



New Law Restricts Ability Of Massachusetts Employers To Ask About Criminal Convictions

Insights

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On August 6, 2010, Governor Deval Patrick signed into law legislation which overhauls the Commonwealth's Criminal Offender Record Information (CORI) law. Currently, the Massachusetts Fair Employment Practices Law prohibits 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.

Employers Prevented From Asking About Convictions On Initial Job Applications

Effective November 4, 2010, Massachusetts employers will not be permitted to ask **any** questions about an applicant's criminal record on an "initial written application form," including questions about the applicant's criminal charges, arrests, and incarceration. The only exceptions to this 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. It is unclear whether employers may still question applicants about felony and unprotected misdemeanor convictions later on in the application process (e.g., during an in-person interview). It also is unclear whether the new law requires employers to obtain information about a criminal offender's record only from the newly created Department of Criminal Justice Information Services, as opposed to third party vendors.

Employers May Obtain Criminal History Under Certain Conditions

Employers may still obtain a current or prospective employee's criminal history contained in the CORI database. However, an individual's CORI record will no longer include (1) felony convictions that have been closed for more than 10 years (i.e., the conviction occurred more than 10 years ago or, if the individual was incarcerated, the individual was released more than 10 years ago); or (2) misdemeanor convictions that have been closed for more than five years. In addition, a current or prospective employee will be able to obtain from the Department of Criminal Justice Information Services a list of persons who requested his or her CORI record, the date of the requests, and the certified purpose of the requests. An employer who has lawfully obtained an employee's or prospective employee's CORI record may ask the individual about his or her criminal history and can decide to take adverse action against the employee or not hire the applicant based on the individual's criminal history, provided that the employer *first* gives the individual a copy of his or her CORI record.

Additional Changes To Take Effect in 2012

The following provisions become effective February 6, 2012:

Employers who annually conduct five or more criminal background investigations must maintain a written criminal offender record information policy that states 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.

The new 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, and prohibits employers from maintaining an unsuccessful applicant's CORI record for more than seven years from the date of the decision not to hire the candidate.

Employers who make the employment decision within 90 days of receiving the CORI record and who verify the information in the CORI record will be shielded from liability for failure to hire based on erroneous information on a candidate's CORI record. Likewise, these same employers will be shielded from liability for negligent hiring based on their reliance on CORI records, even if these employers do no other research into the applicant's criminal history.

For assistance in reviewing and revising your policies, procedures and application forms to comply with the new CORI legislation or for assistance with any hiring issue, please contact your local Fisher Phillips attorney.

This Legal Alert provides an overview of a specific state law. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.