Labor and Employment Law Information Memo

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NEW LEGISLATION REGULATES EMPLOYERS' USE OF EMPLOYEE PERSONAL IDENTIFYING INFORMATION AND CRIMINAL RECORD INFORMATION

Three new State statutory changes deserve the close attention of New York employers.

1. Use of Employee Personal Identifying Information

First, as part of broad legislation designed to combat issues of identify theft, the State has enacted Section 203-d of the New York Labor Law ("§203-d") to restrict the use of employee personal identifying information by employers. §203-d, which becomes effective January 3, 2009, prohibits employers from:

- publicly posting or displaying an employee's social security number;
- visibly printing a social security number on an identification badge or card, including any time card;
- placing social security numbers in files with open access; and
- communicating an employee's personal "identifying information" to the general public.

"Identifying information" is defined to include an employee's social security number, home address or telephone number, personal electronic mail (e-mail) address, Internet identification name or password, parent's surname prior to marriage, or driver's license number.

An employer that commits a knowing violation of §203-d may be liable for a civil penalty of up to $500. Under the new statute, it is presumptive evidence that a violation of §203-d was "knowing" if the employer has not adopted policies or procedures to safeguard against §203-d violations, including procedures to notify relevant employees of these statutory requirements.

To comply with §203-d, employers should assess their current procedures for safeguarding employee "identifying information." Employers should have in place a policy incorporating the statutory requirements and advising employees, especially those with access to "identifying information," that they are forbidden from communicating such information to the public. Further, access to "identifying information" should be limited to those employees whose jobs necessitate access to such information.

2. Regulation of Prior Criminal Convictions

Governor Paterson also recently signed several pieces of legislation designed to re-enforce the prohibition against employment discrimination based on an individual's prior criminal convictions.

a. Denial of Employment Based on Prior Convictions

According to a recent report from the Society for Human Resource Management (SHRM), 80% of employers run criminal background checks on applicants before hiring, which is up nearly 30% from 1996. The sponsor of one of the bills described below argued that legislation was needed because some "employers maintain blanket barriers to employment based solely on criminal conviction records even when the conviction may be completely unrelated to the job sought and no threat to the public or property is present."

The recent legislation relates to Article 23-A of the New York Correction Law ("Article 23-A"). Article 23-A generally prohibits employers from denying employment to an applicant or employee based on a prior criminal conviction, and prohibits the denial of employment because the employer finds that the individual lacks "good moral character" based on his or her criminal conviction record. While the statute has always applied to applicants for employment, it was amended in 2007 to make explicit that the protection also extends to existing employees.

Under Article 23-A, there are two exceptions that may permit an employer to deny employment based on a prior criminal conviction: first, if there is a "direct relationship" between one or more of the previous criminal offenses and the specific employment sought or held by the individual; and second, if the granting or continuation of the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public. The factors that an employer must consider in determining whether to hire, or adversely affect the employment of, an individual with a criminal conviction include:

1) The overall public policy of New York State to encourage the employment of persons previously convicted of one or more criminal offenses;

2) The specific duties and responsibilities necessarily related to the employment sought or held by the person;

3) The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his fitness or ability to perform one or more of such duties or responsibilities;

4) The time which has elapsed since the occurrence of the criminal offense or offenses;

5) The age of the person at the time of occurrence of the criminal offense or offenses;

6) The seriousness of the offense or offenses;

7) Any information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct; and

8) The legitimate interest of the employer in protecting property, and the safety and welfare of specific individuals or the general public.

A related article in the General Business Law regulates employers' use of third parties to conduct background checks on applicants and employees. Under General Business Law Section 380-c, if an employer obtains an investigative consumer report on an individual, which includes information from personal interviews with the individual's neighbors, friends or associates, then the individual is entitled to receive the name and address of the consumer reporting agency that performed the investigation. In addition, the individual must be advised that he or she may inspect and receive a copy of the report by contacting the agency that performed the background check.

While the new legislation does not change the legal analysis under Article 23-A or the General Business Law, it does create several new requirements for employers, which become effective February 1, 2009, and also provides additional protection from negligent hiring and retention claims.

b. New Posting and Notice Requirements

The legislation amends the New York Labor Law to add Section 201(f), which requires every employer to post, in a visually conspicuous manner, a copy of Article 23-A of the Correction Law and any regulations promulgated under that statute. According to the Bill's sponsor, this legislation is designed to ensure that employees are aware of the protections afforded to them under the law and to inform employers about the mandates of Article 23-A, their obligations not to discriminate against persons with prior criminal convictions, and to make legitimate decisions based on the factors set forth in Article 23-A.

In addition, the new legislation amends General Business Law Section 380-c to require that an individual, such as an applicant for employment, who is the subject of an investigative consumer report must also be provided with a copy of Article 23-A. While the statute, on its face, applies only to "investigative consumer reports" (i.e., a narrow subset of background investigations which would not include an investigation limited to a criminal records check), it is not clear whether the Legislature intended such a narrow scope for the new notice requirement.

c. Defending Negligent Hiring and Retention Claims

Finally, Governor Paterson recently signed an amendment to the N.Y. Human Rights Law, which is intended to reduce employers' exposure to litigation, and lower recidivism rates, by assisting those with criminal convictions in obtaining employment. The amendment creates a rebuttable presumption in favor of excluding evidence of an employee's past criminal record, in a negligent hiring or negligent retention case against the employer, provided that the employer has complied with Article 23-A in making its employment decisions (i.e., provided the employer has evaluated an applicant's criminal history in accordance with the eight factors set forth in Article 23-A, and decided in good faith to hire the individual). The legislation attempts to provide some level of protection from lawsuits for employers that would otherwise be wary of hiring an individual with a prior criminal conviction for fear of potential liability that may arise if that employee were subsequently to cause harm to a third party while working for the employer.

To be in a position to take advantage of this statutorily-provided rebuttable presumption, employers should create and maintain a written record demonstrating that all of the eight factors set forth in Article 23-A were assessed before any employment decision was made with respect to an applicant or employee with a criminal conviction. Without such a record, an employer may be foreclosed from relying on this rebuttable presumption, and forced to defend against a negligent hiring or retention claim with the employee's criminal history permitted to be used as evidence against the employer.

If you have any questions regarding the new legislation or wish to discuss options for appropriate courses of action, please contact:

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Upcoming BS&K Events

February 4, 2009 – BS&K Webinar

Understanding The Interplay Between New York's New WARN Act (effective February, 2009) And The Federal WARN Act And Other Compliance Issues In A Layoff Or Reduction-In-Force

From Wall Street to Main Street, from Citibank to Ford and GM, economic conditions are forcing many New York employers to reduce their workforces or separate individuals from their payroll. Separation from employment also necessarily requires that eligibility for employee benefits be properly and timely addressed. While such separation activities can assist a company during difficult times, they also create high risks of potential liability at the most inopportune of times.

New York's new WARN Act sets up another potential pitfall. It is important to understand how it differs from and interacts with the Federal WARN Act. In addition to this explanation, the webinar will also:

- Analyze Alternatives to a RIF to reduce costs
- Select the Criteria (seniority, performance, forced ranking, etc.)
- Establish the Decision Makers and Decisional Unit
- Analyze the Impact of the Criteria
- Utilize Appropriate Releases and Separation Agreements
- Address Union Issues
- Consider Communication and Documentation Issues Throughout the Process

March 2009 – Statewide Breakfast Briefing

Changes to the ADA and FMLA: What HR and In-House Counsel Need to Know …

Both the Americans with Disabilities Act (ADA) and the Family Medical Leave Act (FMLA) have undergone significant changes recently as a result of new legislative and regulatory developments. These changes will have a major impact on employers and how they address and document requests for accommodation under the ADA and leave under the FMLA. This breakfast briefing will provide you with practical information on how these changes will affect your organization and what you need to do to ensure that you are in compliance.

The presentation will focus on:

- New guidance on military and non-military leaves under the FMLA
- The ADA: What was the law and what is it now?
- ADA training and other preventive measures that employers need to take
- How litigation under the ADA Amendment Act will be different, and the interplay between litigation and training
- How do the changes affect New York employers covered by the New York Human Rights Law?

May and June, 2009 – BS&K's 10th Annual Workplace Seminar

Will be held in Albany, Buffalo, Corning, Melville, New York City, Rochester and Syracuse. Dates to be announced, watch our web site and your e-mail. You do not want to miss New York's best Statewide Labor, Employment and Employee Benefits Seminar.

Visit www.bsk.com for more information.

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