

Mandatory Guidelines on the Application of New York State Correction Law Article 23-A to Hiring

I. The Article 23-A Balancing Test

- (a) In accordance with the public policy of this State to encourage the employment and licensure of people with criminal convictions, as expressed in Correction Law Article 23-A, a State agency, commission, board, or department (an “agency”) who is considering a qualified candidate who has a criminal conviction or convictions for a position (the “candidate”) shall be permitted to select the candidate unless (i) there is a direct relationship between one or more of the previous convictions and the duties required of the position; or (ii) hiring the candidate in that position would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.
- (b) In order to reject a candidate based on his or her criminal conviction, the agency must arrive at an affirmative finding to the questions set out above in (a)(i) or (a)(ii), by considering each of the eight factors listed under New York State Correction Law § 753. Each of the aforementioned eight factors must be considered individually; none of the eight factors may be disregarded. *See Matter of Acosta v. New York City Dep’t of Educ. et al.*, 16 N.Y.3d 309, 320 (2011). The eight statutory factors are as follows:

Factor 1: The public policy of the state to encourage the employment of persons previously convicted of one or more criminal offenses.

This public policy creates a presumption in favor of employment and places the burden on the agency to demonstrate why the candidate should not be selected based on his or her criminal conviction.

Factor 2: The specific duties and responsibilities necessarily related to the position.

Each position requires competency in a function (*e.g.*, typing, lifting, driving, negotiating a contract, managing a budget). The agency shall compile a list of the functions involved in the position at issue and use that list to evaluate Factor 3 below.

Factor 3: The bearing, if any, the criminal offense will have on the fitness or ability to perform one or more of such duties or responsibilities.

The agency shall evaluate whether the specific elements of a candidate’s conviction renders him or her unable to perform the specific functions of the position identified in Factor 2 above. In the event that an agency finds a significant relationship between the elements of the conviction(s) and the candidate’s fitness or ability to perform one or more of the position’s functions,

it must be able to articulate its reasoning with specificity. Finding a significant relationship between the elements of a conviction and the specific duties and responsibilities of the position does not end the agency's consideration of employment. The agency must consider all eight statutory factors.

Factor 4: The time which has elapsed since the occurrence of the criminal offense or offenses.

Absent a statutory requirement to the contrary, an agency shall not require the lapse of a fixed period of time between the occurrence of the criminal offense(s) and selecting a candidate. Rather, an agency must engage in an individualized analysis for each candidate. In the event that an agency finds that the amount of time elapsed weighs against selecting a candidate, it must be able to articulate its reasoning with specificity.

Factor 5: The age of the person at the time of occurrence of the criminal offense or offenses.

An agency is required to take the age of the candidate at the time of the occurrence of the offense(s) into account, and it must do so with the understanding that individuals who exercise poor judgment as youth or young adults very often mature into law abiding productive adults. In the event that an agency finds that the age of the candidate at the time of the occurrence of the criminal offense(s) weighs against employment, it must be able to articulate its reasoning with specificity.

Factor 6: The seriousness of the offense or offenses.

The agency must evaluate the seriousness of the offense(s) for which the candidate was convicted, and as is the case with each factor, it must weigh its findings against the other seven factors in the final analysis. In the event that an agency finds that the seriousness of the offense weighs against the selection of the candidate, it must be able to articulate its reasoning with specificity.

Factor 7: Any information produced by the candidate, or produced on his or her behalf, in regard to rehabilitation and good conduct.

As part of its analysis of this factor, an agency must review a variety of information if provided, including, but not limited to, evidence of completion of treatment, programming, history of post-conviction employment, volunteer or community activity, and letters of reference from employers, community members and others who can speak to a candidate's conduct since the time of the occurrence of the offense(s).

Factor 8: The legitimate interest of the agency in protecting property, and the safety and welfare of specific individuals or the general public.

As an agent of the State, an agency must evaluate the impact of hiring an individual on the safety and welfare of individuals and property. In doing so, the agency must engage in an individualized analysis for each candidate. In the event that an agency finds that consideration of the safety and welfare of individuals and property weighs against the selection of a candidate, it must be able to articulate its reasoning with specificity.

In addition to these eight factors, an agency must give consideration to a certificate of relief from disabilities or certificates of good conduct issued to an applicant, and such certificate must be considered in the person's favor as a presumption of rehabilitation. However, an agency may not consider the fact that a candidate does not have a certificate as a factor against employment.

II. Procedure.

- (a) Upon disclosure of a criminal offense by the candidate or upon discovery of a criminal offense through a mandatory fingerprinting process, an agency shall communicate with the candidate in writing to offer an opportunity to provide, within a reasonable period of time, a statement or other information regarding his or her rehabilitation or good conduct. A sample of such communication is attached.
- (b) In instances in which a criminal offense is self-disclosed, an agency shall not ask an applicant to produce a court disposition or to provide a copy of the applicant's self-obtained criminal history record ("Rap sheet").
- (c) An agency shall take note of the statutory elements of the offense(s) of which the applicant was convicted and may consider facts relevant to the circumstances of the conviction. To access these facts, the agency may give the candidate an opportunity to discuss them, and the agency may request the accusatory instrument or sentencing minutes directly from the relevant court. To the extent that an agency chooses to review the accusatory instrument or sentencing minutes, it may only do so for the purpose of obtaining facts relevant to the conviction; it may not consider unrelated

allegations contained therein. Further, if the agency chooses to obtain these documents, it must use best efforts to do so in a timely manner so as not to delay consideration of the candidate for employment.

III. Mandatory Bars on Hiring and Correction Law § 751.

An agency shall not select a candidate if a New York State statute expressly forbids selecting a candidate based on that candidate's specific criminal conviction (*e.g.*, robbery) or class of conviction (*e.g.*, felony), except, as set out in Correction Law § 751, when a candidate has received an executive pardon, or a certificate of relief from disabilities or a certificate of good conduct. If a candidate otherwise barred from a position in an agency has an executive pardon or a certificate of relief from disabilities or a certificate of good conduct, an agency shall consider the candidate according to the standards set forth in Section I herein.

Notwithstanding the above, if a federal statute expressly forbids employment based on a candidate's specific criminal conviction (*e.g.* endangering the welfare of a child) or class of conviction (*e.g.* felony) then the agency shall not hire the candidate, even if the candidate has a certificate of relief from disabilities, a certificate of good conduct or an executive pardon. The Agency staff shall consult with their agency's general counsel before determining whether the federal statute exception to Correction Law §751 applies.