

Employment, Labor and Benefits Alert: Massachusetts Law “Bans the Box,” Requiring Many Employers to Change Their Employment Applications by November 4, 2010

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Today, many written employment applications for jobs in Massachusetts have a box for applicants to check if they have been convicted of a crime. Beginning November 4, 2010, Massachusetts joins a growing list of “ban the box” states to prohibit most employers from requesting criminal offender record information on any initial written employment application. This “ban the box” provision was enacted as part of legislation overhauling the Commonwealth’s Criminal Offender Record Information (CORI) laws, and is intended to provide greater employment opportunities to rehabilitated offenders who may not get past the initial application stage if they are required to “check the box.” This provision amends the Massachusetts Fair Employment Practices Law, M.G.L. c 151B §4, and applies to both public and private employers.

Under current M.G.L. c. 151B, §4(9), employers may not ask an applicant or employee for any information, either orally or in writing, regarding: (i) an arrest, detention, or disposition regarding any violation of law for which no conviction resulted, or (ii) a first conviction for certain specified misdemeanors, or (iii) any conviction of a misdemeanor where the later date of such conviction or the completion of any period of incarceration resulting from the conviction occurred five or more years earlier. Under current law, other requests for information pertaining to criminal offender convictions are generally allowed, subject to certain restrictions.

From November 4th on, however, most employers will be prohibited in most circumstances from asking applicants about their convictions as part of the “initial written employment application.” Thereafter, employers may only request such information where there is a legally mandatory or presumptive disqualification for employment because of a conviction, or where there is a federal or state law or regulation that prohibits an employer from hiring persons who have been convicted of certain crimes. Of course, even where it is legally permissible to request this information, the existing provisions of M.G.L. c. 151B, §4(9), described above, will still apply.

The “ban the box” provision applies only to “initial written employment applications,” a term not defined within the legislation. Verbal requests or requests made in writing beyond the “initial written employment application” stage of the hiring process are not expressly prohibited provided that they comply with M.G.L. c. 151B, §4(9) and related laws. Such requests are not unfettered, however, and may be subject to other significant and complicated legal restrictions.

Other employment-related changes to the CORI law will not take effect until 2012. These other provisions are likely to have more regulatory guidance as the effective date nears.

Action Items for Employers in Massachusetts

- Employers, unless hiring for positions that are exempt from the “ban the box” provision, must revise their initial written employment application forms to eliminate requests for criminal offender record information.
- Employers should use this opportunity to evaluate their hiring practices, human resource procedures and record retention protocol, especially with respect to when, if, and how criminal record information is sought, used, and retained.

For legal advice on best practices and any questions regarding the new “ban the box” law, employers are encouraged to contact their Mintz Levin attorneys.

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