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**LAMB & BARNOSKY, LLP**  
ATTORNEYS AT LAW

## MEMORANDUM

**TO: OUR EMPLOYER CLIENTS**

**FROM: LAMB & BARNOSKY, LLP**

**RE: RECENT AMENDMENTS TO NEW YORK LAW REGARDING JOB APPLICANT AND EMPLOYEE CRIMINAL CONVICTION RECORDS**

**DATE: OCTOBER 31, 2008**

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Several recent amendments to New York State law affect how an employer handles information regarding a job applicant or employee's criminal conviction history.

In order to place these amendments in their proper context, here is a quick overview of the existing law in this area. New York law presently prohibits an employer from refusing to hire an applicant because of the applicant's previous conviction of one or more criminal offenses, or because the employer decides that the applicant lacks "good moral character" due to prior criminal convictions, unless: (1) there is a direct relationship between one or more previous criminal offenses and the specific employment sought; or (2) hiring the person would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

In making this determination, the law requires that an employer consider the following factors:

1. State public policy to encourage the licensure and employment of persons previously convicted of one or more criminal offenses;
2. The specific duties and responsibilities necessarily related to the employment sought;
3. The bearing, if any, the criminal offense or offenses for which the applicant was previously convicted will have on his the applicant's or ability to perform one or more such duties or responsibilities;
4. The time which has elapsed since the occurrence of the criminal offense or offenses;
5. The age of the applicant at the time of the occurrence of the criminal offense or offenses;

6. The seriousness of the offense or offenses;
7. Any information produced by the applicant, or produced on the applicant's behalf, in regard to rehabilitation and good conduct; and
8. The legitimate interest of the public agency or private employer in protecting property, and the safety and welfare of specific individuals or the general public.

Governor David Paterson recently signed into law new legislation that creates a rebuttable presumption in favor of excluding from evidence, in a lawsuit in which the employer is accused of negligent hiring or retention, any information regarding the prior incarceration or conviction of the job applicant or employee in question. This presumption will only apply in law suits in which the employer, upon learning of the job applicant or employee's criminal conviction history, considered the factors set forth above and made a reasonable, good faith determination that the factors weighed in favor of hiring or retaining that individual.

Therefore, in order to take advantage of this presumption and avoid liability for allegations of negligent hiring or retention of an employee with a criminal record, we recommend that, when you learn of a job applicant's or employee's criminal conviction history, create a record setting forth how each of the eight factors set forth above was considered and evaluated before the hiring or retention decision was made. Otherwise, if a lawsuit is brought, you run the risk of having the applicant's or employee's criminal history used against you in a negligent hiring or retention law suit.

In addition, on August 5, 2008, Governor Patterson signed into law another change to existing law pursuant to which, effective February 1, 2009, when an employer: (1) requests an investigative consumer report regarding a job applicant; or (2) receives a consumer report regarding a job applicant that contains criminal conviction information, the employer must provide that individual with a printed or electronic copy of Article 23-A of New York Correction Law (which includes the provisions of law described above). Moreover, the law was further amended to require every employer, as of February 1, 2009, to post in a conspicuous manner in an area accessible to its employees, a copy of the newly amended New York Correction Law Article 23-A and any regulations promulgated pursuant thereto. (As of today, the New York State Department of Labor has not yet published a suitable poster. To see the list of existing required postings for New York employers, use the following link to the New York State Department of Labor website:

<http://www.labor.ny.gov/workerprotection/laborstandards/employer/posters.shtm>

Please do not hesitate to contact us if you have any specific questions about these new laws.

THIS MEMORANDUM IS MEANT TO ASSIST IN GENERAL UNDERSTANDING OF THE CURRENT LAW. IT IS NOT TO BE REGARDED AS LEGAL ADVICE. THOSE WITH PARTICULAR QUESTIONS SHOULD SEEK THE ADVICE OF COUNSEL.