



EMPLOYERS' USE OF CRIMINAL RECORD INFORMATION IN HIRING PROCESS RESTRICTED

A new Massachusetts state law restricting employers' use and availability of criminal record information was enacted on August 6, 2010. The Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information (CORI), Chapter 256 of the Act of 2010 ("the Act"), changes the state's CORI system and sets out new rules for the use of criminal record information. A new Department of Criminal Justice Information Services in the Executive Office of Public Safety is to administer the state's criminal justice information system. This advisory highlights several of the Act's provisions relevant to employers.

Application Form Changes

The new law restricts an employer's ability to ask applicants about their criminal records. The Act amends the state's anti-discrimination law to prohibit employers generally from asking about criminal records in an initial application form. There are several limited exceptions to this prohibition for particular jobs, such as when federal or state law impose a mandatory disqualification for a conviction. The employer may still obtain criminal record information later in the employment process. However, if the criminal record information is used as a basis for an employment decision, or if the applicant or employee is asked about the information, a copy of the criminal history record must be provided to the applicant or employee before any adverse decision or questioning about the history. These requirements barring questions on an initial employment application will be effective November 4, 2010. Employers will need to change any non-conforming application forms before that date.

Procedural Changes

If an employer annually conducts five or more criminal background investigations, the employer must maintain a written criminal offender record information policy. This policy requires that the employer: (1) notify the applicant of the potential for an adverse decision based on the CORI, (2) provide a copy of CORI and the policy to the applicant, and (3) provide information concerning the process to correct a criminal record. The policy also must comply with any additional obligations required by the new Department of Criminal Justice Information Services. An employer who does not comply with the requirements of the Act may be subject to investigation, hearing, and sanctions by the state.

The Department of Criminal Justice Information Services is to create a new online access system that will provide CORI information for a fee. The applicant or employee must sign an acknowledgement form authorizing the requester to obtain the CORI. If an employer obtains information from this system, and uses the information within ninety days, the Act establishes immunity from liability for (1) negligent hiring practices by reason of relying solely on the CORI received and not performing additional criminal background checks and (2) discriminatory employment practices for failure to hire based on erroneous information received from the department.

Restricting and Destroying Information

The Act reduces the criminal record information that will be accessible to employers. The waiting period for sealing felony convictions, except for murder and certain sex offender convictions, has been reduced from fifteen years to ten years. Similarly, misdemeanor convictions can be now be sealed after

five years, rather than ten years. As a result, if an applicant has been successful in sealing such a conviction through an application to the commissioner of criminal justice information services, an employer will not have access to older convictions through the CORI system.

The Act leaves unchanged the prohibition in the state's existing anti-discrimination law against requesting or using information regarding (1) any arrest in which no conviction resulted, (2) a first conviction for the following misdemeanors:

drunkenness, simple assault, minor traffic violations or disturbance of the peace, or (3) a conviction for a misdemeanor where the date of conviction occurred more than five years prior to the request for information, unless the person has another conviction within the five years before the request.

Finally, the Act requires employers to discard criminal offender information seven years from the last date of employment or from the date of the adverse decision of the employer concerning the applicant.

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