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CLIENT ALERT
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**MASSACHUSETTS JOB APPLICATIONS CAN NO LONGER
REQUEST CRIMINAL INFORMATION**

On August 6, 2010, Massachusetts Governor Deval Patrick signed legislation which included sweeping reforms to the state's criminal record information system as well as criminal sentencing laws. The vast majority of the changes appear to affect only those employers that access criminal offender record information which is compiled by the state's Criminal History Systems Board¹ (often referred to as "CORI reports"). Therefore, those employers that have been approved by the Criminal History Systems Board to access CORI reports through the Board should contact legal counsel to discuss the many changes which will need to be made to their processes and policies as well as the new limitations regarding the scope of the criminal information which will be contained in CORI reports.

However, there is at least one provision of the bill which will affect all Massachusetts employers, regardless of their CORI approval status. **Effective November 4, 2010, it is unlawful for an employer to request criminal information on "its initial written application form" unless a federal or state law restricts the employer's ability to hire individuals with certain criminal records.** Thus, most Massachusetts employers must remove from their employment applications questions regarding an applicant's criminal background (e.g., "Have you ever been convicted of a felony?"). Although Massachusetts employers may still ask applicants the same limited questions regarding their criminal history, employers can only do so after the applicant has completed the initial written job application. In other words, an employer can no longer use the applicant's answers to questions on the job application about their criminal background to "screen out" applicants at the application stage. Employers that ignore this new requirement and continue to ask about an applicant's criminal history on their initial written application form will be in violation of the state's anti-discrimination statute.

The bill's language is not a model of clarity and leaves many unanswered questions, especially with regard to employers that conduct background checks through private agencies that do not access/use information from CORI reports. For example, it appears that the language of the bill could be interpreted to require that all employers that conduct five or more criminal background investigations per year maintain a written criminal offender record information policy, even if they do not access actual CORI reports from the state agency. These additional provisions do not become effective until February of 2012. We hope that the newly created agency will issue regulations before February of 2012 which will clarify some of the uncertainty left by the bill's language.

We will keep you informed of any developments with respect to the implementation of this new law.

¹The bill also creates a new state agency, the Department of Criminal Justice Information, which replaces the Criminal History Systems Board.

MASSACHUSETTS EMPLOYERS MUST NOTIFY EMPLOYEES WITHIN 10 DAYS OF ADDING ANY NEGATIVE INFORMATION TO THEIR PERSONNEL RECORD

On August 5, 2010, Massachusetts Governor Deval Patrick signed into law an extensive economic development bill. The bill's creation of a "tax free weekend" on August 14 and 15 received the most fanfare. Much less attention was given, however, to a section of the bill that significantly expands the obligations of Massachusetts employers with respect to personnel records. These new obligations went into effect immediately.

The bill requires an employer to notify an employee, within 10 days, any time the employer places in the employee's personnel record any information that might negatively affect the employee. Specifically, the bill requires notification any time the employer puts in the personnel record "any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." Violations are enforced by the Massachusetts Attorney General's Office, and could lead to fines of \$500 to \$2,500.

On the positive side for Massachusetts employers, the law maintains an employee's right to review his or her personnel record, but limits that right to two reviews per calendar year (not including reviews caused by notification of new negative information). In what may be a drafting error, however, the bill does not limit the number of times employees may request copies of (rather than just reviews of) their personnel record.

The sweeping language of this new law, coupled with the already broad definition of a "personnel record," means that virtually any document an employer creates that references an employee, and might eventually have a negative impact on that employee, could require notification. This potentially covers not only such documents as annual reviews, written warnings and performance improvement plans, but also such items as managers' personal notes, internal memoranda, investigative files, productivity and sales performance reports, or virtually any other document referencing an employee.

Read literally, this new law places an unreasonable and unrealistic burden on Massachusetts employers, and its scope likely will be sorted out in court. For now, however, employers should review and update their policies and/or procedures regarding preparing and delivering employee evaluations, disciplinary actions and similar documents to include a requirement that the employee be notified within 10 days of such documents being added to an employee's personnel record. For other documents, such as internal notes and investigative files, that often would not be shared with an employee but may or may not fall within the requirements of the new law, employers will have to weigh the risk of not complying with an unclear law against the risk associated with notifying employees about highly sensitive, and previously confidential, documents.

As each situation is unique, we encourage employers to contact us for assistance in reviewing particular circumstances and needs.

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