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Guidance on CORI Reform in Massachusetts

November 24, 2010

The Massachusetts Commission Against Discrimination ("MCAD") has issued guidance on "An Act Reforming the Administrative Procedures Relative to Criminal Offender Record Information and Pre- and Post-Trial Supervised Release" (the "Act"), signed into law on August 6, 2010 by Massachusetts Governor Deval Patrick. The Act, codified at G.L. c. 151B, § 4(9-1/2), prohibits employers from asking job applicants to disclose information about their criminal record history prior to the interview stage of the hiring process. It applies to any employer that does business in Massachusetts and takes applications in Massachusetts.

The Act went into effect on November 4, 2010, but it left many questions unanswered, such as what constitutes an "initial written application form" and whether national employers would be precluded from including questions about criminal conviction history on form applications. Since that time, the MCAD, the enforcing agency of G.L. c. 151B, § 4(9-1/2) as well as the existing Massachusetts Criminal Records Statute G.L. c. 151B § 4(9), has provided some clarification defining the obligations of employers.

Under Massachusetts law, employers were already prohibited from asking applicants or current employees, in writing or orally, about: (1) prior arrests, detentions, or dispositions that did not result in a conviction; (2) prior first convictions for the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; (3) misdemeanor convictions where the date of the conviction predates the inquiry by more than 5 years; or (4) sealed records or juvenile offenses. See G.L. c. 151B, § 4(9). As of November 4, 2010, employers may no longer ask job applicants to provide any information about their criminal history or felony or misdemeanor convictions on initial written applications (unless the employer or the position falls within a statutory exemption).

Notably, the MCAD has indicated that national and international employers may continue to use standard application forms, provided that such forms contain explicit instructions that employers in Massachusetts may not obtain criminal history information from applicants. (Such a disclaimer would not be necessary, and an employer could inquire about applicants' criminal history, if an employer falls within one of the statutory exemptions in G.L. c. 151B, § 4(9-1/2), as discussed below.) Any disclaimer must be clear and unambiguous, in bold print, and positioned within the application form to attract a reader's attention.

Though the new law only explicitly prohibits inquiries about criminal history on an "initial written application form," the MCAD has indicated that even oral inquiries about an applicant's criminal history may be prohibited if such inquiry occurs prior to the interview stage. Thus, it appears that the form of the "initial written application form" does not matter as much as the timing of the inquiry, and it does not matter if such inquiry is written or oral. With that in mind, employers should not make any inquiries into an applicant's criminal history until they have reached the formal interview stage established as part of their hiring process. And even at the interview stage, employers are still prohibited from asking about those topics enumerated in G.L. c. 151B, § 4(9), discussed above.

Employers may be exempted under G.L. c. 151B, § 4(9-1/2) if they fall within one or both statutory exemptions. An employer may ask about criminal convictions if:

1. The applicant is applying for a position where federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction for one or more types of criminal offenses, or
2. The employer or an affiliate is subject by federal or state law or regulation not to employ persons in one or more positions who have been convicted of one or more types of criminal offenses.

The MCAD has indicated, however, that a "regulation" will only create a mandatory or presumptive disqualification if it was promulgated in accordance with G.L. c. 30A (for state regulations) or 5 U.S.C. §§ 551 et seq. (for federal regulations).

The MCAD will assess each fact pattern on a case-by-case basis. Until this new law and its implementation have been tested, and additional guidance has been provided by its enforcing bodies, employers should not ask about criminal record history in Massachusetts prior to an interview.

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