

[Rosemary Enright]: Welcome back, everybody, to our discussion on criminal background checks. I’m Rosemary Enright, and sitting here in Buffalo, New York, studio B...home of hopefully next year’s Super Bowl. It’s still...I think probably April, you’re thinking, she’s still talking about it. Well, I suspect when this is dropping, OTAs will have just gone out or will be happening, so it is always top of mind for us. But yeah...

[Mike]: I’ll chime in, I don’t think it was the coach. I’ll just say I’m not sure they should have fired him. That’s my opinion.

[Rosemary]: I know, I’m in the same camp, I’m in the same camp. But anyway, we just jumped right in there, gang. But, welcome to Barclay Damon’s Labor & Employment Podcast. It’s a continuation of our previous episode. And I’ve got Mike Sciotti, my cohort in crime. Do you like how I work that in? ...my cohort in crime. And for the podcast. But, before we start, we always start with a question. So this episode’s question, Mike, is what television show are you embarrassed to admit you watch or watched?

[Mike]: This happened a few weeks ago. We were... my wife and I were going through TV stations, and “Happy Days” was on, and I loved “Happy Days” as a kid. And so we’re watching it for a few minutes, and I was just like, so embarrassed after those few minutes. I said, man, this is much cornier than I remember it to be. So I’m going to answer “Happy Days.”

[Rosemary]: You’re going to answer, “Happy Days.” All right. Well, you know, what’s funny is I watched “Happy Days” as a kid, and I loved it. Fonzie and Richie, and then “Laverne and Shirley,” remember?

[Mike]: Oh, yeah. I loved it as a kid. It was sort of... But now looking at it, you know years later Yes. Because, like, I’m like. Ouch.

[Rosemary]: Right. Exactly. So, so for me, I was trying to think, this was a hard one for me. And I thought, you know what? I’m not embarrassed to say this, but a lot of people give me grief about it, so I’m just going to share it. I’m going to put it out there. I love the Hallmark Channel. In fact, I’ve got the premium subscription, Mike. So right now the theme is “Love-uary,” Mike. So feel free to abuse me offline on that...

[Mike]:...or online depending on...

[Rosemary]: ...So anyway all right. So, Mike, we’ve got a lot to talk about. Let’s just, you know, set the table for everybody. So in our last episode, episode nine, we started out I’m calling it the life cycle of the employment relationship. So we started with okay, we’ve got a job application, or we’ve got job posts out on Indeed, on Monster, or your company website. And, you know, we talked about what we can and cannot or should not include on those on our application and on the website which then came through. We said, all right, somebody is now interviewing what can and, and should we say or ask during an interview. And how do we handle an applicant who may make disclosures that we don’t want to know about? So we talked all about that. We then hit... okay, we’ve now made a conditional offer of employment to this individual. And so we’ve got conditional offer, pre-employment which is that’s the sweet spot everybody. We talked about that. And so everyone, that’s the sweet spot when we talk about this. Mike and I were just talking about the eight questions that that you want to ask. You should consider asking this job applicant as part of your criminal background or, inquiry questionnaire. I think that’s how you labeled it. So we had talked

about the questions, and Mike and I were talking about this, and we thought, you know what you're doing this individualized assessment because remember that's the buzzword. Also it's... and that's why you ask all those questions. But things come up, like people may answer a question a certain way and an employer may think, well, I don't want to ask a follow-up, or should I ask a follow-up? Or should I get clarity on this? So we thought or I think Mike, some examples here would be helpful.

[Mike]: Sure...

[Rosemary]: Share are some of your war stories.

[Mike]: So, you know, as we ended the last podcast, I, I said, you know, the sort of the discrimination standard, you have to show that there's a direct relationship between the employment being sought and the conviction—or a safety risk in essence. So let me start with the first one. True story. This has to be about 25 years ago; I'm a young associate at the firm I was at... we took walk-ins—and it didn't last long. But here was one of the walk-ins: I've been discriminated against by a bank. They won't hire me, so I bit, and I'm like, well, what position did you apply for? Security guard. Okay. And why did they say you can't work there? Well, I have a criminal conviction. And I look at him, I said, would it happen to be for robbery? And he's like, well, yeah. And I said, and I said, wouldn't happen to be for bank robbery.

[Rosemary]: Oh come on, Mike, you are making this up.

[Mike]: No I'm not, I swear I am not. And then he got on this thing. I'm innocent. And I said, sir, did you have a trial? He's like, yeah. Were you found guilty? Yeah. Did you go to prison? Yeah. I said, that's a direct relationship, right there. It is a true story.

[Rosemary]: That's awesome.

[Mike]: I can't make that one up. That was off. But he wasn't discriminated against because there is that direct relationship. A lot of times what we were looking for are, maybe it's a financial position. And you've been convicted of bank fraud, wire fraud, mail fraud, altering business documents, embezzlement. That's a direct relationship. So the direct relationship, whatever the conviction is, we can deny it. If there is this direct relationship, you don't have to, but you can't. So that's what we have to look for. And when you figure that out, you go through all those factors that we mentioned. We'll talk about those, individually in the second. Another one. You also remember from the last podcast I said, you make them answer, is it a felony or misdemeanor? And what was it? So we had this gentleman do the following. He said "felony." What was it a violation. And I'm just making the section up violation of Penal Code 117.9, subdivision two. And they hire the guy. And then later on they discover he was convicted of involuntary manslaughter. And I'm like, well, did you all go check what this section was? And they're like, no. And I did. And guess what? He was truthful. Involuntary manslaughter. He killed someone and they hired him. And now he's around what I would call teenagers, young adults,

[Rosemary]: So vulnerable population...

[Mike]: Vulnerable population. But they were perplexed, how we got to get rid of them. And long story short, we were able to, for legitimate reason, nothing to do with the criminal conviction. An example of a sophisticated individual who's being truthful. The other thing that we sometimes see, and now we're in the age of electronic applications, this is sort of dying out. Have you ever been convicted of a crime? Yes or no. When they put the mark right in between the two, many employers just ignore that. And I'm like, did you read it? He didn't answer the question. He's playing fast and loose with you. Force them to answer the question. It is important that if you're going to ask about criminal convictions, that you make them answer the questions, number one. And then number two, you read it. Don't give it lip service. You know, they failed to answer one of those questions I went through last time. Like, how old were you at the time of the offense;

or when was the criminal offense or what caught it was make them answer those questions because it's very important. Another thing this comes up, it's... I'll be honest, employers do this. I think we know that. I Google the applicant's name, don't have a written policy that says you're doing that. If by chance you do that, make sure you're looking at the right person, and just because it's on the internet doesn't mean it's true.

[Rosemary]: Right.

[Mike]: Everyone on this podcast that's listening, Google my name and then mugshot and up will come another Michael Sciotti and a couple mugshots and it's not me. So make sure if you're looking at the internet, is it accurate? Is it the person in front of you? You know, it's critical that you make sure if you're relying on the internet that it's correct. And there are legitimate sites to look at, Rosemary, like New York State has an inmate lookup. And you can look up the inmates, if they did time, what they were convicted of, etc. That's a nice way to cross-reference someone that says they had a felony and they maybe they did state time. Another thing that I failed to mention last time, if you're doing a written criminal conviction inquiry, I would attach a copy of Article 23A to it, and it's mandatory if you do a background check, which we'll talk about at the end, to also provide the person with a copy of Article 23A. Article 23A if an applicant asks to see the employment posters, let them, I think. I don't know why they want to see it, but they they're probably doing it. The letters, let's say...[sounds goes out] Background information. Do you have anything else you want me to consider? And you do the letter from mom or the letter from the priest or the rabbi? Whoever it is, I might verify the information. You know, I would say, hey, I need to talk to priest so-and-so, and sometimes they're legitimate and sometimes they're not. And then the person has lied on their application. They said they gave you these letters from Reverend So-and-so, it wasn't. We talked to Reverend So-and-so, and he said he never wrote it. Doesn't even know who this person is. So look at this stuff as a "trust but verify" situation.

[Rosemary]: So I was going to say is. I'm sorry. I thought you were going to pause there, Mike. And when Mike just said, you know, they've now lied is part on the job application or as part of this interview process that brings up. Yeah, reminded me make sure on your application, both of you have a hard copy of physical and an online that you have a statement in there that says if inaccurate or false information is provided, those are grounds for rescinding the offer/terminating employment. We should have language like that on your application, so that if this person then in fact ...and when Mike's example, produces a letter that is not from the rabbi or the priest that you can say, rely on that statement on the job application, which, oh, is right by where they signed off on it, whether it's electronically or a wet signature. So I wanted to throw that in there.

[Mike]: And I would I would actually add one other thing to that. Incomplete. And they're functionally leaving out parts of the picture that ..you know that that to me is a red flag. So like someone that lists their job history but doesn't list any dates associated with it, you know, that that to me is a red flag you're dealing with. Honestly, it's a red flag that the person probably has a criminal record. And the other thing that, remember I said, have you ever been convicted of a crime? I have seen many applications, Rosemary, where it says, have you ever been convicted of a felony in the last seven years? And I've never understood that question. Here's an example why. In the year 2000, I'm convicted of murder, sentenced to 25 years to life. That means I have to serve 25, and can get out in 25. In 2026, I apply for a job for you. Have you ever been convicted of a felony in the last seven years? No. They've answered the question truthfully. You know, and it's like, well, you asked the wrong question, right? You hired an ax murderer. But you asked the wrong question, right? These questions really, really do matter in the preciseness with what you're asking is going to dictate the answers that you're going to get. And also, should you ask these questions? I am of the belief you should. Here's an example of a tough situation for an employer, which where I thought they couldn't do anything. Ten-year employee, excellent employee. Never asked as part of the application process, have you ever been convicted of the crime in any way at any time? He was. He's on the sex offender registry. One day they hire a new employee and they said, you get this guy working here, you know, he's on the sex offender list. And I get the call. We go through it. I look on the sex offender registry. I see his picture, his convictions, his restrictions. And you know, I ask a question? Did you ask? No. Has he a good employee? They're like yes. Do you

have, you know, he had a bunch of conditions. Does he violate any of these conditions by working for you? And they're like, no. And I said, I'm not sure you can do anything. You know, you didn't bother to ask the questions, and he's a good employee. So you're then going to turn around. And what fired him because of his conviction that you found out about 10 years later with a stellar employment record, that's not going to look good to the Division of Human Rights or the EEOC, neither one would go, well,

[Rosemary]: That's right. And if I could follow up on that, Mike, you know, I think it's important for everybody to realize, you know, you go through those questions and let's say they had asked that question, and this individual made that disclosure. I cannot tell you how many people have said, you know what, I think that is awful. I have kids... you know, everybody's got their own, you know, their personal opinions about it. All right. Which we get. Remember what we have said. You've got to look at the direct relationship to the job, the relevancy to the job. All right. And if this is, for example, a manufacturing plant and this particular example of a sex offender that, you know, and there are no children, there's not... Then what's the relevancy? I know you don't like it. And people may, you know, have an issue and, you know, think whatever and say whatever they're going to say about this individual. It is not a disqualifying factor under Article 23A. It just isn't. I've had a true story that I have is an individual was convicted for distributing pornography to minors. Okay. Again we don't know...we employ no minors. Right. So this and again, there's no relevancy to it. Well, I think it's disgusting. I hear you, but again there's no... Article 23A you conducted at individualized assessment meets all the qualifications for the job. You got this person to this point. Post- ... You know. Yeah. You know you can't disqualify them for that reason.

[Mike]: Yeah. And the... that that's a perfect lead-in for the other... I gave the example where there was a direct correlation with the job and the conviction. Then the other part of that was a safety issue to you know... is there a threat to the workforce or those that might come into the workforce, like we're talking about pedophiles and sex offenders? Do children come into the office? And if they do, maybe that could be the reason to disqualify. Is there is school across the street? You're allowed to take a look at those factors. But also I want you to really listen to the individual, because you're going to run into lots of different types of applicants. There will be those that will, you'll want to hire because you believe they have been reformed and you think they would be a good fit. Make sure you've done this safety assessment, and if you think you're okay, go ahead and hire them. I mean, it's not meant to be, a death sentence, a criminal conviction such that you have to have been able to work again. And let me be frank, there may be, for certain positions and certain convictions, the person may be unemployable, and that's just the reality of it. But for most positions out there, and just so you're aware, Rosemary and I think you are, but everyone that's listening. Yeah, the vision is... the question how much time has elapsed? The longer the period of time the division is taking a very hard look. Been more than five years and there's been no recidivism, no other convictions. You better take a long look at that applicant. And the one thing I didn't say is what is the impact of a certificate of relief from disabilities? The Good Conduct certificate? What those signify to you as an employer are... it's like the conviction didn't occur. They... it is proof of rehabilitation. And unless you have some other reason to doubt the person or the safety assessment or the position, you know, we have to be very careful in denying it because criminal conviction discrimination is one of the...I see... I get one a month.

[Rosemary]: Yeah. Okay. Well and remember the whole reason, Mike that Article 23A exists is to give individuals another chance. Like you said, the fact that... I mean, yes, there maybe there are some individuals whose convictions have made them almost unemployable. But for the most part, what they're looking for is individuals who can show or have been rehabilitated. There's no recidivism, which is why you get into it's, you know, they're the... so I'm how many? I'm drawing a blank on the number. Mike is it 10? No, 12 factors. Article 23A has the 12 criteria. You know and what we'll do, listeners will give you a, we'll include a hyperlink in this. So you can then go and look at Article 23A, and it lists everything—we're hitting on the ones I think are the most... they're all relevant. I don't want to say they're not, because I don't want to have the division listen and think, well, why on earth would they say they don't matter? That's not what I'm saying. But, those that generally really inform the decision or the, the direct relevance or the correlation to the job, the recency. Right. How recent? Like we said, when you get beyond five years, you know, they're

going to take a long hard look at it as should you. The safety aspect, as Mike said. Rehabilitation. That's another. So those are typically as I said, there's 12 of them. But those are typically the ones that you're going to go through all 12. But really I think really inform the decision.

[Mike]: Yeah. And I agree. Like one of the first ones is like the public policy. You say the not to discriminate. Okay, okay. I mean, we move on. It's not a what I call a substantive factor. It's something it's just a reading statement of, of the law. So.

[Rosemary]: Right. Exactly.

[Mike]: I get that.

[Rosemary]: So I just wanted to make sure that everybody, you know, so you've got the questionnaire and then you go through, you've got all the information. Then you're going to do that individualized assessment. And as Mike has said repeatedly, do not be afraid to go back and ask follow-up questions. And you should give the individual an opportunity to talk it through with you. Like what I often say, Mike, and I'd be curious to see what you your thoughts on this. I'll say to my clients, you know, talk to the individual and ask them, okay. So I'm looking at this and you've got this conviction. There's somewhat there is somewhat of a relation here, you know, or a correlation to the position. It's been X number of years. So tell me why shouldn't I be concerned? Why are you the right person for this position or why should that not disqualify you? Ask them and hear what they have to say. That's what I always say. Mike, what do you think...

[Mike]: I agree totally, and the version of the question that I say is why should I hire you in light of what you disclosed? And they may have a great answer or they may not and they may not be prepared for it. I would hope they are, but I do like to hear directly from the people. The questions in these factors, I say put it in writing and make them commit and put their John Hancock on it. You can also do it face to face or over Zoom or something. It's not limited to a written inquiry. I like the writing better that way, you know, it's in their handwriting, or they typed it or answered the online questions because later they can always say why I didn't say that during the follow-up interview. I make them commit in writing. But don't be afraid to ask a tough question. You know, and some of you are out there, some of you, probably all of you are having trouble filling some positions. And that is the nature of the beast these days. And, you know, this is a hiring pool that not many people put their toe in, and they don't want to take advantage of it. And I can attest, there have been many clients, my clients who have hired individuals with criminal convictions. It works out. And there's another group, it doesn't. I mean, it's not a guarantee, but, you know, if you need someone who's looking for a job, this could be an area for you to find someone.

[Rosemary]: And if I, if I could Mike, I was just going to say, you know. So I'm glad to hear my... that you agree with me and that you asked that same question because I always do. And the other thing I want to say to everybody is when you're having the conversation...and so you've now collected all this information, do not feel pressure to... right on the spot, say, okay, you've got the job, or no, you don't, right?...The whole point of this is you're having a discussion. And again, what you then want to do is go back now. And even if it is something that is so obvious, I think, Mike, and I'd be curious in your opinion, pause and say, we'll be in touch and then sit down and, you know, there's ...maybe a hiring committee, or maybe it's the hiring, not the hiring manager, but, you know, whoever it is that makes these decisions and sit down and look at all the information you have and make an informed decision. Do not do it on the spot. Because, again, I don't want somebody coming back saying, well, I told them this and that and asked them to look at this or that and they just told me, no we're not hiring you.

[Mike]: Yeah, I, I agree totally. And I would add the following: if you make the decision not to hire someone with a criminal conviction, there's another provision you all need to be aware of in the corrections law. Generally speaking, when we don't hire someone, it's a, "hey, thanks for applying. While your qualifications were outstanding, we had a better candidate. Please try again in the future." Something like that. Like, you

don't actually give the reason why. If I am a law-abiding citizen, I have no criminal conviction, and you don't hire me and I get one of those letters, and I call you up and say, why didn't you hire me? I want a specific reason. I don't have to give one. Here's the kicker. Under the corrections law, I have a criminal record. I get that general letter from you. I call you up, I send you an email. Why didn't I get the job? You must respond in writing to the individual within 30 days. All right. Not on the spot. 30 days. In that letter, we have to be spot on. Which factor? Why? First of all, was it because of the criminal conviction? I didn't hire you because you were an hour late for the interview. I didn't hire you because you were drunk at the interview. I didn't hire you because you swore during the interview. Those are all reasons unrelated to Article 23A. However, if it was the criminal conviction, you have to do the analysis. You have to go through all the factors and say, I found this factor against you, here's why. This one was neutral. This one I found in your favor. And on balance, the individualized assessment, I determined that your conviction for bank robbery six months ago disqualifies you from being a security guard at the bank. Just realize that. It's a unique law... is one of a kind here in New York. But they do have that, right? Yep. Absolutely.

[Rosemary]: That's a great, great point, Mike. So, we're coming up on our on our time here. Is there anything else, Mike, that we, we want to share with everybody? I mean, you know, we could have a discussion, but I think it's longer around arrests. And I think we should talk about that. And you know, what you do when you have an applicant who maybe makes that disclosure—or you have an employee. So we'll, we'll do that for we'll do that another episode. But anything else that we want to wrap up with our, Article 23A discussion?

[Mike]: Can come out in a couple different ways. They can file a charge with the EEOC, they can file a charge for the Division of Human Rights, or they can sue straight out in New York State Supreme Court. So just be aware of those.

[Rosemary]: Yeah okay. All right. Great. Well hopefully everybody you're feeling like you're on a little more solid ground with this. Know you can always reach out to us if you have questions, you know. Thanks as always, Mike. This was great. And, everybody, as I say at the end of every episode, please check us out on Spotify, YouTube, and all those other cool places. I also think, LinkedIn. I think Mike and I have got our these, episodes out on LinkedIn, like us, ask us questions. Tell us what you want to hear about... all that good stuff. So everybody have a great day. And again, Mike, thanks.

[Mike]: Thank you, Rosemary. Take care, everyone.

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

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