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Criminal Record Law Requirements Become Effective May 4

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Significant changes to Massachusetts criminal record laws implemented by the Massachusetts Criminal Offender Record Information Reform Act will become effective on May 4, 2012. The law, which was passed in August 2010, has become well known for its “ban the box” provision that prohibits most employers from asking about an applicant’s criminal history on an initial written application. Other significant portions of the law will go into effect on May 4, further affecting the process through which employers obtain criminal background information about job applicants. Some of the changes specifically affect criminal offender record information obtained from the state (known as “CORI”), and other changes affect any criminal record information obtained by employers in the process of making decisions regarding employment.

Employment-Related Changes Effective May 4, 2012

- In connection with a decision regarding employment, prior to questioning an individual about his or her criminal history, an employer in possession of the individual’s criminal record information must provide the individual with the criminal history record in the employer’s possession, *regardless* of the source from which it was obtained.
- If the employer makes an adverse decision on the basis of an individual’s criminal history, the employer must provide the individual with a copy of the criminal record information in the employer’s possession, *regardless* of the source from which it was obtained (however, if the employer already gave the individual a copy of the record prior to questioning, the employer does not need to provide an additional copy in connection with an adverse decision).
- An employer that annually conducts five or more criminal background checks, *regardless* of the source from which it obtains the criminal record information, must maintain a written CORI policy. The law requires that the policy include certain provisions, including that the employer will: (i) notify the applicant of the potential adverse decision based on criminal record information; (ii) provide a copy of the individual’s criminal history information and the employer’s policy to the applicant; and (iii) provide information concerning the process for correcting a criminal record.

- CORI may only be shared with individuals within the employer's business with a need to know the information. In addition, employers must maintain a dissemination log for a period of one year following the dissemination of an individual's CORI, including: (i) the name of subject; (ii) his or her date of birth; (iii) the date of the dissemination; (iv) the name of person to whom it was disseminated; and (v) the purpose for the dissemination.
- Employers that make decisions within 90 days of obtaining CORI directly from the state may not be held liable for negligent/discriminatory hiring practices by reason of reliance on CORI (there is currently no such statutory protection for employers using information from private background check companies).

New System for Accessing Criminal Information

In addition to the changes regarding employment-related decisions, effective May 4, 2012, the process for obtaining CORI through the Commonwealth of Massachusetts also will change. Previously, only certain employers that regularly have contact with vulnerable populations were able to access the Massachusetts database containing CORI. As of March 12, 2012, the Department of Criminal Justice Information Services (DCJIS) stopped accepting applications for CORI access, because DCJIS anticipates that beginning on May 4, 2012, a new system, iCORI, will become available to all employers. Once they have registered, employers will be able to access iCORI records for any individual who has signed an acknowledgement form. Employers should be aware, however, that they must retain the acknowledgement forms for at least one year from the date of the iCORI request. In addition, employers may *not* retain iCORI records for more than seven years after an employee's last date of employment or the date of the decision not to hire an applicant.

Regulatory Guidance Not Yet Available

Although the new law requires that DCJIS issue regulations to assist in the implementation of these sweeping changes, DCJIS has not yet issued such regulations. Ogletree Deakins will issue another update outlining any new requirements contained in those anticipated regulations.

Practical Steps for Employers

Employers that conduct background checks on employees or applicants in Massachusetts should review and update their policies and practices to ensure they are in compliance with the new changes to the law. Practical steps to take include:

- Employers should confirm that they have not included any questions regarding criminal history on any initial employment application completed prior to an interview.
- If employers conduct five or more background checks per year, they must implement a written CORI policy that complies with the new law.
- If applicants and employees' CORI is obtained, employers must maintain the necessary dissemination log.
- Although the statute is not clear on this point, we recommend that employers provide any applicant whose criminal history will be checked with a copy of the employer's

CORI policy, notification that the employer may make an adverse decision based on criminal background information, and a copy of the DCJIS document containing information concerning the process for correcting a criminal record.

- Prior to questioning an applicant about his or her criminal background, the employer must provide the applicant with a copy of the criminal record information in the employer's possession.
- If making an adverse decision based on an applicant's criminal background, the employer must provide the applicant with a copy of the criminal record information in the employer's possession, along with notification that the employer is making an adverse decision and, if the employer has not already done so, provide the applicant with its CORI policy and the DCJIS document containing information concerning the process for correcting a criminal record. In addition, employers are advised to give applicants a reasonable opportunity to respond to the criminal record information before finalizing the adverse decision.
- Staffing personnel and hiring managers should be trained so that they understand what can and cannot be asked of applicants regarding their criminal records and background, and when the questions may be asked. Specifically, staffing personnel and hiring managers should be aware that they are prohibited from requiring an applicant or employee to disclose: (i) arrests that did not result in conviction; (ii) first misdemeanor convictions for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbing the peace; and (iii) convictions for misdemeanors where the date of conviction or the completion of incarceration (whichever is later) occurred five or more years from the date of the application (unless there was an intervening conviction). Staffing personnel and hiring managers also should understand that they are never permitted to *require* an individual to provide a copy of his or her own CORI.
- Employers should ensure that all practices and policies comply with DCJIS regulations, when issued.

If you have any questions regarding the new law or need assistance in reviewing your current policies or implementing a written policy that complies with the new law, contact the Ogletree Deakins attorney with whom you normally work or the Client Services Department at 866-287-2576 or via email at clientservices@ogletreedeakins.com.

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