Employment Bulletin - August 13, 2010

August 13, 2010

MASSACHUSETTS RESTRICTS EMPLOYERS' USE OF CRIMINAL RECORD INFORMATION

written by Andrew J. Orsmond

On August 6, 2010, Massachusetts Governor Patrick signed into law the "CORI Reform Bill," which significantly affects employers' access to and use of criminal record information during the hiring process. The law changes the state's Criminal Offender Recommendation Information (CORI) system and includes new rules on how and when employers may obtain and use criminal records. The following is a summary of those changes specifically directed at employers.

Most notably, the new law amends Chapter 151B, the state anti-discrimination law, by prohibiting employers from asking applicants about their criminal record in an initial application form. This prohibition is effective November 4, 2010. However, there is an exception for positions that are subject to state or federal laws mandating or creating a presumption of disqualification of applicants with certain types of conviction records.

While employers may no longer ask about criminal records on initial application forms, the new law still permits questioning about criminal records at other stages of the hiring process. In fact, employers will be able to obtain CORI information for a fee through the newly-created Department of Criminal Justice Information Services. This new online access system is required to be operational within 21 months. Employers who obtain information from this system and use the information for hiring decision-making purposes within 90 days will be immune from liability (1) for failure to hire an applicant based on erroneous information in a CORI report and (2) for failure to conduct additional criminal history background checks prior to hiring an individual (i.e., "negligent hiring" claims).

However, employers must provide applicants with a copy of any criminal record information prior to questioning the applicant about it or using it a basis for an adverse employment decision. This requirement applies regardless of whether the criminal offender record information has been obtained from the Department of Criminal Justice Information Services or any other source.

Employers who conduct five or more criminal background checks annually will also be required to maintain a written criminal offender record information policy. That policy must (1) notify applicants of a potential adverse decision based on criminal offender record information, (2) provide that a copy of the criminal offender record information will be given to the applicant, along with a copy of the policy, and (3) explain the process for correcting a criminal record.

The policy must also comply with any regulations promulgated by the state. Violation of these requirements can subject an employer to investigation, hearing, and sanctions.

The law also changes what information will be accessible. Except for murder and level 2 and 3 sex offender convictions, felony convictions will be automatically sealed 10 years after the completion of a sentence. Misdemeanor convictions will be sealed after 5 years. Under the old law, felony convictions generally remained visible for 15 years, and misdemeanor convictions for 10 years.

Finally, the law requires employers to discard both applicants' and former employees' criminal offender information after 7 years from the adverse hiring decision date or last date of employment, respectively.

Because the new law changes what information can be obtained by employers and how that information can be used, all employers will need to review their existing application forms and any policies on CORI information, including record retention policies. Employers who utilize criminal records in the application process but do not have a written policy likely will need to draft a policy consistent with the new law.