

NEW YORK  
CITY BAR

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Governor Elliot Spitzer  
State Capitol  
Albany, New York 12224

Dear Governor Spitzer:

On behalf of the Association of the Bar of the City of New York, we urge your administration to adopt safe harbor legislation that would absolve employers from negligent hiring claims in instances where they hire ex-offenders after the employers have received and reviewed valid Certificates of Rehabilitation. The proposed legislation is intended to help ex-offenders fully reintegrate into society by removing barriers to employment, while at the same time limiting legal exposure for employers.

**I. Background**

The unemployment rate for ex-offenders in New York is very high; up to sixty (60%) of ex-offenders are unemployed one year after release.<sup>1</sup> Moreover, there is a strong statistical correlation between unemployment and recidivism. For example, in New York State, eighty-three (83%) of individuals who violate the terms of their probation are unemployed at the time of the violation.<sup>2</sup> Thus, without employment, ex-offenders are unable to meet their basic needs and fully reintegrate into society.

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<sup>1</sup> Center For Employment Opportunities, Issue Overview: Crime and Work, available at [http://www.ceoworks.org/roundcrime\\_work012802.pdf](http://www.ceoworks.org/roundcrime_work012802.pdf) (last visited Jan. 24, 2007).

<sup>2</sup> Id.

Ex-offenders, however, face a number of barriers to reentry into the workforce. The initial barrier is the employment application itself, which often asks the applicant "Have you ever been convicted of a crime?" Many employers are forced to ask this question to avoid negligent hiring or other legal claims. Under a negligent hiring theory, the employer's liability arises from its failure to take reasonable care in making hiring decisions, thereby placing the newly-hired employee in a position to cause foreseeable harm.<sup>3</sup> The potential for negligent hiring claims creates an incentive for employers to avoid hiring previously incarcerated individuals. If an employer hires an employee with a conviction, such a conviction may serve as evidence that the employee was unfit for the job, which then establishes a crucial element of a negligent hiring claim. In an apparent effort to avoid such tort exposure, many employers choose not to hire ex-offenders when they apply for employment.

Additionally, because in New York over one hundred occupations list a license, certification, or registration as a prerequisite to employment, ex-offenders are further disadvantaged. A few of these licensing schemes automatically bar an individual from receiving a license if he or she has a past conviction, and several others place a "good moral character" standard on licensure. Even if the individual is not barred from receiving a license, the cost of the license itself may be prohibitive, since ex-offenders often lack the financial means to apply.

## **II. New York Law and Certificates of Rehabilitation**

The New York Legislature has implemented a number of laws that help ex-offenders re-enter the workforce. First, New York law prohibits employers from discriminating against applicants based on their criminal conviction history except in certain circumstances.<sup>4</sup> Second, Certificates of Rehabilitation provide an opportunity for ex-offenders to prove their rehabilitation for employment and licensing purposes. There are two types of Certificates of Rehabilitation: (1) Certificate of Relief from Disabilities ("CRD"), and (2) Certificate of Good Conduct ("CGC").<sup>5</sup> The sentencing court or the New York State Parole Board generally issues certificates, at its discretion, to eligible applicants based on their favorable character or fitness to work. Individuals with fewer than two felony convictions may apply for a CRD, while individuals with two or more felony convictions may apply only for a CGC. Certificates of

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<sup>3</sup> To prevail on a claim of negligent hiring, the plaintiff must prove that: (1) the person causing the injury was the employee of the defendant; (2) the employee was unfit for employment; (3) the employer knew or should have known that the employee was unfit; (4) the plaintiff was injured by the employee; (5) the defendant owed a duty of care to the plaintiff; and (6) the hiring of the employee was the cause of the plaintiff's injuries. See, e.g., T.W. v. City of New York, 286 A.D.2d 243 (1st Dep't 2001); Detone v. Bullit Courier Serv., Inc., 140 A.D.2d 278 (1st Dep't 1988); Haddock v. New York, 140 A.D.2d 91 (1<sup>st</sup> Dep't 1988).

<sup>4</sup> N.Y. EXEC. L. §296(15); N.Y. CORRECT. L. § 752.

<sup>5</sup> N.Y. CORRECT. L. § 701; N.Y. CORRECT. L. § 703.

Rehabilitation are helpful when ex-offenders seek employment or apply for a license because the employer must take the certificate as evidence that the applicant is rehabilitated.<sup>6</sup>

Certificates of Rehabilitation, while well-intentioned, are not without their shortcomings. Even assuming an ex-offender obtains a Certificate of Rehabilitation, the individual is still required to list his or her complete conviction history on employment applications, and as described below, employers are legally permitted to refuse employment if the conviction is “job-related.”

The Legislature may more effectively aid the reintegration process by implementing incentives for employers to hire individuals with criminal conviction histories.<sup>7</sup>

### **A. Current Legal Landscape**

Section 296(15) of the New York Human Rights Law incorporates Article 23-A of the New York Correction Law by reference. Article 23-A prohibits employers from discriminating against individuals applying for employment or license who were previously convicted of a criminal offense. Article 23-A provides, in relevant part:

No application for any license or employment, to which the provisions of this article are applicable, shall be denied by reason of the applicant’s having been previously convicted of one or more criminal offenses, or by reason of a finding of lack of “good moral character” when such finding is based upon the fact that the applicant has previously been convicted of one or more criminal offenses. . . .<sup>8</sup>

The statute further provides exceptions where there is (1) a direct relationship between the criminal offense and the employment sought, or (2) offering employment would involve an unreasonable risk to property, to the safety of specific individuals, or the general public.<sup>9</sup>

Section 753 of the New York Corrections Law delineates a number of factors employers may consider in determining whether to employ a person with a previous criminal conviction. These factors include: (a) New York’s public policy which encourages the licensure and employment of individuals with criminal convictions; (b) the duties and responsibilities related to the employment sought; (c) any bearing the criminal offense will have on the individual’s ability to perform; (d) the time that elapsed since the criminal offense; (e) the age of the person at the time of the offense; (f) the seriousness of the offense; (g) any information produced by the

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<sup>6</sup> N.Y. CORRECT. L. § 753(2).

<sup>7</sup> We do recognize federal law may preempt legislation in certain areas and still present barriers to reentry.

<sup>8</sup> N.Y. CORRECT. L. § 752.

<sup>9</sup> Id.

applicant regarding rehabilitation or good conduct; and (h) the employer's interest in protecting property, safety and welfare of specific individuals or the general public.<sup>10</sup>

## **B. Proposed Legal Framework**

Although New York Corrections Law § 753(g) allows an employer to consider “[a]ny information produced by the person, or produced on his behalf, in regard to his rehabilitation and good conduct,” employers are not absolved from liability when they hire individuals who present documentation of their rehabilitation and good conduct.

Thus, we propose that the Legislature amend New York Corrections Law § 753 by including a “subsection (3)” which would provide:

To encourage the licensure and employment of persons previously convicted of one or more criminal offenses, a Certificate of Relief from Disabilities or Certificate of Good Conduct issued in New York shall render the underlying conviction(s) inadmissible in a lawsuit alleging that a public or private decision-maker was negligent, or otherwise at fault, for hiring, retaining, licensing, leasing to, admitting to a school or program, or otherwise transacting with an individual, provided that the decision-maker had knowledge of the certificate at the time of the alleged negligence or other fault. A Certificate of Relief from Disabilities or Certificate of Good Conduct issued in New York, pursuant to New York Corrections Law §§ 701 and 703-a, shall be admissible as evidence of due care, by any person who had knowledge of it, in deciding to hire, retain, license, lease to, admit to a school or program, or otherwise transact with an individual.<sup>11</sup>

Providing a safe harbor for employers who hire individuals with a criminal conviction history would aid both employers, who are currently wary of any liability that may result from such hiring, and the applicant who will have increased opportunities to obtain gainful employment and reintegrate into society.<sup>12</sup>

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<sup>10</sup> N.Y. CORRECT. L. § 753.

<sup>11</sup> The proposed safe harbor legislation is modeled after the National Conference Of Commissioners On Uniform State Laws (“NCCUSL”), Uniform Collateral Sanctions And Disqualification Act, at Section 8(f) (October 2006 Draft), available at [http://www.law.upenn.edu/bll/ulc/ucsada/2006octdraft.htm#TOC1\\_9](http://www.law.upenn.edu/bll/ulc/ucsada/2006octdraft.htm#TOC1_9) (last visited Jan. 24, 2007).

<sup>12</sup> Recently, Assemblymember Hakeem Jeffries and Senator Velmanette Montgomery introduced legislation which would create state and local tax incentives aimed at encouraging companies to hire people with criminal records. This program would be modeled after a similar program in Philadelphia that grants a \$5000-per-job credit against business-privilege taxes to companies that create new jobs for released offenders, which is in addition to a federal tax incentive that provides \$2,400 per hire. The supporters of this plan hope to create 800 new jobs for ex-convicts each year in Philadelphia. This is another meritorious idea to consider. See

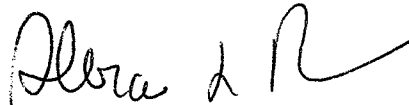
The re-entry of ex-offenders into the workforce and society may also be aided by:

- (1) examining whether disclosure of conviction history is necessary for all occupations that have license, registration, and/or certification requirements;
- (2) providing more information to ex-offenders about the availability of Certificates of Rehabilitation; and
- (3) accelerating the time period in which Certificates of Rehabilitation are issued.<sup>13</sup>

### III. Conclusion

We urge the administration to seriously consider the foregoing recommendations and offer our assistance in developing and implementing the proposed legislation.

Respectfully submitted,



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Chair Labor and Employment Law Committee  
New York City Bar Association

cc: Assemblymember Hakeem Jeffries  
Barry Kamins, Esq.

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Lowe, Herbert Tax Breaks Proposed for those Hiring Ex-Convicts, Newsday, Jan. 18 2007, at A22. The City of New York is similarly expected to announce a new initiative designed to assist ex-offenders find employment as part of its budget proposal.

<sup>13</sup> To obtain a Certificate of Good Conduct, a formerly incarcerated individual must complete a mandatory three (3) year waiting period before applying, and then undergo an application process that could take at least one (1) year. See Legal Action Center, Certificates of Relief from Disabilities and Certificates of Good Conduct: What You Can Do About Criminal Convictions When Looking for Work (2003), available at [http://www.lac.org/pubs/pubs\)top.html](http://www.lac.org/pubs/pubs)top.html) (last visited Jan. 24, 2007).