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Massachusetts has joined Hawaii to become only the second state in the nation to ban both public and private employers from inquiring about an applicant's criminal history on initial job applications.

Massachusetts Becomes the Second State to “Ban the Box” on All Employment Applications

By Carie Torrence

On August 6, 2010, Massachusetts Governor Deval Patrick signed legislation overhauling the Commonwealth's Criminal Offender Record Information (CORI) system. The long-sought CORI reform is aimed, in part, at increasing employment opportunities for reformed offenders. The legislation includes a so-called “ban the box” provision, which bars employers from requiring applicants to check a box if they have a criminal history. This provision becomes effective on November 4, 2010. The provisions that govern the access to and use of CORI records are not effective until May 4, 2012.

Ban the Box Legislation

In 1998, Hawaii became the first state to “ban the box,” prohibiting public and private employers from inquiring about an applicant's criminal history until after a conditional offer of employment has been made. A movement to enact similar legislation across the country is starting to gain momentum. In 2009, Minnesota enacted “ban the box” legislation proscribing public employers from asking a job applicant about criminal records or conducting a criminal record check until after an applicant has been selected for an interview. New Mexico and Connecticut followed in 2010, passing comparable legislation applicable to public employers. Similar legislation is currently pending in Nebraska, New Jersey, and Rhode Island. Cities and counties nationwide, including Boston, Providence, and New Haven, have also adopted similar local ordinances or regulations applicable to municipalities and public contractors.

Effective November 4, 2010, Massachusetts will become the second state in the nation to ban both public and private employers from requesting criminal record information on initial job applications. The legislation contains a narrow exception that permits employers to inquire about an individual's criminal history on a job application if: (1) the applicant is applying for a position for which any federal or

state law or regulation creates a mandatory or presumptive disqualification based on a conviction of certain criminal offenses; or (2) the employer is subject to an obligation under any federal or state regulation not to employ persons in one or more positions who have been convicted of certain criminal offenses.

Unlike Hawaii's law, the legislation does not require employers to wait until a conditional offer of employment has been made before questioning an applicant about his or her criminal record or before requesting CORI records. The restriction only bars employers from requesting criminal history information on the "initial written application form." Accordingly, employers may ask an applicant about his or her criminal history during the interview process. Employers should bear in mind, however, that the Massachusetts Fair Employment Practices Act bars an employer from asking an employee about arrests that do not result in convictions and convictions for certain misdemeanors. The Massachusetts Commission Against Discrimination (MCAD) will enforce this portion of the new law, and available remedies to an aggrieved applicant could include equitable relief, compensatory and punitive damages, interest, and attorney's fees.

Access to and Use of Criminal Records

Employers may request CORI records from the Commonwealth after an applicant signs an acknowledgement form authorizing the request and after the employer verifies the applicant's identity by reviewing a form of government-issued identification. CORI records include information concerning every person who comes into contact with the Commonwealth's criminal justice system, even if the case is dismissed or the person subsequently receives a not guilty disposition. Under the legislation, however, the scope of CORI records available to most employers will be narrowed to include only: (1) felony convictions for 10 years following disposition; (2) misdemeanor convictions for 5 years following disposition; and (3) pending criminal charges. Employers whose employees interact with children or other vulnerable populations, such as the elderly and the disabled, will have access to complete CORI records.

Employers are permitted to question an applicant about his or her criminal record during the interview process and may take adverse actions based on that record. However, prior to questioning an applicant or taking an adverse action based on criminal record information, an employer must provide the individual with a copy of any criminal records in its possession, whether those records were obtained through a CORI request or from an independent source. An employer who fails to provide this information is subject to civil and criminal penalties.

New Requirements

The legislation imposes retention limits and recordkeeping requirements on employers that obtain CORI records from the newly created state agency responsible for the CORI system. Employers may not maintain CORI records for more than seven years after an employee's last date of employment or after the date of the final decision not to hire an applicant. Employers must retain an applicant's signed acknowledgement form for a period of one year from the date of any CORI request. Employers must also document specific details about the dissemination of any CORI records in a dissemination log and must maintain the log for a period of one year following the disclosure of any CORI record. The dissemination log is subject to audit by the Commonwealth. Any person who unlawfully disseminates CORI records is subject to criminal and civil penalties.

The legislation also requires any employer that annually conducts five or more criminal background investigations to establish and maintain a written criminal records policy. In addition, these employers must: (1) notify any applicant who is the subject of an investigation of the potential for an adverse decision based on the criminal records; (2) provide a copy of the criminal records and the policy to the applicant; and (3) provide information concerning the process for correcting a criminal record. These requirements apply even if an employer obtains the criminal background data from an independent source rather than through a CORI request.

Implications for Employers in Massachusetts

Employers should revise applications to eliminate any questions regarding criminal history well in advance of November 4, 2010. Although the remaining provisions are not effective until May 4, 2012, employers should not wait until the last minute to implement policies and procedures that comply with the new procedural and recordkeeping requirements. Early action will help to ensure that your workplace is in compliance before the effective date of the legislation.

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