



Management Alert

Governor Signs CORI Reform Prohibiting Massachusetts Employers from Inquiring About Criminal Convictions on “Initial” Applications

On August 6, 2010, Governor Patrick signed into law legislation overhauling the Commonwealth's Criminal Offender Record Information law (CORI). The new law contains several provisions that will affect employers' use of the criminal histories of prospective and current employees.

Employers Should No Longer Ask About Convictions On “Initial” Job Applications

The new law prohibits employers from asking questions on an “initial written application form” about an applicant's “criminal offender record information,” which includes information about criminal charges, arrests, and incarceration. This provision amends a portion of the Massachusetts Fair Employment Practices Law, M.G.L. Chapter 151B, §4 (9), which bars employers from asking questions of job applicants about arrests that do not result in convictions and convictions for certain misdemeanors, but allows questions about felony convictions and about misdemeanor convictions not protected from disclosure. By using the term “initial written application,” the new law may allow employers to continue to question applicants about felony and currently unprotected misdemeanor convictions in subsequent parts of the application process such as in-person interviews, but the intent of the amendment is not clear. The new law may also be read to require employers to obtain criminal offender record information only from the newly created Department of Criminal Justice Information Services, which is a department in the executive office that largely replaces the Criminal History Systems Board (CHSB). The law does not address criminal history inquiries conducted by third parties on behalf of a current or prospective employer. Until these ambiguities in the CORI reform law are resolved, employers are advised to exercise caution in asking job applicants about any felony or misdemeanor convictions during the application process, to seek such information from the new Department, and to avoid asking for such information in any event on an “initial written application form.”

The only exceptions to the new initial job application requirements expressly provided in the CORI reform law are for (1) positions for which a federal or state law or regulation disqualifies an applicant based on a conviction; or (2) employers who are subject to an obligation under a federal or state law or regulation not to employ persons who have been convicted.

Employers Can Still Consider A Candidate's Criminal History Subject To Conditions

The CORI reform law does not prohibit employers from obtaining a current or prospective employee's criminal history contained in the Commonwealth's Criminal Offender Record Information (CORI) database. However, under the law, an

individual's CORI record will no longer include (1) felony convictions that have been closed for more than ten years (i.e., the conviction occurred more than ten years ago or, if the individual was incarcerated, the individual was released more than ten years ago); or (2) misdemeanor convictions that have been closed for more than five years.

Also, the employer's request for a current or prospective employee's CORI record will no longer be invisible to the subject. A current or prospective employee will be able to obtain from the Department of Criminal Justice Information Services a log listing the names of persons who requested his or her CORI record, the date of the requests, and the certified purpose of the requests.

Employers in possession of a current or prospective employee's CORI record are still allowed to ask the subject about his or her criminal history and can decide not to hire a candidate or take adverse actions based on that person's criminal history. Before doing either, however, the employer must give the subject a copy of his or her CORI record.

Employers Who Conduct Five or More Criminal Background Investigations Per Year Must Have A Written Policy

Employers who annually conduct five or more criminal background investigations will be required to maintain a written criminal offender record information policy. The policy must provide that the employer will (1) notify an applicant who is the subject of an investigation of the potential of an adverse decision based on the investigation; (2) provide a copy of the policy to the applicant and a copy of the criminal offender record information obtained as part of the investigation; and (3) provide information concerning the process for the applicant to correct his or her criminal record.

Employer's Obligation To Discard CORI Records

The CORI reform law prohibits employers from maintaining a former employee's CORI record for more than seven years from the former employee's last date of employment. Employers are also prohibited from maintaining an unsuccessful candidate's CORI record for more than seven years from the date of the decision not to hire the candidate.

Employer Defenses To Charges Of Negligent Hiring And Failure To Hire

The law also contains some protections for employers related to their use of and reliance on CORI records, provided that the employer made the employment decision within 90 days of receipt of the CORI record and verified the information in the CORI record as set forth in the law's requirements. First, the law shields employers from liability for failure to hire based on erroneous information on a candidate's CORI record. Second, the law provides that employers cannot be liable for negligent hiring by reason of relying solely on CORI records and not performing additional criminal history background checks prior to hiring an individual.

Effective Dates

With the exception of the provision restricting questions about criminal history on initial written applications, the provisions described above do not take effect until February 6, 2012. The initial application provision, however, will become effective on November 4, 2010, which means that employers who continue to ask questions on initial written applications about felony or misdemeanor convictions may be subject to liability under the new law beginning this November.

If you have any questions about this legislation, please contact the Seyfarth Shaw attorney with whom you work, or any Labor and Employment attorney on our website.



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