

MCAD Issues “Fact Sheet” on CORI Reform

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Last week, the Massachusetts Commission Against Discrimination issued a “Fact Sheet” regarding certain provisions of the Criminal Offender Record Information (CORI) Reform law that went into effect on November 4, 2010. Among other things, the CORI Reform law prohibits employers from asking applicants about their criminal history in an “initial written application.” While the MCAD’s Fact Sheet regarding this prohibition is not a formal regulation and does not have the force of law, it offers some guidance for employers regarding how the MCAD intends to enforce the law. However, the MCAD’s position is controversial and leaves many questions unanswered.

The Fact Sheet states that the MCAD will presume that any written application or form requesting criminal background information prior to an interview is a prohibited “initial written application.” Thus, the MCAD is taking the position that the first time an employer can ask an applicant about his or her criminal history is during or after an in-person or telephonic interview. Further, during or after that interview, the employer cannot ask about (1) an arrest that did not result in a conviction, (2) a criminal detention or disposition that did not result in a conviction; (3) a first conviction for drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace; (4) a conviction for a misdemeanor which is more than five years old; and (5) sealed records and juvenile offenses. Effectively, employers are now required to have an interview if they wish to ask applicants questions about any criminal history, and they should use a form or a script that carefully describes what information is being sought.

The Fact Sheet also addresses whether multi-state and international employers may use a standard application form. To be permissible, the application must state that Massachusetts applicants should not answer questions about their criminal history and that employers in Massachusetts are prohibited from obtaining criminal history information from applicants. This information must be in clear and unambiguous language, be in boldface type and must be in a form and manner to attract the applicant’s attention. The “Fact Sheet” includes sample language acceptable to the MCAD. However, the sample language is broader than the law because it suggests that employers may never ask an applicant about his or her criminal history.

The Fact Sheet also states that any employer that does business in Massachusetts and takes applications in Massachusetts is subject to the law. The language does not clarify, however, whether in the MCAD’s view the law covers an application from a Massachusetts resident for an out-of-state job or whether an application from an out-of-state applicant who applies for open positions both in and outside of Massachusetts is covered. As to these and other scenarios, the Fact Sheet states only that the MCAD will “consider other scenarios on a case-by-case basis.”

While providing some initial guidance, the Fact Sheet illustrates the challenges that Massachusetts employers face in complying with the new law. At a minimum, every employer that asks applicants about their criminal history needs to review their applications and their hiring practices to ensure that they are complying with the new law. The Fact Sheet adds new wrinkles to this obligation, however, and the MCAD, the agency with enforcement responsibility, appears to taking a broad view of what the statute requires. We will update you as more guidance becomes available.