

COMMERCIAL INVESTIGATIONS LLC

CI TIMES



OBTAINING CRIMINAL BACKGROUND INFORMATION? WHAT EMPLOYERS NEED TO KNOW... (ARTICLE 23-A OF THE CORRECTION LAW)

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Recently, New York State passed two laws designed to encourage employment of individuals with prior criminal convictions. The first law imposes new notice requirements on employers requesting criminal background checks. The second law provides additional protection for employers against negligent hire and retention claims.

Legal Background

New York limits the circumstances under which an employer can deny employment based on an individual's prior criminal history. An employer may not refuse to hire (or fire) an individual because of a criminal conviction, unless the employer can demonstrate either: (1) a direct relationship between the criminal offense and the employment sought; or (2) that granting the employment sought would create an unreasonable risk to the property or safety of others.

For these analyses, New York law provides various factors, which are found in Article 23-A of the N.Y. Correction Law ("Article 23-A"). These factors for consideration include the following:

- the public policy to encourage employment of individuals with prior convictions;
- the specific duties and responsibilities of the position;
- the bearing of the criminal offense on the applicant's fitness or ability to perform the duties and responsibilities of the position;
- the time since the crime was committed;

- the applicant's age at the time the crime was committed;
- any information the applicant has produced regarding rehabilitation; and
- the legitimate interest of the employer in protecting property and the safety and health of individuals or the general public.

An employer may be liable for unlawful discrimination if the employer refuses to employ an individual without demonstrating a direct relationship between the offense and the employment sought or an unreasonable risk to property or safety based on these factors.

New Notice Requirement

New York will require employers to notify applicants of the anti-discrimination rule and an employer's obligation to consider the Article 23-A factors. Beginning February 1, 2009, employers obtaining criminal background checks must:

- provide a copy of Article 23-A to the individual about whom such a report was requested, and
- post Article 23-A and any related regulations in a conspicuous location at the employer's premises.

The employer must provide Article 23-A to the subject: (1) prior to requesting a criminal background investigation and (2) when the consumer reporting agency (e.g., background investigation firm) provides the report (with criminal background information) to the employer. An employer must comply with these requirements beginning February 2009.

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CLIENT CLUE

Article 23-A of the N. Y. Correction Law

Effective February 1, 2009, employers will be required to provide applicants with a copy of Article 23-A of the Correction Law whenever an investigative consumer report is requested as part of a background check. Employers are also required to conspicuously post Article 23-A.

CI has attached Article 23-A to its Consent Forms and has provided an Article 23-A poster for its clients. The revised Consent Forms and Poster can be found in your online client packet.

Please contact a CI representative for assistance in accessing your online client packet or with any questions.

**OBTAINING CRIMINAL BACKGROUND INFORMATION?
WHAT EMPLOYERS NEED TO KNOW...(Article 23-A)**
(continued from page 1.)

**New Protection Against Negligent Hire
Claims**

The second law provides additional protection from negligent hire or retention claims. Negligent hire or retention claims arise when:

- an employee with a criminal conviction injures someone or causes other harm during the employee's course of employment;
- the criminal conviction demonstrates the employee had a proclivity to engage in the wrongdoing that caused the injury or harm;
- the employer knew or should have known of the employee's proclivity; and
- the employer could have prevented the injury or harm by refusing to employ the employee.

For example, an employer who fails to conduct a background check may be liable for hiring an employee who is a convicted violent sex offender, if that employee later sexually assaults a third party during the course of his employment. The prior criminal history is evidence the employee had a proclivity to engage in violent sexual conduct. If the employer could have reasonably discovered this conduct (e.g., with an appropriate background check), the employer might have prevented that particular attack by refusing to hire the employee.

The new law excludes evidence of the employee's criminal background when the employer made a reasonable, good faith determination that the Article 23-A factors support hiring (or retaining) the employee.

This new protection adds incentive for employers to conduct criminal background checks and conduct the Article 23-A analysis. If an employer learns of a conviction and conducts the Article 23-A analysis reasonably and in good faith, evidence of the conviction will not be considered in deciding whether the employer negligently hired or retained the employee. This could, in many cases, result in a dismissal of the claim.

In practice...

When assessing your screening procedures, the following are critical areas for review:

- Are we conducting appropriate background checks for each employee classification, with special consideration for those who have access to financial information, cash, or who work with little or no supervision?
- If the screening process reveals a criminal conviction, do we conduct an Article 23-A analysis?
- Do we comply with federal and state Fair Credit Reporting Acts authorization and notification requirements?

Periodic review of your screening procedures will help ensure you are taking appropriate steps to protect your company from legal liability.

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∞ INQUIRY SPOTLIGHT ∞

COUNTY CRIMINAL

A COUNTY CRIMINAL inquiry is highly recommended as a minimum criminal record search to ensure the discovery of any misdemeanor or felony charges that may have been brought against a subject. Due to compliance standards, county criminal searches are usually run where a subject has lived within the past 7 or 10 years at the client's discretion.

CI conducts COUNTY CRIMINAL inquiries by submitting a query to a professional court researcher who physically retrieves the records from the appropriate jurisdiction.

Examples of charges that can be revealed through a COUNTY CRIMINAL Inquiry include assault, robbery and murder. More often, a COUNTY CRIMINAL inquiry uncovers "minor" convictions such as theft, drug possession or shoplifting that are very relevant to employers seeking the best applicants.

Note that in New York State, county level searches reveal felonies only and will not reveal "minor" crimes considered misdemeanors such as those mentioned above. For this reason, CI does not recommend that county level only searches be performed in New York State, instead the NEW YORK STATEWIDE CRIMINAL inquiry is recommended.

To add CI's COUNTY CRIMINAL inquiry to your background investigations contact a CI representative today.

DUE DILIGENCE: WHO'S IN YOUR CABINET? PROTECTING YOUR OFFICE LIKE THE OVAL OFFICE — GIVE YOUR OWN VETTING PROCESS THE PRESIDENTIAL TREATMENT

When it comes to vetting potential high-level advisors, President-elect Barack Obama has been perhaps more cautious and thorough than any President before him. With the recent arrest of the Illinois Governor Blagojevich and money manager Bernard Madoff—you can clearly see why.

There will always be individuals who abuse their power and are driven by greed. The incoming administration is using every legal and available means to scrutinize their candidates. For your own new hires, a cost effective background investigation can duplicate some of what they are doing in their vetting process.

Let's revisit Due Diligence as an example of how you can effectively and affordably give your vetting process the presidential treatment.

At first glance, Due may appear fit for any cabinet or just the right candidate to join your organization. His resume is impressive. He shows up for the interview on-time. He is well dressed. He is well prepared with copies of his glowing resume and letters of recommendation. He dazzles with articulated answers to your questions and has thoughtful, researched questions about your company and the position.

The problem is that everything you have at this point is applicant supplied information. He filled out the application. He prepared the re-

sume and gave you the letters of recommendation. When vetting your candidates, it is important to verify all applicant supplied information. The assumption should be that the candidate does have something to hide. A background investigation should be used to provide an objective reason to believe that the candidate is not hiding something.

Use the links below to view Due's resume as well as a red flagged resume that shows what we know after his background investigation. You can also view his adverse findings on his complete background investigations report. This report shows how an affordable background investigation can reveal many of the same things Barack Obama's investigators were looking for when vetting potential cabinet members.

Here is the link to Due's Resume:

<http://ciware.com/DueDiligenceResume.pdf>

Here is the link to Due's Resume with the red flags marked:

<http://ciware.com/DueDiligenceResumewithFlags.pdf>

Here is the link to Due's complete Background Investigation Report:

<http://ciware.com/DueDiligenceReport1206.pdf>

EXERCISE DUE DILIGENCE



DO THE DUE

FOLLOW DUE IN 2009

A New Year for Due Diligence

In 2008, we were able to get to know Due more through his own self-published blogs, MySpace page and other social networking sites. We reviewed Due's online presence through CI's Cyber Investigation Report.

Through his own generated web content, Due had implicated himself with illegal and unethical behavior.

We also reviewed Due's fake diploma he received through an Internet diploma mill.

Stay tuned in 2009 for more adventures from Due Diligence.

To see Due's past reports, view his page online at www.commercialinvestigationllc.com/duespage.

Read previous issues of CI Times to see the full details of Due's life at www.commercialinvestigationllc.com/Newsletter.

COMMERCIAL INVESTIGATIONS LLC

A LICENSED PRIVATE INVESTIGATIVE AGENCY

Dedicated to providing innovative Private Investigative solutions to its clients and working with them to develop tailored services that meet their needs.

Services provided include:

BACKGROUND INVESTIGATIONS

CI provides accurate, timely, cost-effective and fully compliant reports delivered with exceptional client service.

CONSULTING SERVICES

CI assists you in implementing a compliant background investigation process and provides assistance in implementing in-house procedures.

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