

ANDERSON KILL CO-OP, CONDO & REAL ESTATE ADVISOR

New Legal Responsibilities for New York Employers

By Bruce A. Cholst and Elliot J. Coz

Over the past two years, a number of state and local laws have been enacted that restrict an employer's use of traditional benchmarks in their hiring process. Moreover, a new local law enhances the rights of freelance workers. Since hiring employees and freelancers is an integral part of the property management function, this legislation significantly impacts the operation of cooperatives and condominiums. This is particularly so because penalties for noncompliance can be hefty.

Prior Criminal Convictions

New York Correction Law Article 23-A

New York Correction Law Article 23-A was enacted to prevent "unfair discrimination [in hiring practices] against persons previously convicted of one or more criminal offenses . . ." It applies to private employers that employ 10 or more people.

Specifically, affected employers are prohibited from refusing to hire an applicant based

on prior criminal convictions or a "finding of lack of good moral character" because of such convictions unless:

1. "There is a direct relationship between [the conviction] . . . and the specific . . . employment sought or held by the [applicant]; or
2. "The . . . employment would involve an unreasonable risk to the property or to the safety or welfare of specific individuals or the general public."

The statute then enumerates a series of factors that must be considered before concluding that the criminal conviction in question warrants rejection of an applicant on the grounds of either a direct relationship between the crime and the position, or the risk presented to the property or public safety. The factors are:

1. That the public policy of New York encourages employment of people previously convicted of crimes.
2. The specific duties and responsibilities necessarily related to the employment.

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3. The bearing the crime may have on the applicant's fitness or ability to perform the job duties and responsibilities.
4. The time elapsed since the crime occurred.
5. The age of the applicant when the crime occurred.
6. The seriousness of the crime.
7. Information in regard to the applicant's rehabilitation and good conduct.
8. The legitimate interest of an employer in protecting property and ensuring the safety of individuals or the general public.

Moreover, when contemplating these factors, the employer *must also* give consideration to a certificate of relief from disabilities or a certificate of good conduct relative to the offense, which certificate creates a presumption of the applicant's rehabilitation.

Finally, under Article 23-A the employer is required to comply within 30 days with any request by an applicant with a prior criminal conviction for a written explanation of his denial of employment.

The Fair Chance Act, Local Law No. 63 (2015)

In adopting the Fair Chance Act, the New York City Council took Article 23-A one step further by seeking to force an employer to consider an applicant's merits as they existed prior to any criminal convictions. This objective is affected by prohibiting an employer from either investigating or inquiring about an applicant's criminal history until an offer of employment has been extended. (The offer may be extended *conditionally* based on the results of a criminal background check). In this manner, a provisional offer is made without reference to or knowledge of an applicant's criminal history. An employer is permitted to conduct general research about an applicant's background and experience, but if they inadvertently discover information related to a criminal conviction, they cannot further investigate the nature or circumstances of the conviction. In the event of such an inadvertent discovery, the employer should prepare a memorandum to the file to document its inadvertence should there be subsequent enforcement action relative to violation of the Fair Chance Act.

Once a provisional offer is extended to an applicant, the employer is free to investigate

and inquire into the applicant's criminal history. However, they may not withdraw their offer based upon the results of this search unless they can demonstrate the existence of either of the two criteria required under Article 23-A, taking into consideration each of the eight enumerated factors cited above. This analysis must be documented in writing because, under the Fair Chance Act, any denial of employment on the basis of a prior conviction must be accompanied by disclosing to the applicant that an inquiry into his criminal background was conducted, and by providing a copy of the Article 23-A analysis. The applicant then has three business days to respond to the employer's concerns.

Salary History

Local Law 67 (2017)

Under Local Law 67, which becomes binding throughout New York City on October 31, 2017, employers are prohibited from inquiring about an applicant's salary history, or to rely on the history as a basis for determining compensation. However, an employer may engage in discussion with an applicant about their salary expectations. This provision does not apply to applicants for internal transfer or promotion with their current employer. It also does not apply when an applicant voluntarily discloses their salary history.

Consumer Credit Score

Stop Credit Discrimination in Employment Act, Local Law No. 37 (2015)

This law, which prohibits employers from inquiring about a candidate's consumer credit score or history, or using such information in an employment decision, reflects the City Council's belief that "credit history is rarely relevant to employment decisions." However, the law does not apply to candidates for positions responsible for managing funds or assets in excess of \$10,000.

Freelance Workers

Local Law 140 (2016)

This local law, which took effect on May 15, 2017, and applies throughout New York City, provides freelance workers with broad new protec-

tion against their employers. As defined in this provision, the term “freelance worker” means “a person or an organization consisting of no more than one person hired as an independent contractor, whether the individual is doing business under his own name, is incorporated or uses a trade name.” Examples of freelance workers often hired by cooperatives or condominiums are painters, landscapers, and interior designers. The new requirements include:

- A written contract must be in place if the value of the freelance services is \$800 or more. The written terms must include names and addresses of all parties, a list of services to be performed by the freelancer, cost of services, rate and method of compensation, and date on which payment is due.
- Payments must be made on or before the date specified in the contract, or, if no date is specified, within 30 days of the completion of service. ▲

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