

LOONEY & GROSSMAN LLP

Attorneys at Law

101 Arch Street
Boston, Massachusetts 02110
Telephone (617) 951-2800
Facsimile (617) 951-2819
www.lgllp.com

WHAT EMPLOYERS NEED TO KNOW ABOUT THE NEW MASSACHUSETTS LAW REGARDING CRIMINAL BACKGROUND INQUIRIES & CHECKS. FOR EXAMPLE, JOB APPLICATIONS MUST NOT INCLUDE CRIMINAL HISTORY QUESTIONS.



Nancy L. Perlman, Esq.
nperlman@lgllp.com



Elizabeth M. Adler, Esq.
eadler@lgllp.com

By: Nancy L. Perlman, Esq. & Elizabeth M. Adler, Esq.

Governor Deval Patrick signed into law legislation reforming the Commonwealth's Criminal Offender Record Information law (CORI). Below is a summary of the most critical changes of which all employers need to be aware.

Employer's initial written job application may no longer include questions concerning the applicant's conviction of a crime.

Effective November 4, 2010, employers are no longer permitted to solicit any information on initial written job applications regarding the criminal history of prospective employees. Previously, employers had been allowed to ask applicants about felony convictions and certain misdemeanor convictions that were not protected from disclosure. Though the new law only explicitly prohibits inquiries about criminal history on an "initial written application form," the Massachusetts Commission Against Discrimination ("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. However, at the interview stage, employers may still ask applicants certain limited questions about their criminal history.

Changes to available information

The law creates a new database, and a new method for employers to access criminal records, replacing the current procedure with the Criminal History Systems Board. Beginning in May 2011, employers may, for a fee, obtain applicant CORI records from the Massachusetts Department of Criminal Justice Information Services. The database will only list convictions and pending charges. Provided that there are no subsequent offenses, felony convictions will be sealed after ten years, and misdemeanor convictions will be sealed after five years. Previously, employers had been able to receive information about felony convictions occurring up to fifteen years earlier and misdemeanor convictions occurring up to ten years earlier. Certain convictions for crimes such as sex-based offenses, murder and manslaughter will never be sealed.

Keep in mind that the database will only contain information from Massachusetts courts. Employers will need to use alternative means if interested in checking records from other jurisdictions.

Also please note that not all data obtained in the background check process may be utilized in reaching an employment decision. The federal Equal Employment Opportunity Commission continues to take the position that a blanket ban on hiring those convicted of criminal offenses results in unlawful discrimination.

Employers are limited in making certain inquiries until, and can only take adverse action after, they have presented the candidate with the CORI report.

Employers in possession of an employee or prospective employee's CORI records are still

November 2010

Looney & Grossman Practice Areas:

Bankruptcy & Insolvency
Business
Employment Law
Family Law
Litigation
Professional Liability Defense
& Insurance
Real Estate
Transportation & Maritime
CORI Updates

101 Arch Street
Boston, Massachusetts 02110
Telephone (617) 951-2800
Facsimile (617) 951-2819
www.lgllp.com

... the Massachusetts Commission Against Discrimination (“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.

Looney & Grossman

Practice Areas:

Bankruptcy & Insolvency
Business
Employment Law
Family Law
Litigation
Professional Liability Defense
& Insurance
Real Estate
Transportation & Maritime

permitted to ask about the applicant’s criminal history and are permitted to make an employment decision based on that person’s criminal history. However, before doing so, the employer must provide the employee or prospective employee a copy of his/her CORI record and offer the applicant with an opportunity to provide information regarding same. In deciding whether to make an employment decision based upon criminal history, care must be taken to consider the relationship between the particular position at issue and the specific results from a background check results.

Any employer that conducts five or more background checks on an annual basis must have a written criminal offender record policy.

Employers who conduct five or more criminal background investigations annually must have a written policy in place. The written policy must provide: 1) that the employer will give copies of the policy and the information obtained during the criminal background investigation to the affected employee; 2) that there is a potential for an adverse decision based on the criminal background investigation; and 3) the steps an applicant can take to correct his/her criminal record.

Employers must then make sure to give a copy of the policy and the information obtained during the investigation to the job applicant.

Providing a copy of the policy to the applicant is required regardless of whether the employer directly requests the applicant’s records from the new state database or uses a third-party vendor.

Employers must dispose of an individual’s CORI report not more than 7 years after their last date of employment.

Employers are obligated to destroy copies of an employee’s or a prospective employee’s CORI after seven (7) years from the person’s last day of employment or from the date of the decision not to hire.

You can also review the Fact Sheet recently issued by the MCAD here:

<http://www.mass.gov/mcad/documents/Criminal%20Records%20Fact%20Sheet.pdf>

What Should Employers Do?

This is a good time for employers to examine their background inquiry and check policies, the process they use to obtain background information about a prospective or actual employees (including the interview process), their handling of background check information during the job application process, and their record destruction practices. For example, employers can better protect themselves by including a statement in their application to the effect that employment is contingent upon completion of the company’s background check to the company’s satisfaction. Additional requirements apply for employers with federal contracts or subcontracts in excess of specified dollar amounts. Furthermore, the (federal) Equal Employment Opportunity Commission has stated that it may soon weigh in on the subject of criminal background inquiries, and therefore additional changes may be forthcoming.

To discuss your situation, and to learn how Looney & Grossman may be able to assist you, please contact Nancy L. Perlman, Esq. or Elizabeth M. Adler at (617) 951-2800.