission, 1992)*

A court found that an applicant's nine-year old manslaughter conviction was not directly related to the position of housing caretaker, and that based on this conviction the applicant did not pose a risk to property or public safety. However, when considered in light of the applicant's three-year old convictions for criminal possession of a narcotic drug with intent to sell and criminal possession of a controlled substance, the court held that the applicant had demonstrated a lack of rehabilitation and that his involvement in drugs and violence posed an unacceptable risk to the housing tenants. (Soto-Lopez v. New York City Civil Service Commission, 1989)

What if I consider all the factors and decide not to offer the applicant a job?

If, after considering the required factors, the employer chooses to deny the applicant employment, the applicant is entitled to a written statement giving the reasons for this denial. The employer must provide this statement within 30 days of request.