

**[Rosemary Enright]:** Hello, everyone, and welcome once again to Barclay Damon’s *Labor & Employment Podcast*. For those of you, if this is your first time joining us, my name is Rosemary Enright. I’m the practice group leader for our labor and employment group here at Barclay Damon. And I’m joined by my esteemed colleague, Mike Sciotti.

**[Mike Sciotti]:** It’s...that’s funny.

**[Rosemary]:** You are esteemed, Mike! He’s sitting in Syracuse. So thanks, Mike, for joining me again.

**[Mike]:** No problem.

**[Rosemary]:** Yeah. So this week, or rather I should say, in this episode, Mike, we’re going to talk about criminal convictions and how to handle those in the workplace. Through the recruiting process and so on. So we’ll jump right in. But before we do that, we’ve... I’ve got the question for you, Mike. And today’s question is: If you could play any musical instrument, what instrument would it be?

**[Mike]:** And for those of you that remember my answer to the “what band you could watch close up,” and I said, Van Halen, obviously it’s the electric guitar.

**[Rosemary]:** You know, and I would have picked that. And I think I’m going to shock you with what I say, Mike: the fiddle.

**[Mike]:** Really.

**[Rosemary]:** I told... it’s bizarre, isn’t it? But you know what it is. I think it’s because, you know, I’ve gone to, you know, all these different concerts. I love, you know, like Cajun music and bluegrass. I love rock and roll and all that, too. But, you know, I’ve been down in New Orleans for the Jazz Fest and that and the people who play the fiddle, they’re up there and they just look like they’re having so much fun. And it’s great to listen to. I just I just think it would be a really fun instrument to play.

**[Mike]:** Sounds good.

**[Rosemary]:** Yeah. So I’m going with the fiddle, but all right. So to the mundane. So let’s talk criminal convictions. Mike. And I think the best way to start or the, the right place to start Mike, is at the beginning. And so at the beginning of the employment relationship. So what comes to mind for me, Mike, when I’m thinking beginning of employment relationship job applications, ban the box.

**[Rosemary]:** So tell us about it. What do you say?

**[Mike]:** Yeah. And let’s let me just take a quick step back. New York has a law, Article 23A that applies statewide to all employers. Then to complicate things about, you know, maybe 10 years ago or so, we started to see local laws on this issue. So Buffalo, Rochester, Syracuse, Westchester County, New York City—all started with local laws that sort of changed the timing of when you can ask about criminal convictions. So before the local laws, generally speaking, most employers put it right in the job application

itself, right up front. So with the passage of Article 23A, which has been around for a while, the position of the EEOC that says it should be post-offer, pre-employment. And then all these local laws out there, what is the best practice in how to in order to be able, Rosemary, to comply with everything. Well at number one is keep it off the job application initially unless and this is a big “unless” you have a specific law that says you must make these inquiries up front. You know, you got to maybe run their name through the Justice Center, things like that. So this presentation is not so much for those specific laws where you have to ask up front and get all the information and submit it to the state. This is for everyone else. So the rule that we have is give on the job application a little warning: Warning, if you receive a job offer, you will be asked to complete what I call a “criminal conviction inquiry form.” That is post-offer, but pre-employment. And it’s sort of like a part two of a job application. But you’ve already given the offer and then and only then analyze the criminal conviction and determine, yes, we will proceed with the hiring. No, we will not proceed with the hiring. If you do it in that manner, you sort of complied with state law, federal law, and local law. And that way, you know, it’s not that you can’t ask it. So when you hear “ban the box.”

**[Rosemary]:** Yeah.

**[Mike]:** Have you ever been convicted of a crime? You can ask it. It’s just when ...it is a delay in the timing of asking the question. And that’s the best practice and the easiest way to comply with federal, state, and local law.

**[Rosemary]:** Yeah. And I love that. I love that the way you’ve... I would say context because context always matters. Right, Mike? So the context of that is: it’s the timing. That’s all we’re talking about. Now, a couple of things. So I want to say, Mike, that I agree with you, that giving someone notice similar to citizenship. Right. So you have, you know, a lot of times on the application, the EEOC has said you should not ask these types of questions relative to an individual’s citizenship, but you can give them a notice that you will be required, you know, should you be hired or accept this position to present on your first day of hire, blah, blah, blah. You know, the papers that you’re eligible to work in the United States. So it’s a similar thing. And what I’d say, Mike, is, I agree with everything except one small thing, and it may just be the way you were talking. I don’t know that I would use the word “warning,” because I think that implies, you know, we’ve got some serial filers out there, which we’ll talk about in a minute, but that I feel would be like a they might say ding ding. That implies, you know, or a chilling. We had one of these individuals actually file a discrimination charge saying that the way it was written had a chilling effect on them. They didn’t want to apply because, you know, this warning. So I might even just say, and I think it was just you and me talking, I’d call it a notice, but yeah. So I’d call it a notice. But you know what? That got me thinking about, Mike, when you were talking? We have the job application. We also have job postings out on the internet. That is, you know, so you’ve got it on Indeed or Monster on, you know, and your own company website. And again, you may have a, you know, an online application there. And so again, dear listeners, pay attention. All right. So you may think oh all right I’m looking, Rosemary, and Mike said, you know, they advise against having it on my hard copy. I don’t know how many still have those, but they might. People walk in off the street maybe, you know, in the hospitality industry and that, you know, maybe don’t forget about your online presence because again, same rule applies.

**[Mike]:** Yeah. And I would add, Rosemary, a lot of these online entities like Indeed ask are you willing to... and I don’t know the exact wording of the question people have told me this... are you willing to accept applications from individuals for criminal convictions? Yeah. Just check yes.

**[Rosemary]:** Yes.

**[Mike]:** And then it’s a delay in the timing of the inquiry. Only I tell every employer welcome the application from those individuals who have criminal convictions. You might be surprised. You might hire and we’ll talk about obviously that. Yeah. In a few minutes. Yeah.

**[Rosemary]:** Yeah. And the other thing. So and let's just, you know, I just want to pause here for a moment, or I guess that's the right word. But, you know, you have somebody that goes online and sees the notice that Mike and I spoke about, and they might send you an email. All right. This is, you know, Mike and I were we're talking before we started recording this episode about the fact that, you know, there are some individuals who we refer to as serial filers. So that, I mean, this is what they do. They go out on the internet, and they look for job postings that reference that a criminal background check is required. And even though it says post-offer pre-employment, these individuals will often send an email. Right. Mike. They send an email to the hiring manager or HR and they'll say, hey, I saw that you do this, that we're required to submit to or complete a criminal background check. I just want to tell you, I have a prior criminal conviction. I don't want to waste your time. Is it, you know, is it for real? I can't tell you how many employers have said, well, what is your conviction for to begin this dialog? And then all of a sudden, you know, all heck breaks loose.

**[Mike]:** My clients, same experience. I probably know the individual you're talking about. You know, I think they... you need to realize that you're dealing... that some of these frequent filers are very sophisticated.

**[Rosemary]:** Yes.

**[Mike]:** And they're trolling the internet and they're looking for employers to file a claim against. They will skirt the application process initially.

**[Rosemary]:** Precisely.

**[Mike]:** Back door. You go right to the head of HR. Yep. As Rosemary said, the HR response I think is, is something along these lines. We encourage you to apply for employment. Something like the application is a complete thing. We evaluate everything. Those individuals with criminal convictions are not automatically disqualified. Basically encourage the individual to go ahead and to meet the complete application. And, you know, they'll push back. Well, I have a conviction for rape. Should I bother? And again, I would push back and not engage with the specifics and say, we can only make a determination based on a complete review of the job application an interview or whatever else your process is. Don't get suckered into the discussion, because if you say no, don't bother applying, they're going to file a claim against you.

**[Rosemary]:** Right. Yep. And you are going to end up with the probable cause. In the division of human rights. Absolutely. We've had it many times. So please, again, it's just please apply. We encourage you to apply. There is no automatic disqualification. All those buzzwords that Mike said and then move on. So good. So that was the beginning. So we've got the beginning. So Mike. So now we've got somebody coming in and they're going to interview. All right. And so we're now sitting having an interview with them. And you know shall we ask them. All right. Now we've already kind of teed it up. We've said it like four or five times. But let's just make sure everybody gets it. All right. So we're not asking about it on the application or on that, you know, online or hard copy. Somebody calls us or sends an email trying to back door... not going to any of that. Now we're sitting doing an interview. Mike, as part of the discussion. Can I ask about it?

**[Mike]:** Then the answer is yes, we could. But no you shouldn't.

**[Rosemary]:** Right, Mike.

**[Mike]:** And the reason is we still are in the interview phase. The interview phase, lasts all the way up until you give a conditional job offer. You could have multiple interviews. Who knows? Be very careful. You must send out a conditional job offer before you start asking about criminal convictions. And this is the best practice. How to keep you out of trouble. And that's what we're trying to do here.

**[Rosemary]:** Right. Exactly. All right. And you know what comes up a lot, Mike, you're in that interview and somebody says, hey, listen, I know that I'm going to have to, you know, agree to a criminal background check if I am offered a job. So can I just tell you now, let me just tell you what happened. Let me tell you my story. How do we stop them, Mike, or should we stop those? So two questions. Yeah. Should we stop them? And then how do we stop them? Go ahead.

**[Mike]:** Two schools of thought. And, when you have a job applicant that has... they run their mouth. It's not just criminal convictions. I have a heart condition. I've been married 16 times.

**[Rosemary]:** I have, I have eight kids.

**[Mike]:** Who knows? Yeah. Some protected class comes out. Two schools of thought. At school of thought number one. Don't engage and let them talk. And don't write anything down. I'm not in that camp.

**[Rosemary]:** Neither am I.

Mike: Camp number two is stop them. And the reason I say stop them is this. Assume they're wired and recording you. They may not be. Most times they won't be, but they might be.

**[Rosemary]:** Yeah.

**[Mike]:** Sir. Ma'am. I'm sorry I didn't ask that. I'd rather not discuss that with you. At this point, or maybe ever. It's not part of the questions that I need to ask and review with you. And it's not a factor I am considering at this point. And that's that. And if they keep at it, you're free to end the interview and say, I'm sorry, you're not answering my questions. You want to answer a bunch of other questions that I don't care about. Remember, you're in control of the job interview, not them. And you have to exert that control and authority. And I would. When someone starts getting into protected information, stop them.

**[Rosemary]:** Always.

**[Mike]:** I think it's the best practice that to not let them. Some of my employers do and they just sit back and listen and they're filing it all away in their head. But now the cat's out of the bag and they can... they... the claim would be I wasn't hired because I disclosed my marital status. That's right. All right. Well, you let him talk about it. Yeah. You may not be able to stop them initially, but stop them as soon as you can. I'm sorry, sir, I didn't ask that.

**[Rosemary]:** Yeah, exactly. That's right. I have said that 100 times, if I've said it once to my clients, which is? Just stop them. The piece that I love that you added. I guess that is not a factor. We consider. Right. Yeah. And so I think that's I think that's brilliant to add that to the end of it.

**[Mike]:** And I'm... you know, I've mean, you and I've been doing this a long time. I don't trust any of them anymore. Yeah, I realize they're good employees and good applicants, but I want you to assume the person is wired for sound. They may not be. Just assume they are. And the reason is, think about what you're saying. Think about how this could sound on a recording. You know, there's two things here. Is it legal or should you do it? A lot of times things are legal. But I say don't do it. Yeah. Mean the employee that volunteers all that information? That's on them. Yeah I wouldn't listen. I would shut it down as quick as you possibly can.

**[Rosemary]:** I couldn't... I could not agree more Mike. Yeah. So you go through the interview process and come through the interview process, and we make them a conditional offer of employment. So now what happens, Mike. So we've made the conditional offer. And let me... before you do that let me just say to everybody please, in these offer letters, use the words "conditional offer of employment." I can't tell you

how many times a client will say, well, of course it's conditional because I want to check this and this, but you didn't say that. All right. And so let's, you know, I'm a belt and suspenders kind of gal here. So, you know, we're happy to extend this conditional offer of employment and then go on and then and in there, you include again in the closing paragraph the conditions again, this offer of employment is conditioned upon successful completion of blah, blah, blah and whatever, blah, blah, blah is depending for, you know, on the employer. But anyway, so I'm sorry, I just wanted to say that because it makes me crazy. Mike, when I get those and I don't see those words in there.

**[Mike]:** Yeah, I agree totally. And also remember everyone, we're focusing this podcast on criminal convictions. There may be other things, maybe a medical exam that you do for people entering in this position you do for everyone. Whatever conditions you need to have in there, you put in that that letter. We're only going to focus on the criminal convictions. Now there's two ways to proceed at this point. Are you doing a background check and/or are you doing a written criminal conviction inquiry? Honestly, I encourage you to potentially do both. You know, the background check only goes back typically seven years. So it limits you and then the written questions that you would pose. Really, it's not, have you ever been convicted of a crime. Yes. No. Please explain. If that's your question, you're violating the law in my opinion, because it's an eight-step review that you have to do. And your questions have to be laid out in order to meet all those eight factors. So, do you want to go through those now or how do you want me to do this?

**[Rosemary]:** What do you do? I'm trying to think, Mike, the best to the... What makes sense? You know what? Yeah. Let's go through them.

**[Mike]:** Let's go. Yeah. Just taking each step back. New York state law, basically between the corrections law and the human rights law, says I can't automatically disqualify individuals because of a criminal conviction. I'm not talking about violations. I'm not talking about, you know, little traffic infractions. Although this law also does not apply to pending arrests, which we can talk about later. It applies if you have a criminal conviction sometime in the past. So the first question is, have you ever been convicted of a crime, yes or no? Now remember something here: we have... New York State now has enacted legislation that allows individuals after certain waiting periods, three years for misdemeanor, seven years for felony. As long as it wasn't like a sex offense or class A felony to now answer that question. Oh, if you meet the, the qualifications of this other law, which I'm sure we'll talk about another podcast. So what I like to do is define what a criminal conviction is. And it's basically a felony or misdemeanor that has not been sealed. It does not apply to traffic offenses. It does not apply to violations. It does not apply to juvenile or youthful offender status. And you sort of give that definition. So the person knows. Okay. Yes. I have. My next question, Rosemary, is it one conviction or more than one conviction. Why? Because you have to do this analysis with each and every conviction. Don't let them group them together. They're going to... we have to tear them apart and do the analysis separately. The reason for that is one of these convictions may be a non-disqualifying event, and another one may be 100% disqualifying. I don't know, it depends what the position is. And you know what the conviction was for. Let's assume it's just one conviction now. But you keep doing this. Was it a felony or a misdemeanor? Check one. And they're like, I don't know. Stop. I tell them, go figure it out and come back when you know the answer to the question. I don't let them continue. But so if they hand that in, say, I'm sorry you have not completed this form, you need to go figure out, do you have a conviction of what the conviction is? We don't have a crystal ball. This is self-disclosure. So if they start telling me, I don't know. Go figure it out. Come back when you do. And I probably give them some time. I would ask, what is it? What was the conviction for? When was it, what court it? What I'm looking for here, is it like New York state, county court? Is it, town court? City court? Federal? Was it a federal crime? Was it out of state? Was out of the country? I don't know. Tell me and we'll evaluate it. The reason we ask when was it because we're allowed to take into consideration your basically... your age for the criminal conviction. You're not allowed on an application, Rosemary, to ask what your date of birth or how old you are. However, in a criminal conviction inquiry situation, we can ...and the person has responded, yes, I was convicted of felony whatever. We can

ask the following question. How old were you at the time of the occurrence of the crime? And that, coupled with when did this occur? You know, you do some math in your head. We figured out their date of birth, that's not the point. The point is to evaluate, is this fresh or were you young and stupid in this happened 20 years ago. And the reason that is important, and I'll tell you a true story in a minute is, you know, if you were 19, you did something stupid, and now you're 55 and you've lived the law abiding life from 19 to 55, I'm not really going to hold that one against you, depending on what it is. And, you know, we got to be careful. So some other things that we have to determine in, the evaluation is the seriousness of the crime. So that's why we ask what it was. And I usually ask for a little explanation. What occurred? I think it's important. The more details, the better. They're going to try to downplay it. They're like, I had someone recently say, oh, it was self-defense. I'm like, no, it wasn't, you went away for 25 years, the self-defense did not work. And, you know, the client rejected the application because he wasn't he wasn't being truthful, wasn't right as to what occurred.

**[Rosemary]:** Someone can. I just want to stop you for one second. When you were just saying that, Mike, about, you know, getting the details sometimes, you know, I've had, clients say to me, well, you know, can I do that? I feel uncomfortable with it. And the answer is absolutely yes. Because, you know, under Article 23A, which will we can talk about more. We'll probably wrap up here in a couple minutes. But remember, the whole thing here is you're conducting an individualized assessment. That's the language. That's the term. And individualized assessment. And the only way and when you're doing that it has to be informed. You have to be knowledgeable. You can't just be guessing, right. Or saying, well, you know, they told me this or that. Well, I, you know, and then you make a decision and it's the wrong decision. So I'm all for giving an individual the opportunity to talk about and explain what happened. And I know you're going to probably talk about rehabilitation and that so which we will with Article 23A but, that all feeds into and everything that Mike is talking about here is the individualized assessment that you're doing so that you are making a fair and full determination for this person.

**[Mike]:** And some of the... and awesome I agree with all that. Well, some of these frequent filers look for the following. Some employers are silly enough to put on their website, "felons need not apply." You're violating the law and they're going to... they have a good claim and they're going to bring it against you. You know, what you should have on your website is an EEO statement. And not sit there and prejudge people based on criminal convictions. But let me I'll wrap up the factors and then we'll call it break. Okay.

**[Rosemary]:** So yeah, perfect.

**[Mike]:** Any information that the individual produces I ask, do you have a certificate of rehabilitation. Do you have a certificate of good conduct? Yes or no? If yes, please provide a copy. Make them give it to you. Don't have to ask you again. Ask right then and there. And then I ask a catchall: Is there anything else you would like us to consider? Yes or no? And what is it? It's a letter from my rabbi. A letter from my priest. A letter from my mother. I had an individual once. One of our clients got a letter. He wrote a letter. Please, please hire me. I was dumb, young, and stupid. I was in the gang when I was 16, 17. Whatever. I got this criminal conviction as a result of it. I've gone to college. I have my two-year degree. I'm working on my four-year degree. I'm married. I have a kid. I have rehabilitated myself. Please hire me. They did, you know, five, six years later, he's still there. He's been promoted and is a manager. That is the purpose of all these questions. To hire someone that, yeah, they made a mistake. Most people got a past... not all. And well I'm sure we'll talk about that. But those are the factors. And I'll just wrap it up with this. You have to basically say I'm going to deny the employment if there is a direct relationship between the crime and the job you're applying for, or there is a safety risk, we'll come back to the next episode we can pick up right there. Because I got some great examples.

**[Rosemary]:** Yeah. Hey, and Mike just quickly, I just want to make sure everybody's crystal clear these factors... these questions, let's say questions that Mike was just taking you through. Those are as you said, if you are doing... how did you have would you refer to it as Mike, a written inquiry?

**[Mike]:** Yeah, I call it a criminal conviction inquiry questionnaire.

**[Rosemary]:** There you go, there you go. So that is if you, you know, dear listener and employer, are, you know, are doing this yourselves versus, you know, using a third party or something. All right. So with that said, well, Mike, as always, it was terrific. And so thank you. And, for, all of our listeners, there's going to be a part two. And I always seem to make.. other than I think the first two episodes, everyone goes on because we have so many stories and so much to share. Hopefully you're finding it helpful and interesting. Please check us out on Spotify YouTube. Like us. Ask questions. Let us know what you want to hear about and talk about. As we said in the last episode that we did, that was one we just dropped in because one of my clients said, hey, could you spend a little time talking about meal period? So we do read it, we listen, we respond. So thank you all and we'll talk to you on the other side. Thanks, Mike.

**[Mike]:** Thank you.

**[Rosemary]:** The *Labor & Employment Podcast* is available on [barclaydamon.com](http://barclaydamon.com), Spotify, and all major podcast platforms. Be sure to like, follow, and stay connected for future episodes.

*Disclaimers:*

*This material is for informational purposes only and does not constitute legal advice or legal opinion. No attorney-client relationship has been established or implied.*

*Barclay Damon Live podcast transcripts and captions are automatically generated through artificial intelligence, and the texts may not have been thoroughly reviewed. The authoritative record of Barclay Damon Live programming is the audio file. Thanks for listening.*