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■ Law

# SECOND CHANCES

## Companies may break the law when hiring former law-breakers

By **KRISTEN D'ANDREA**

Last month, Whole Foods was named in a class-action lawsuit that accused the company of using an unlawful form to get job applicants to consent to background checks. The suit, filed in California federal court, sheds light on a situation all employers should remember during their hiring processes.

The suit alleges authorization forms requesting permission to conduct a background check contained unlawful liability waivers – and claims this violation to the Fair Credit Reporting Act triggers statutory and punitive damages for each prospective employee for whom Whole Foods obtains a consumer report without valid authorization.

A potentially larger issue involves the need for employers to tread lightly when using a job applicant's background as the basis for employment denial. While employers are permitted to inquire about applicants' criminal convictions and any pending arrests or criminal proceedings, they cannot request an applicant's arrest records.

In fact, in New York, if an employer hires a third-party company to conduct background checks on potential employees, that company is prohibited from disclosing an individual's arrest record.

This differs greatly from a record of criminal conviction, said Jessica Moller, an associate at Bond, Schoeneck & King in Garden City. If an applicant has been convicted, either by trial or plea bargain, of a misdemeanor or felony, an employer can inquire about the conviction, which can potentially be used against an employee during the hiring

process, Moller said.

The law is very specific about factors that employers must weigh when determining if an applicant's prior criminal conviction correlates to the specific job being sought. New York Correction Law Article 23-A prohibits employers from unlawfully discriminating against employees and job applicants who were previously convicted of a criminal offense.

The amendment does, however, list several factors that an employer should use to determine if the conviction bears a direct relationship to the job – or would lead to unreasonable risk to the property or health and welfare of employees or the general public. Those factors include the severity of the criminal offense; time elapsed since the offense; age of the applicant at the time of the offense; and the specific duties and responsibilities of the position sought, including whether they directly relate to the criminal offense, Moller said.

While some occupations require employee background checks, such as jobs in education, healthcare and other highly regulated industries, they are not required in most of private industry, according to Dominique Camacho Moran, partner in charge of the labor and employment practice group at Uniondale-based Farrell Fritz.

Still, in some circumstances, employers who do not thoroughly investigate the background of a new hire could be potentially liable for negligent hiring. For instance, if a furniture repair company sends an employee, who has previously been convicted of stealing and home invasions unbeknownst to the employer, into a customer's home, the customer can sue the company if the employee steals items while in the home, Moran noted.

Although it's not an easy case to prove, "there's a risk [the employer] will be liable for negligent hiring and damages suffered," she said.

Moran recommends employers do not discuss an applicant's criminal record during an interview. If the applicant made a disclosure on the application about a prior conviction that is directly related to the job he or she is seeking, the employer may have questions. But if the conviction is unrelated to the job, "you don't want an interview to be hijacked by that conversation," Moran added, noting it can always be explored down the road if the

applicant moves along in the hiring process.

The goal during the interview is to determine if the applicant is the most qualified candidate for the job, Moran said. Employers shouldn't get distracted by the criminal conviction, since it may never be an issue if the applicant is not the most qualified.

Moran suggests employers initially limit who has access to an applicant's criminal background check until after it's determined the person is the most qualified, then assess what the job responsibilities are and determine whether the criminal conviction record is directly related.

"Doing it in this strategic, logical order minimizes the risk of unlawful factors clouding the decision-making process," she said.

Whole Foods is not in hot water for denying an applicant employment due to criminal history; rather, the company ran into trouble with the wording on its background check request form. The lesson employers should take away, according to Andrew Kimler, a partner at Vishnick McGovern Milizio in Lake Success: Don't conduct searches without proper written authorization signed by a potential applicant.

Kimler is currently trying a case involving a former accountant who has a prior criminal record related to financial issues. Following his conviction, the accountant left the world of finance entirely and went to nursing school, in the hopes of becoming qualified to obtain a job in a field unrelated to his conviction, Kimler said. Upon completing nursing school, however, the individual was denied a nursing license.

"Our position is that the two are completely unrelated," Kimler said. "People don't understand that by creating stumbling blocks for individuals who seek employment, all you're doing is perpetuating the same problem."

"To avoid recidivism, we need to create opportunities for individuals to become employed," he added.

That was the purpose of the amendment to New York's Correction Law – to give people a second chance, Kimler said.

