

New Legislation Changes Basic Employment Practices in Massachusetts

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Two pieces of legislation signed by Massachusetts Governor Deval Patrick in early August – one intended to stimulate job growth and coordinate state-funded economic development, and the other reforming the Commonwealth’s Criminal Offender Record Information (“CORI”) system – contain provisions that will require employers in the Commonwealth to take affirmative steps to change their current employment practices. In particular, though the substantive measures included in these bills reach far beyond the scope of the provisions discussed below, employers in the Commonwealth must take note of the immediate changes they must make in the way they handle two issues: negative information added to employee personnel files and inquiries regarding criminal history on job applications.

The Law Regarding Personnel Records in the Commonwealth

On August 5, 2010, Governor Patrick signed into law “An Act Relative to Economic Development Reorganization” in an effort to stimulate job growth. This act also amends M.G.L. c. 149, § 52C, the Massachusetts statute that defines what constitutes a “personnel record” in the Commonwealth and provides the procedure for employee review of personnel records, by imposing a new affirmative duty upon employers with respect to employee personnel files. Effective August 1, 2010, employers must notify employees within ten days of placing information that may lead to disciplinary action or may negatively affect their employment into their personnel records.

Massachusetts defines a personnel record broadly, as “a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee’s qualifications for employment, promotion, transfer, additional compensation or disciplinary action.” Arguably, these recent revisions now obligate an employer to inform an employee about even informal documents that contain negative information, such as emails between supervisors, if these documents are placed in an employee’s personnel record file. Only time will tell the reach of the legislation as the courts try to decipher the intent behind it.

On a related – but employer-friendly note – the recent amendments limit employee review of personnel records to twice per year, though this does not include those reviews triggered by the placement of negative information into an employee’s personnel records.

Individual employees cannot sue their employers for violations of this law, but the Attorney General, who is tasked with enforcing it, may seek fines between \$500 and \$2500 for each violation.

Changes in the Criminal Offender Record Information Law

Shortly after signing “An Act Relative to Economic Development Reorganization,” on August 6th, Governor Patrick signed a new law reforming the CORI system, and in the process amending a portion of the Massachusetts Fair Employment Practices Law, M.G.L. Chapter 151B, §4. In an effort to improve employment opportunities for citizens with a criminal record, these revisions prohibit employers from asking questions on an “initial written application form” about an applicant’s criminal background, which includes questions about arrests, charges, and incarceration, though employers may still be able ask to about felony convictions and certain misdemeanor convictions during job interviews. The only exceptions to this new ban on inquiring about an applicant’s criminal background are for (1) positions for which a federal or state law or regulation disqualifies an applicant based on a conviction; or (2) employers who are subject to an obligation under a federal or state law or regulation not to employ persons who have been convicted. This ban on inquiring about a candidate’s criminal background goes into effect on November 4, 2010.

The CORI reform law does not prohibit employers from obtaining a current or prospective employee's criminal history contained in the Commonwealth's CORI database, though employers will not be able to make anonymous requests for CORI records. Individuals will be able to obtain a list of people who have requested their CORI record, the date of the requests, and the certified purpose of the requests. The recent amendments to the Commonwealth's CORI system make employer inquiries easier, however, by allowing employers to obtain criminal records of job applicants over the Internet for the first time, rather than navigate the archaic CORI system which was in place and did not always contain the most up-to-date or accurate information. The revisions do, however, reduce the time for sealing felonies from 15 years to 10 years, and for misdemeanors from 10 years to five years.

Employers may ask current employees or potential candidates about their criminal history based on a CORI record – and can make employment decisions because of the information contained in a CORI record – but must provide the individual with a copy of that CORI record before questioning him or her about it. Employers are prohibited from maintaining CORI records for former employees and unsuccessful candidates for more than seven years.

These and additional changes to the CORI system concerning employers that conduct five or more criminal background investigations per year, and employer defenses to charges of negligent hiring, go into effect on February 6, 2012.

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