

### **Amendments to Massachusetts Law Mandate Changes to Employment Applications and The Use of Criminal History Information**

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We mentioned in our [memorandum of September 23, 2010 \("Memorandum"\)](#), concerning the amendments to Massachusetts' Criminal Offender Record Information ("CORI") law (which pertains to all employers doing business in Massachusetts) that guidance on the implementation of these amendments would be forthcoming. Indeed, guidance, in the form of a ["Fact Sheet,"](#) was recently posted to the website of the Massachusetts Commission Against Discrimination ("MCAD" or "Commission").

The MCAD enforces the section of the CORI amendments that became effective on November 4, 2010. That section, codified at G.L. c. 151B, § 4(9½), pertains to limitations on an employer's ability to seek disclosure of job applicants' criminal record information prior to the interview stage of the hiring process. The MCAD also enforces G.L. c. 151B, § 4(9), which prohibits employers from seeking certain criminal history information in connection with an application for employment, whether written or oral. The Fact Sheet offers guidance to employers with respect to certain specific provisions of the CORI amendments, as well as existing law pertaining to permissible pre-employment inquiries related to criminal history.

#### **Summary of Fact Sheet**

Among other things, the Fact Sheet provides that:

- The CORI amendments apply to all private employers that (i) employ at least six employees, (ii) do business in Massachusetts, and (iii) take applications for employment in Massachusetts. They also apply to all public employers in Massachusetts (regardless of how many employees are employed).
- National or international employers may use "standard" employment application forms in Massachusetts, so long as the form contains explicit instructions that the employer is prohibited from obtaining criminal history information from the applicant (unless one of the exceptions set forth in G.L. c. 151B, § 4(9½) applies) *and* the employer properly disclaims. Such disclaimer must be "clear and unambiguous, in boldface type and placed and printed to attract the reader's attention."
- The following is an example of the disclaimer mentioned above:

**MASSACHUSETTS APPLICANTS ONLY:**

**Under Massachusetts law, an employer is prohibited from making written, pre-employment inquiries of an applicant about his or her criminal history. MASSACHUSETTS APPLICANTS SHOULD NOT RESPOND TO ANY OF THE QUESTIONS SEEKING CRIMINAL RECORD INFORMATION.**

- Depending on the specific information the employer seeks from the applicant, only certain criminal history may be inquired about during an interview. In particular, G.L. c. 151B § 4(9) prohibits employers from asking (orally or in writing) about:
  - An arrest that did not result in a conviction;
  - A criminal detention or disposition that did not result in a conviction;
  - A first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace;
  - A conviction for a misdemeanor where the date of the conviction predates the inquiry by more than five years; and
  - Sealed records and juvenile offenses.
- There are two exceptions to the blanket prohibition against asking an applicant for criminal history information on a written application. Specifically, an employer may ask about criminal convictions if (i) the applicant is applying for a position where federal or state law or regulation creates a “mandatory or presumptive disqualification” based on a conviction for one or more types of criminal offenses, or (ii) the employer or an affiliate is subject by federal or state law or regulation not to employ persons in one or more positions who have been convicted of one or more types of criminal offenses.
- With respect to the above two exceptions, a “regulation” will only create a “mandatory or presumptive disqualification” if it was promulgated in accordance with G.L. c. 30A (for state regulations) and 5 U.S.C. §§ 551 et seq. for federal regulations. Further, the Commission considers an employer to be mandatorily disqualified only if a properly promulgated statute or regulation specifically bars the hiring of an applicant with a particular criminal conviction.
- *Any “written application or form requesting criminal background information prior to an interview is part of the ‘initial written application.’”* (Our Memorandum noted that employers are prohibited from obtaining criminal background information in their “initial written application for employment.”)
- In promulgating the CORI amendments, “the Massachusetts Legislature intended to give prospective employees the opportunity to meet employers before disclosing their criminal histories, thereby reducing barriers to employment applicants with a criminal history face.”

It should be noted that the provisions of the Fact Sheet pertaining to what constitutes an “initial written application” appear to be broader than the actual statutory language. The CORI amendments require only that the “initial written application for employment” not inquire about the criminal background of applicants. However, as stated above, the MCAD is taking the view that such information may not be sought prior to an interview, regardless of how many written documents may be exchanged prior to an interview. It should also be

noted that guidance has not yet been provided by the Commonwealth of Massachusetts on the remaining aspects of the CORI amendments, which do not go into effect until February 6, 2012.

### **What Employers Should Do Now**

As a result of the Fact Sheet, we suggest that employers take the following actions, unless the job in question falls within one of the two exceptions previously mentioned:

- (i) Ensure that all employment applications used in Massachusetts include a disclaimer stating that Massachusetts applicants are not to respond to questions regarding criminal history;
- (ii) Ensure that such verbiage is both in boldface type and at least substantially similar to the verbiage recommended by the MCAD;
- (iii) Confirm that no written questions are asked of applicants regarding criminal history prior to the interview;
- (iv) Confirm that even during interviews, applicants are not asked about topics specifically prohibited (see the fourth bullet point in the “Summary of Fact Sheet” section); and
- (v) Educate managers about each of the above four actions.

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