

A Guide for New York State Employers

from The Doe Fund

**Understanding Article 23-A: How to evaluate
qualified job seekers with conviction histories**

INTRODUCTION

At the request of the New York State Division of Criminal Justice Services, The Doe Fund's Founder & President, George McDonald, assembled a committee of stakeholders to suggest policies that would enhance employment opportunities for job seekers with conviction histories. After a year of meetings and professional focus groups, the committee released a report "Reentry and Employment" (available at www.doe.org) that contained its policy recommendations. As the first qualitative research of its kind, the report has been cited repeatedly by the New York Legislature and multiple policy organizations.

One key recommendation was the provision of resources to New York employers to raise awareness of state laws and financial incentives regarding the hiring of individuals with conviction histories. In addition to its longstanding practice of directly advising individual employers, by producing this guide, The Doe Fund seeks to help a broad audience of employers effectively secure qualified workers with conviction histories who are ready, willing, and able to work.

The tools included in this guide are designed to help employers fairly evaluate candidates and protect themselves from unnecessary exposure to negligent hiring claims. Ultimately, these businesses will be a positive force in strengthening families and communities throughout New York, will help reduce crime, and will participate in rebuilding the state's economic base.

A GUIDE TO ARTICLE 23-A OF THE NY CORRECTION LAW

The New York Correction Law Article 23-A prohibits an employer from unfairly discriminating against a person previously convicted of one or more criminal offenses.

Article 23-A requires employers to fairly evaluate qualified job seekers and current employees with conviction histories on a case-by-case basis. The law specifies eight factors that employers must consider when evaluating an applicant with a prior conviction. Another law, New York State Employer Education Act of 2008, requires that employers post a copy of the text of Article 23-A in their places of business and provide a copy of the law to applicants when they conduct a background check.

THE PURPOSE OF THIS GUIDE IS TO:

—
Explain the law and provide guidance to employers on how to apply it when making hiring decisions.

—
Explain how companies can better protect their businesses from negligent hiring claims.

—
Explain how employers can take advantage of federal and state incentive programs that are available to companies that hire applicants with prior convictions.

—
Inform employers of available resources that support businesses hiring qualified job seekers with prior convictions.

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A Fair Evaluation



BASIC STEPS TO MAKE A FAIR HIRING DECISION

This process will be explained with more detail in the pages that follow, but it essentially involves:

1\ INTERVIEWING THE APPLICANT

Questions should pertain not just to the circumstances of the offense, but also to what the applicant has accomplished since and the lessons the applicant has learned. Write down the answers on the worksheet (found on page 21) to keep on file.

2\ CONSIDERING THE FACTORS REQUIRED BY ARTICLE 23-A

Based on the applicant's specific circumstances, decide whether or not each factor supports employment.

3\ MAKING AN INFORMED DECISION

Don't generalize. Employers should make hiring decisions based on a careful and particularized consideration of each applicant's circumstances.

ARTICLE 23-A REQUIRES EMPLOYERS TO CAREFULLY CONSIDER THE FOLLOWING EIGHT FACTORS TO DETERMINE WHETHER OR NOT TO HIRE AN APPLICANT WITH A PRIOR CONVICTION:

- 1\ New York State's public policy of encouraging the employment of persons with prior convictions.
- 2\ The specific duties and responsibilities necessarily related to the license or employment sought.
- 3\ The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his 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 person 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 person, or produced on his behalf, in regard to his rehabilitation and good conduct.
- 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.

IF AN APPLICANT HOLDS A CERTIFICATE OF RELIEF FOR DISABILITIES OR A CERTIFICATE OF GOOD CONDUCT, THESE SHOULD BE CONSIDERED AS WELL: EACH CREATES A PRESUMPTION OF REHABILITATION.

FOR HIRING DECISIONS TO BE CONSIDERED FAIR, QUALIFIED JOB SEEKERS WITH PRIOR CONVICTIONS MUST BE EVALUATED INDIVIDUALLY AND ON A CASE-BY-CASE BASIS.

The law instructs employers to consider these eight factors in making a hiring decision. The analysis of the factors is important — each one must be considered in light of the others. It is essential to remember that no single element by itself should determine the outcome of the hiring process.



Factors Employers Must Consider When Evaluating a Job Seeker with a Prior Conviction



It is the policy of the State of New York to encourage employers to hire qualified applicants with prior convictions. Article 23-A sets forth factors that will enable employers to make intelligent, informed, and fair hiring decisions when presented with an applicant with a prior conviction. Some of these factors focus on the job seeker and the circumstances surrounding his/her offense, some focus on the duties and responsibilities of the job which the applicant is seeking, and others concern matters of public policy. Each factor must be considered in light of the others.

CONVICTION RELATED FACTORS

1 TIME ELAPSED SINCE THE CONVICTION

Research shows that if a person is conviction free for four to seven years or longer, the likelihood of future arrest is about the same as for someone who has never been convicted of a crime. This time is reduced by the person's involvement in positive activities, including employment, education, and occupational training. Therefore, even for applicants with recent convictions, it is important that the employer consider evidence of rehabilitation and other facts and circumstances that indicate that the applicant does not present a significant risk of re-offending.

2 AGE OF APPLICANT AT TIME OF THE OFFENSE

It is not uncommon for someone who exercised poor judgment during youth to mature into a productive, hard working, law abiding adult. When evaluating an applicant with a prior conviction, employers should consider the applicant's age at the time the offense was committed.

3 EVIDENCE OF REHABILITATION AND GOOD CONDUCT

There are a variety of ways that applicants with prior convictions can

demonstrate that they have put their lives back on track, and that they will be successful and valuable employees. Applicants may seek to demonstrate their rehabilitation by presenting documents from prior jobs they have held or programs they've been involved with since the time of his/her offense. All evidence of rehabilitation should be considered.

Some examples of items that an applicant might provide to demonstrate his/her rehabilitation are:

/ **EDUCATION:** Transcripts, diplomas, certifications, or letters from teachers.

/ **REFERENCES FROM PAST EMPLOYERS OR FROM JOB TRAINING PROGRAMS:** Letters of reference from past employers and letters of support from faculty and staff of job training programs may demonstrate the applicant's suitability for employment and provide useful information about the applicant's punctuality, skills, and whether they will be a motivated employee. Even programs completed in prison are relevant. They show an applicant has made strides in changing his/her life since the time of conviction.

/ **EVIDENCE OF PARTICIPATION IN COUNSELING AND OTHER WORKFORCE DEVELOPMENT OR SOCIAL SERVICE PROGRAMS:** Letters from counselors and other supportive service providers may demonstrate the applicant is proactively trying to identify and address whatever circumstances led to his/her prior conviction and is taking steps to change, grow, and learn from the experience.

/ **VOLUNTEER PROGRAMS:** An applicant may present a potential employer with documentation of his/her volunteer activities that indicate that he/she is responsible and willing to contribute to the well being of others.

4 THE SERIOUSNESS OF THE CONVICTION

Not all offenses are the same and how they are defined does not always reflect the circumstances involved in a case. A youth who may have taken another youth's book bag off his body to toss it around can be

charged with robbery. (These is a real case example.) Therefore, the circumstances of the case may more accurately reflect the seriousness of the conviction. An employer should always give consideration to the seriousness of the offense or offenses and the circumstances therein.

FACTORS RELATED TO THE JOB SOUGHT

5 SPECIFIC DUTIES AND RESPONSIBILITIES NECESSARILY RELATED TO EMPLOYMENT SOUGHT

What does the job entail? What are the responsibilities of the job? Are any special skills required? What is the job like on a day-to-day basis?

6 THE BEARING, IF ANY, THE OFFENSE HAS ON APPLICANT'S FITNESS OR ABILITY TO PERFORM JOB DUTIES/ RESPONSIBILITIES

Do the job responsibilities share any qualities with the activities that led to the conviction? For instance, a person convicted of burglary or credit card fraud may not be suitable for a job counting money at the bank. Does the offense make the applicant less suitable for the job? If so, can you articulate what makes this person less qualified?

7 PUBLIC POLICY CONSIDERATIONS

As previously discussed, it is the policy of the State of New York to encourage employers to hire applicants with prior convictions. Article 23-A aims to eliminate bias and illegitimate obstacles people with prior convictions face when seeking work, while at the same time, protecting society's interest in hiring and employing reliable and trustworthy job candidates. Though Article 23-A does not require employers to give preferential treatment to qualified job seekers with

prior convictions, it does seek to remove prejudice against such applicants in obtaining jobs. This prejudice is not only widespread, but unfair and counterproductive to you as an employer seeking qualified workers and to the people of New York.

ARE THERE ANY CIRCUMSTANCES WHERE AN EMPLOYER CAN REJECT AN APPLICANT DUE TO A PRIOR CONVICTION?

The answer is yes, but only under very limited circumstances. Article 23-A recognizes two instances where an employer may legitimately deny employment to an applicant based on his/her prior conviction.

- 1\ When there is a direct relationship between the prior offense and the specific employment sought, and
- 2\ When the employment would involve an unreasonable risk to property, the safety or welfare of specific individuals, or the general public.

8 LEGITIMATE INTERESTS

Recording and keeping track of the factors enumerated in Article 23-A and evaluating them fairly will help employers to determine whether a direct relationship exists between the position sought and the prior offense, or whether the employers' legitimate interest in protecting the welfare of people and property would be risked by hiring the applicant. If after careful consideration of all factors the determination is made not to hire the applicant, an employer will typically be safe in denying employment. However, if the evaluation of all factors indicates that an

applicant is qualified for the position sought, an employer should be prepared to demonstrate a legitimate reason not related to the prior conviction for not hiring the applicant. *The conviction itself is not a legitimate reason.*

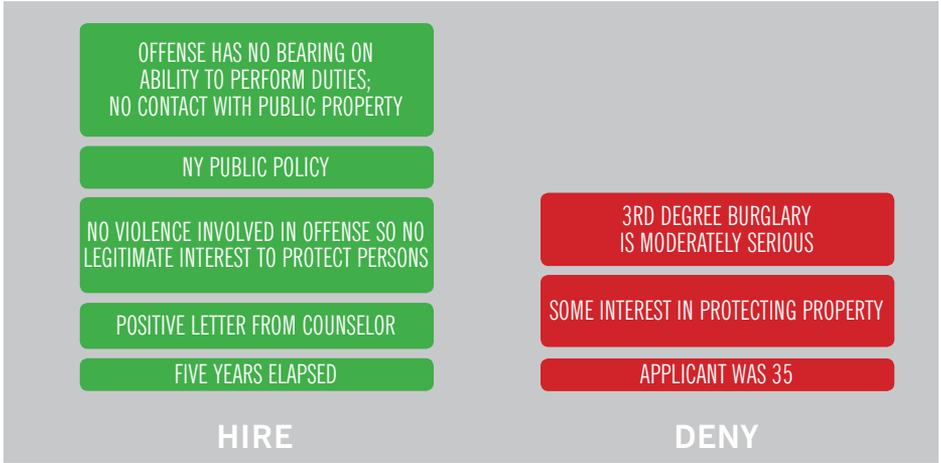


All Factors Considered



After recording facts related to all the eight factors set forth in Article 23-A, the employer's next step is to give them careful consideration. Some of the factors will weigh towards hiring the candidate while others may not. Though all factors must be considered, ultimately, the facts and circumstances of a particular case will dictate the weight to be afforded each fact – which means that not all of the factors will be of equal weight. Therefore, individualized consideration should be given to each candidate, which is a crucial step in the hiring process. In doing so, the results can give the employer a true scope of the candidate's ability to meet job expectations, while ensuring the candidate's rights are not violated and that company anti-discrimination policy is being honored.

ILLUSTRATION ONE:



OFFENSE: **THIRD DEGREE BURGLARY**
JOB: **SHORT-ORDER COOK AT A HOTEL**
 RESTAURANT

RESPONSIBILITIES:

CLEAN FOOD PREPARATION EQUIPMENT, WORK AREAS, AND COUNTERS OR TABLES.

PLAN WORK ON ORDERS SO THAT ITEMS SERVED TOGETHER ARE FINISHED AT THE SAME TIME.

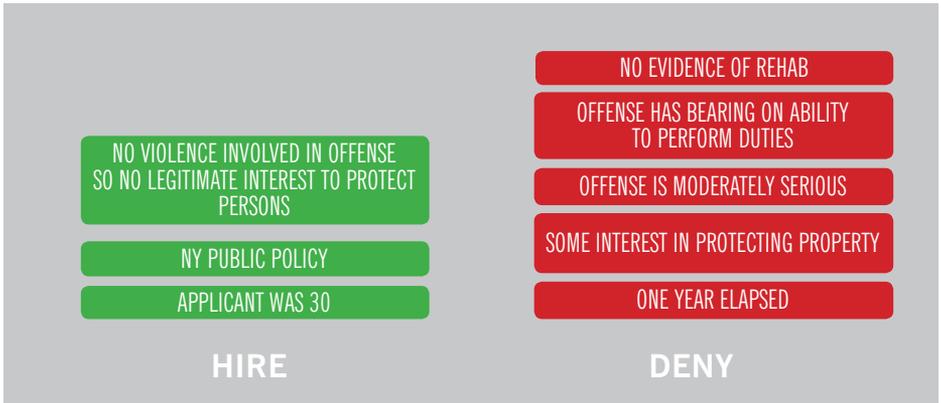
GRILL, COOK, AND FRY FOODS SUCH AS FRENCH FRIES, EGGS, HAMBURGERS, STEAKS, AND PANCAKES.

ORDER SUPPLIES AND STOCK THEM ON SHELVES.

ACCEPT PAYMENTS, AND MAKE CHANGE OR WRITE CHARGE SLIPS AS NECESSARY.

HIRE: After reviewing the responsibilities for the short-order cook job against the details of the candidate's offense, the results are in favor of hiring the applicant. This is because the applicant's unfavorable factors are outweighed by favorable factors – the applicant received positive recommendations from their counselor, five years elapsed since the offense, and the responsibilities for a short-order cook do not involve any activities that are related to the offense.

ILLUSTRATION TWO:



OFFENSE: POSSESSION WITH INTENT TO
DISTRIBUTE NARCOTICS
JOB: PHARMACY TECHNICIAN

RESPONSIBILITIES:

MAINTAIN, STORE, AND SECURE PRESCRIPTION MEDICATIONS.

PRE-PACK BULK MEDICINES.

PREPARE AND AFFIX PRESCRIPTION LABELS.

ASSIST CUSTOMERS BY ANSWERING SIMPLE QUESTIONS, LOCATING ITEMS, OR REFERRING THEM TO THE PHARMACIST FOR INFORMATION ABOUT MEDICATIONS.

DENY: After reviewing the unfavorable and favorable factors with regard to the candidate's employment, the conclusion is that the pharmacy technician position would not be a good fit. Due to the nature of the applicant's offense, this decision is based on the lack of evidence for participating in rehabilitation, having had a one year elapsed time period since the offense, and the likelihood of the offense having a bearing on performing duties, particularly in a pharmaceutical work environment.

ILLUSTRATION THREE:



OFFENSE: SECOND DEGREE ASSAULT
JOB: DELIVERY TRUCK DRIVER

RESPONSIBILITIES:

LOAD AND UNLOAD DELIVERY TRUCK.

MAKE DELIVERIES WHILE OBEYING TRAFFIC LAWS.

VERIFY DELIVERIES AGAINST SHIPPING INVOICES.

PRESENT CUSTOMERS WITH DELIVERY INVOICES AND COLLECT PAYMENTS.

TURN IN RECEIPTS AND PAYMENTS RECEIVED FROM DELIVERIES.

HIRE: After reviewing the reasons to hire or deny the delivery truck driver applicant, the results are in favor of making a job offer. This decision is supported by the applicant's completion of education and job training courses, and the amount of time passed since the offense. Also, the offense has no bearing on their ability to perform duties.

Check Your Understanding



Let's see how one of these examples might play itself out in the real world. Illustration One depicted an applicant with a prior conviction for first degree burglary. The applicant is seeking a job as a short order cook at a hotel.

Since the information has already been gathered, we'll start by considering all of the factors.

AS AN EMPLOYER, YOU SHOULD CONSIDER:

- 1\ The applicant was 35 years old at the time the offense was committed, suggesting the crime was more than a youthful indiscretion.
- 2\ Third degree burglary is a serious offense.
- 3\ The position sought involves some handling of money.
- 4\ Whether or not the applicant has related skills and/or previous experience.

The above factors may weigh in favor of not hiring the applicant, but you must also consider the remaining factors:

- 1\ The elements of burglary, breaking into or remaining in a building with the intent to commit a crime, do not necessarily have any bearing on one's ability to be a cook.
- 2\ The applicant has a positive letter from a probation officer and/or a program counselor which detail the progress he/she has made since the offense.
- 3\ Five years have elapsed since the offense, which is a substantial amount of time.
- 4\ Finally, New York State has a public policy which encourages the employment of persons with previous convictions.

All factors considered, after reviewing the positive factors against the negative factors, the outcome should support hiring this applicant to work as a short order cook.

Article 23-A Factors Worksheet

- 1\ TIME ELAPSED SINCE THE CONVICTION
- 2\ AGE OF APPLICANT AT TIME OF THE OFFENSE
- 3\ EVIDENCE OF REHABILITATION AND GOOD CONDUCT
- 4\ THE SERIOUSNESS OF THE CONVICTION
- 5\ SPECIFIC DUTIES AND RESPONSIBILITIES NECESSARILY RELATED TO EMPLOYMENT SOUGHT
- 6\ THE BEARING, IF ANY, THE OFFENSE HAS ON APPLICANT'S FITNESS OR ABILITY TO PERFORM JOB DUTIES/ RESPONSIBILITIES
- 7\ PUBLIC POLICY CONSIDERATIONS
- 8\ LEGITIMATE INTERESTS

Take notes in the space provided and SAVE this in the applicant's file.

CANDIDATE NAME\

JOB APPLIED FOR\

DATE\

DECISION\

FACTOR 1\

FACTOR 2\

FACTOR 3\

FACTOR 4\

FACTOR 5\

FACTOR 6\

FACTOR 7\

FACTOR 8\

Avoiding Negligent Hiring Claims



HOW CAN AN EMPLOYER COMPLY WITH ARTICLE 23-A WHILE PROTECTING HIS/HER BUSINESS FROM LIABILITY BASED ON NEGLIGENT HIRING?

Most businesses and organizations are familiar with negligent hiring. A negligent hiring lawsuit is a suit brought by a person who claims to have been injured by one of your employees and alleges that the injury could have been prevented had you not hired that employee. The New York State Human Rights Law provides some protection to employers from negligent hiring claims, so long as the employer can document that he or she complied with Article 23-A.

Thanks to a law passed in 2008, the Negligent Hiring Act, in a negligent hiring suit, where the employer can present evidence that demonstrates that they made a good faith, reasonable determination that the factors outlined in Article 23-A supported their hiring decision, there is a rebuttable presumption that the applicant's prior conviction should be excluded as evidence of negligent hiring. This rebuttable presumption is an important protection for an employer because an employee's prior conviction record could otherwise be among the strongest evidence that a plaintiff can offer in support of a negligent hiring claim. Without this evidence, the claim against the employer generally becomes much more difficult to substantiate. This is one reason why it is critical that employers maintain records demonstrating that they were dutiful in acquiring and assessing sufficient information to apply the Article 23-A analysis.

Financial Incentives to Hire Applicants with Prior Convictions



WHY HIRING FROM THE RE-ENTRY WORKFORCE BENEFITS YOUR BOTTOM LINE.

Hiring individuals with prior convictions may entitle an employer to a variety of benefits that can make a business more profitable.

There are three primary kinds of incentives:

- 1\ Tax credits
 - A. Work Opportunity Tax Credit
 - B. Empire Zone Tax Credit
- 2\ Employee bonding
- 3\ Employee screening, training, and support from workforce development intermediaries

These benefits are relatively easy to access and do not require a substantial commitment of an employer's time and resources. You will not have to fill out a large amount of paperwork to participate in any of these programs for any of these incentives.

This section will explain the various incentives and benefits available to employers that hire individuals with prior convictions, and will provide the forms you need to begin taking advantage of those programs.

FEDERAL TAX CREDIT

WORK OPPORTUNITY TAX CREDIT (WOTC)

The Work Opportunity Tax Credit (WOTC) is designed to promote the hiring of individuals who qualify as members of specific target groups, including individuals with prior convictions. Businesses can receive up to \$2,400 in federal tax savings for hiring such applicants that started work between 10/1/1997 and 12/31/2011 (it is likely to be extended).

WHAT

This tax credit applies to employers who hire an employee who:

- 1\ Was convicted of a felony under any state or federal statute, and;
- 2\ Is hired not more than one year after the date of last conviction or the date of release from prison, whichever is later.

OR

- 3\ Qualifies as a disconnected youth age 16–25 who has not been regularly employed or attending school in the past 6 months AND does not have a high school diploma or GED.

WHERE

Everywhere in New York State.

HOW MUCH

Businesses can save up to \$2,400 per year in taxes for each person employed with a prior conviction.

HOW

There are two short forms that the job applicant must fill out, and that the employer must sign. The forms are IRS Form 8850 and Dept. of Labor Form 9061. They are included in the Appendix.

NOTE

The IRS Form 8850 and Department of Labor Form 9061 must be completed and mailed no later than 28 days after the new hire's start date. Forms should be sent to:

WOTC UNIT NEW YORK STATE DEPT. OF LABOR
BUILDING 12, ROOM 200
STATE OFFICE BUILDING CAMPUS
ALBANY, NEW YORK 12240

FOR MORE INFORMATION, CONTACT:
NEW YORK STATE DEPARTMENT OF LABOR
1 (800) HIRE-992
WWW.LABOR.NY.GOV

STATE TAX CREDIT

STATE TAX CREDIT: EMPIRE ZONE

WHAT

This tax credit is designed to bring new businesses to New York State and to enable existing businesses to create new jobs. It applies to businesses located in certain zones (described below) that hire a targeted employee. A targeted employee is someone eligible under the WOTC credit described above.

WHERE

There are currently 11 Empire Zones in NYC. East Harlem, Chinatown, East New York, Far Rockaway, Port Morris, Hunts Point, Brooklyn Navy Yard, Southwest Brooklyn, the West and North Shores of Staten Island, South Jamaica.

HOW MUCH

Each new employee hired in an Empire Zone can generate up to \$3,000 per year against your state tax liability. There are additional credits for jobs paying more than \$40,000 per year. The credits can be taken for up to 5 consecutive years.

HOW

To find out whether your business operates in an Empire Zone and is eligible for the tax credit, contact New York State's Business Assistance hotline at 1 (800) STATE-NY.

FEDERAL BONDS

FEDERAL BONDING PROGRAM

WHAT

If you decide to hire an applicant with a prior conviction, government bonds are available as a type of “insurance” specific to this employee. The New York State Department of Labor issues fidelity bonds, which are business insurance policies that protect employers in case of theft, forgery, larceny, or embezzlement of money or property by an employee who is covered by the bond. Bonds are available for a full-time (at least 30 hours a week) employee (who has a previous conviction) whose job will last at least six months.

WHERE

Everywhere in New York State

HOW MUCH

Bonds are issued for \$5,000 to \$25,000. Bonds are issued for 6 months. After 6 months, you (the employer) can purchase the bond at the regular commercial rate, if you so choose. The cost is only \$95 for a \$5000 bond for six months of bonding.

HOW

Call the New York State Bonding Coordinator at (518) 485-2151.

FOR MORE INFORMATION ON THESE INCENTIVES, AND ONLINE VERSIONS OF FORMS, GO TO:

www.labor.state.ny.us/businessservices/landing/shtm

Resources for Employers



**EMPLOYEE RECRUITMENT SCREENING, TRAINING,
AND SUPPORT FROM WORKFORCE DEVELOPMENT
INTERMEDIARIES.**

There are many not-for-profit agencies that can assist your business in the hiring and retention process. They can also help you apply for the incentive programs described above. These organizations offer services including:

- 1\ Prescreening of candidates to find the right match for your business
- 2\ Job training for new employees before work begins
- 3\ Ongoing support to new employees during the transition
- 4\ Assistance in applying for the financial incentives described above

A number of nonprofit organizations assist employers in the New York metropolitan area that hire applicants with prior convictions.

THE DOE FUND
(646) 672-4248
WWW.DOE.ORG

CENTER FOR
EMPLOYMENT OPPORTUNITIES
(212) 422-4430
WWW.CEOWORKS.ORG

THE FORTUNE SOCIETY
(212) 691-7554
WWW.FORTUNESOCIETY.ORG

THE OSBORNE ASSOCIATION
(718) 707-2600
WWW.OSBORNENY.ORG

For a complete list of nonprofit organizations that assist and support employers, visit the National H.I.R.E. Network's website, www.hirenetwork.org/resource.html

DISCLAIMER AND ACKNOWLEDGMENTS

DISCLAIMER

This guide provides basic information, but is not legal advice. For advice on individual hiring decisions, consult an attorney. The authors, publishers, and distributors assume no responsibility for any errors, omissions, or damages arising as a result of using this guide. Users of this guide are strongly encouraged to confirm information received with other sources, and to seek local qualified advice if embarking on any actions that could carry personal or organizational liabilities. Managing people and relationships are sensitive activities. This guide is for informational purposes only, and the materials and advice set forth here do not provide all the necessary safeguards and checks.

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& Able**

The Doe Fund

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