

Criminal Records & Employment Background Checks

Don't Break the Law When Hiring

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Why Perform Background Checks?



- 1 Reduce theft and fraud
- 2 Limit employee turnover
- 3 Promote a safe work environment
- 4 Prevent negligent hiring claims

A close-up photograph of a person's hands in silver metal handcuffs. The person is wearing a light blue sweater. The background is a plain, light-colored wall. The text is overlaid on the image in a bold, dark blue font.

New York employers generally cannot seek or consider records of arrests that did not lead to a conviction.

New York Human Rights Law

Prohibits employers from inquiring about or acting adversely upon:

“any arrest or criminal accusation of such individual not then pending against that individual which was followed by a termination of that criminal action or proceeding in favor of such individual.”



Job postings cannot indicate that applicants must have clean criminal records.

Ban-the-Box Laws

Buffalo

- Applies to public and private employers within the City of Buffalo with 15+ employees.
- Also applies to vendors of the City of Buffalo, regardless of location.
- Does not apply to public or private schools or service providers of direct services specific to the care or supervision of children, young adults, senior citizens, or the physically or mentally disabled.
- Prohibits covered employers from asking about criminal convictions before the first job interview.
- Job applicants can directly sue employers for violating this law and can recover injunctive relief, damages, and attorneys' fees.
- Penalties are \$500 for an employer's first violation and \$1,000 for each violation afterwards.
- Exception where convictions would provide a legal restriction on the applicant's ability to perform the job, such as positions in schools or police departments.

Ban-the-Box Laws

Rochester

- **Applies to public and private employers with 4+ employees and vendors, contractors, or suppliers of the City of Rochester.**

New York City

- **Applies to employers with 4+ employees.**
- **Covered employers cannot ask about criminal records until after they have made a conditional offer of employment.**

Fair Credit Reporting Act

The FCRA governs third party background checks of employees or applicants.



Defines a “consumer report” as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living”

Consumer Reporting Agency

“Any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports.”



FCRA Notice Requirements

Before obtaining a consumer report, employers must provide applicants with written notice and obtain separate written consent.

FCRA Notice Requirements

Before taking adverse action based on a report, employers must provide a pre-adverse action letter, including a copy of the consumer report and a description of rights under the FCRA.

Employers must wait 5 business days before officially taking adverse action.

FCRA Notice Requirements

After taking adverse action based on a report, employers must provide the contact information of the consumer reporting agency and another statement of rights.

Steps NY Employers Must Take In Denying Employment Based on Prior Criminal History

Consider relationship between position and criminal offenses and whether employment would create an unreasonable risk



Weigh 8 factors in determining whether the criminal conviction is a disqualifying factor



If applicant requests it, provide a written statement of reasons why they were denied employment within 30 days

Decisions Based on Convictions

New York Corrections Law supports employment of applicants with criminal records.

An employer can refuse to hire based on previous criminal conviction, if:

- There is a direct relationship between previous offenses and employment sought, or
- Employment would present an unreasonable risk to property or safety.

NY Corrections Law Factors

Employers must evaluate all of the following:

1. New York's public policy of encouraging employment of persons with criminal records.
2. Specific duties and responsibilities of the position.
3. Bearing of offense(s) on the ability to perform job duties.
4. Time elapsed since the criminal offense(s).
5. Age at the time of the criminal offense(s).
6. Seriousness of the offense(s).
7. Information related to rehabilitation and good conduct.
8. Employer's interest in protecting property, safety, and welfare.

Notice to Unsuccessful Applicant

If an applicant with a criminal record asks an employer why they were denied employment, the employer must provide a written statement within 30 days.



Article 23-A Notice Requirements

» Posting in Workplace

- In a conspicuous manner and accessible to employees.
- Can be included with other employee postings.

» Copy to Individual

- When employer receives a consumer report that contains criminal conviction information.
- Required even if no adverse action is taken.

New York Human Rights Law

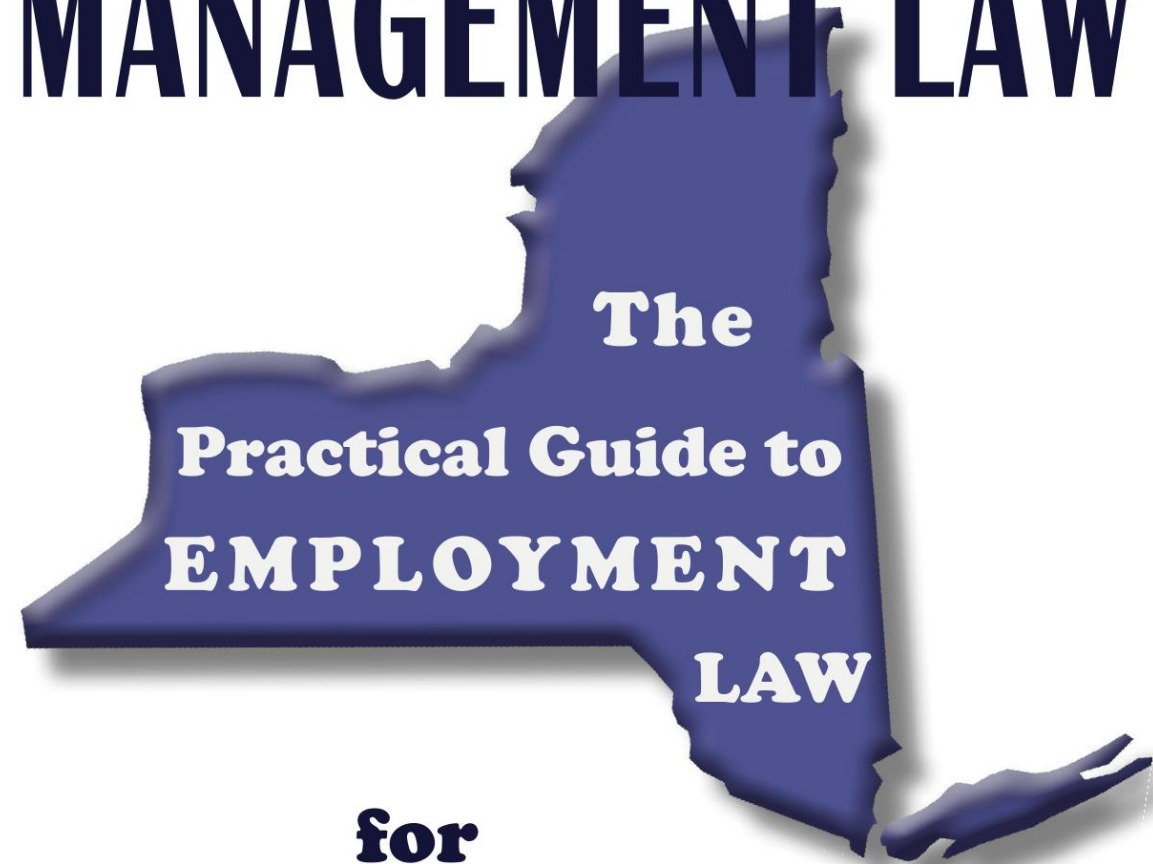
Applicants with criminal records may claim discrimination on the basis of:

- Corrections Law
- Race
- Sex
- Age
- Disability
- (Any other protected category)

EEOC Enforcement Guidance

- April 2012 document entitled “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964”
- Emphasized that a neutral hiring policy can still disproportionately affect certain protected classes (e.g., based on race or national origin)
- Called for individualized assessment similar to that required by NY Corrections Law
- Ruled unenforceable (in Texas) by a federal judge in February 2018

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Thanks for your time!



Questions?

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The logo for Horton Law PLLC is a large, white, semi-circular shape on a dark blue background, resembling a stylized 'H' or a partial circle.

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