

Massachusetts Agency Releases Guidance on Interpretation of “Ban the Box” Legislation

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The Massachusetts Commission Against Discrimination's fact sheet appears to expand the new criminal offender record information legislation in two key ways.

As reported in a previous [On the Subject](#), Massachusetts recently passed new criminal offender record information legislation that significantly affects hiring in Massachusetts. For more information, [click here](#). The Massachusetts Commission Against Discrimination (MCAD), the agency responsible for enforcing the “ban the box” provisions of that legislation, has now issued a fact sheet in the format of frequently asked questions to explain how it interprets the new law. [Click here](#) to view the fact sheet. Importantly, the MCAD's interpretation appears to expand the new legislation in two key ways.

First, the MCAD interprets the phrase “initial written job application” to mean *any* written communication with applicants before the interview. A plain reading of the statute, however, and its reference to the “initial written application form,” would seem to allow employers to ask applicants about criminal history before the interview, so long as that inquiry does not take place on the initial written application. Despite this plain reading, the fact sheet explains that the MCAD “will presume that a written application or form requesting criminal background information *prior to an interview* is part of the ‘initial written application’” (emphasis added).

Second, the MCAD seems to interpret the law as covering applications received by candidates in Massachusetts even where the position for which they are applying is located elsewhere. Indeed, the fact sheet explains “[a]ny employer that does business in Massachusetts and takes applications in Massachusetts is subject to [the law].” The fact sheet does permit multi-state employers subject to this legislation to use standard application forms with questions about criminal history, but only if the forms contain “explicit instructions” that Massachusetts applicants should not respond *and* that pre-interview inquiries about criminal history are not permitted under Massachusetts law. The fact sheet explains that “the employer’s disclaimer must be clear and unambiguous, in boldface type and placed and printed to attract the reader’s attention.” Notably, the disclaimer section of the fact sheet contains some misstatements of the law. For example, in its sample disclaimer language, the MCAD writes that “[u]nder Massachusetts law, an employer is prohibited from making written, *pre-employment inquiries* of an applicant about his or her criminal history” (emphasis added). In fact, there is no such expansive “pre-employment” prohibition in Massachusetts. The law actually only prohibits such inquiries on the “initial written job application” which the MCAD

has now interpreted to mean any “pre-interview” inquiry (as opposed to any “pre-employment” inquiry, which would seem to prohibit asking about criminal history until after the person becomes employed).

The fact sheet is not formal regulation and it does not carry the force of law. It is important guidance for any employer hiring in Massachusetts, however, because the MCAD is the agency responsible for enforcement of this law. This means that the MCAD is the agency where applicants will lodge complaints that they were unlawfully asked about criminal history during the hiring process. The agency can investigate, hold a public hearing and assess damages where the MCAD determines—based on its own interpretation of the law—that an employer has violated the “ban the box” requirements.

At some point, an aggrieved employer may elect to challenge in a court of law the MCAD’s expansive interpretation of this legislation. It is unclear at this point whether a court would give deference to the fact sheet, particularly because it appears to stretch the statute beyond its plain terms. Until a court weighs in, or until the MCAD issues further guidance, employers that want to avoid an enforcement action should consider conforming their policies and procedures to the fact sheet. This would include, among the other practical guidance included in the fact sheet, avoiding asking about criminal history before the interview, and following the law even when taking applications in Massachusetts for positions located elsewhere.

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