

Client Alert

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Background Checks, Nurses' Overtime, and Protections for Negligent Hiring Claims: New Workplace Laws for New York

New York has recently enacted new laws that impact recruitment, background checks, and working conditions for New York employers. This Client Alert highlights these changes. The first law encourages the hiring of ex-offenders by providing employers with additional protections against liability for negligent hiring and retention. The second law amends New York's General Business Law and Labor Law, affording increased protections to applicants/employees with criminal convictions. Effective February 1, 2009, employers must give a copy of Article 23-A of the Correction Law to applicants (and consumers) for whom a background check involving an investigative consumer report has been requested and also requires that employers post in a "visually conspicuous manner" a copy of Article 23-A along with "any regulations promulgated pursuant thereto relating to the licensure and employment of persons previously convicted of one or more criminal offenses." The third law prohibits *mandatory* overtime for nurses unless a statutory exception applies.

Generally, Article 23-A of the Correction Law prohibits public agencies and private employers that employ ten (10) or more persons from denying a license or employment due to the applicant's prior conviction(s) or by finding that the ex-convict lacks "good moral character" (where that finding results from his or her prior conviction(s)), *unless a direct relationship exists* between the conviction(s) and the license/employment sought or granting the license/employment would pose an unreasonable risk to

property or the safety/welfare of individuals or the public at large. In determining whether to hire or retain an ex-offender, the Correction Law requires that employers consider various factors outlined in Article 23-A, including, but not limited to: (1) the time that has elapsed since the occurrence of the criminal offense(s); (2) the age of the offender at the time of the criminal offense(s); (3) the specific job duties/responsibilities of the position sought weighed against the relevance of the ex offender's criminal past and suitability for the position; (4) the seriousness of the offense(s); and (5) any evidence of rehabilitation that the offender presents. Article 23-A also allows an ex-offender who has been denied a license/employment to request that the employer provide, within thirty days of the request, a written statement outlining the reasons underlying the denial.

Employers Who Hire Ex-Offenders Afforded Additional Protection from Negligent Hiring or Retention Claims

On September 4, 2008, § 296 of the New York State Human Rights Law ("NYSHRL") was amended to make it an unlawful discriminatory practice for "any person, agency, bureau, corporation or association, including the state and any political subdivision thereof" to deny a license or employment to an ex-offender merely because of his or her prior conviction(s) or by finding that his or her criminal record indicates a lack of "good moral character," where such a denial violates Article 23-A. The new law is effective immediately and creates a rebuttable presumption in favor of excluding, in any case alleging negligent hiring, negligent retention, or negligent supervision of a hiring manager, evidence of an employee or applicant's prior conviction(s) or incarceration(s), *so long as* the employer has complied with Article 23-A. Thus, employers who make a good faith, reasonable determination that the factors outlined in Article 23-A militate in favor of hiring or retaining an ex-offender are afforded additional protection against lawsuits.

In amending the NYSHRL to make clear that it is an unlawful discriminatory practice to refuse to hire an

applicant or to discharge an employee because of his/her ex-offender status where such conduct is violative of Article 23-A, while simultaneously protecting employers from negligent hiring and retention claims where the employer has complied with Article 23-A, ex-offenders are afforded increased opportunities to obtain/retain employment and, thus, reintegrate into society.

New Workplace Posting and Background Check Requirements

Governor Paterson has signed legislation amending New York's General Business Law and Labor Law with respect to criminal background checks of applicants or employees. These amendments take effect on February 1, 2009. The legislation provides that where an investigative consumer report of an applicant or consumer is requested, such as in connection with an offer of employment, the employer must provide the applicant with a copy of Article 23-A of the Correction Law in addition to the notices already required by the Fair Credit Reporting Act, and advise the applicant or consumer, in writing, of his/her rights to obtain a copy of the investigative consumer report. These new requirements are necessary in light of the exponential increase in background checks undertaken by employers.

Underlying these amendments is substantial evidence that employers who obtain information relating to convictions "repeatedly dismissed qualified applicants and terminated employees based solely on their criminal histories, even if there is no direct relationship between the criminal offense(s) and the job and no unreasonable risk to the safety of the public or property." Thus, the New York Legislature concluded employers needed to be made aware of the requirements of Article 23-A when denying employment or continued employment to an ex-offender. In addition, workplaces must post Article 23-A and the regulations promulgated pursuant to it in an accessible location that is visually conspicuous.

Prohibiting Mandatory Overtime for Nurses

In August 2008, Governor Paterson signed into law amendments to the Labor and Education Laws prohibiting mandatory overtime for nurses (RNs and LPNs) *unless* a statutory exception applies. With an effective date of July 1, 2009, a health care employer (as defined by statute) may *not* require a nurse to work more than his or her regularly scheduled work hours *unless* an exception denoted in subdivision 3 of the statute applies. These exceptions include:

- a federal, state, or county declaration of emergency in effect in the county where the nurse is employed or in a contiguous county;
- an ongoing medical or surgical procedure in which the nurse is actively engaged and whose continued presence through the procedure's completion is necessary to ensure the patient's health and safety; or
- where a health care employer determines that there is an emergency making overtime necessary to provide safe patient care. With regard to this last exception, before requiring an on-duty nurse to work unscheduled overtime, the health care employer must make a good faith effort to have overtime covered on a voluntary basis; for instance, by calling per diems, assigning floaters, requesting an additional day of work from off-duty employees, etc., if such staffing options exist.

The new law also amends New York's Education Law by adding a new § 6510-e, which states that an LPN or RN's refusal to work beyond his or her regularly scheduled hours will not "solely constitute patient abandonment or neglect," *except* under the specific circumstances noted in subdivision 3 of § 167 of the Labor Law. Significantly, the amended law will *not* prohibit a nurse from *voluntarily* working overtime or diminish/waive his or her rights pursuant to other applicable law(s), regulation(s) or collective bargaining agreement(s).

- a health care disaster, such as a natural disaster, which increases the need for health care personnel unexpectedly affects the county where a nurse is employed or a contiguous county;

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For more information, please contact:

New York

David H. Diamond

212.969.3775 – ddiamond@proskauer.com

Fredric C. Leffler

212.969.3570 – fleffler@proskauer.com

Marc A. Mandelman

212.969.3113 – mmandelman@proskauer.com

Katharine H. Parker

212.969.3009 – kparker@proskauer.com

Newark

John P. Barry

973.274.6081 – jbarry@proskauer.com

Wanda L. Ellert

973.274.3285 – wellert@proskauer.com

Los Angeles

Anthony J. Oncidi

310.284.5690 – aoncidi@proskauer.com

Harold M. Brody

310.284.5625 – hbrody@proskauer.com

Boston

Mark W. Batten

617.526.9850 – mbatten@proskauer.com

New Orleans

Charles F. Seemann

504.310.4091 – cseemann@proskauer.com

Washington, D.C.

Lawrence Z. Lorber

202.416.6891 – llorber@proskauer.com

Boca Raton

Allan H. Weitzman

561.995.4760 – aweitzman@proskauer.com

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