

CLIENT ALERT: Massachusetts Overhauls Accessibility to Criminal Information of Applicants and Employees

On Friday, August 6, 2010, Governor Deval Patrick signed a bill (the "Bill") that amends a number of Massachusetts statutes, including the statute that governs the dissemination of criminal offender record information ("CORI"). The Bill changes a number of laws that are important to Massachusetts employers, including what questions about criminal background may be made on initial employment applications. Although aspects of this new law will be clarified in forthcoming regulations and other interpretive guidance, below is an outline of the new restrictions imposed by the Bill.

Massachusetts Employers Can No Longer Ask for CORI on Applications

The Bill amends Massachusetts' anti-discrimination statute and makes it unlawful for employers to request criminal information on their initial employment applications. There are two limited exceptions to this general rule: an employer may request criminal information on an application (1) if a federal or state law or regulation states that the applicant will be disqualified for the position for which he or she is applying based on a conviction of a criminal offense or (2) if a federal or state law or regulation imposes an obligation on the employer or an affiliate of the employer not to employ individuals who have been convicted of criminal offenses.

This change in the law becomes effective as of November 4, 2010. Therefore, employers must cease asking about criminal background on an initial employment application on or before November 4, 2010, unless an employer meets one of the two narrow exceptions above. Additionally, the CORI statute continues to prohibit an employer from asking an applicant or employee to request a copy of his or her CORI and show it to the employer. Mass. Gen. Laws ch. 6, § 172; 803 CMR 6.02.

Massachusetts law, however, does not prohibit an employer from inquiring into most serious criminal background information during an employment interview. The underlying intent of the law appears to be to prevent employers from inquiring about a criminal record in an application and then deciding not to even interview applicants with any type of revealed criminal conviction. Under Massachusetts General Law Chapter 151B § 4(9), employers may not ask applicants or employees about (i) arrests, detentions or court proceedings that did not result in conviction, (ii) a first conviction for minor misdemeanors such as drunkenness or speeding violations, or (iii) a conviction of a misdemeanor where the date of conviction or the end of incarceration, whichever is later, was five years or more from the date of the interview or request for information. This prohibition has allowed Massachusetts employers to generally inquire about felony convictions and almost all recent and serious misdemeanors. Thus, while most employers will no longer be able to ask for such criminal information on their initial application, employers can continue to inquire about the above-outlined felony and recent serious misdemeanor information during the interview process. The law is somewhat unclear about whether in the future an employer will be *required* to only request criminal background information through the newly-created Criminal Justice Information Services Department (which will be in place by February 2012 as set forth below), and we will keep you informed whether

subsequent regulations will impose this requirement.

Employers Access to CORI from the Commonwealth Will Change in February 2012

The Bill further amends the manner by which an employer can access CORI directly from the Commonwealth. The CORI statute was originally enacted in the 1970s and establishes the procedures used by Massachusetts for maintaining and disclosing information concerning arrests, criminal charges, judicial proceedings, convictions and sentencing. Mass. Gen. Laws ch. 6 § 167, *et seq.* The Bill and its efforts to reform the CORI system will impact how employers obtain and use information related to an applicant's or employee's criminal background. The Bill creates a new executive department of criminal justice information services (the "Department"). These substantive amendments to the CORI statute will become effective in February 2012. In the meantime, the Commonwealth will continue to disseminate CORI under the current system.

Under the CORI statute, both currently and once the amendments become effective, the extent to which an individual or organization can access CORI depends the requestor's level of authorization. For example, criminal justice agencies, including police departments and prosecutors, have access to CORI. Conversely, the general public has much more limited access to CORI ("Public CORI").

Currently, Public CORI is available to anyone, including employers who are not otherwise entitled to receive CORI. Public CORI is limited to information regarding adult conviction records and current custody status where the individual has been convicted of a crime punishable by a sentence of five years or more (regardless of the sentence they receive), or has been convicted of any crime and has been sentenced to a term of imprisonment and:

- (1) is currently incarcerated, on probation or on parole; or
- (2) was convicted of a misdemeanor and has been released from custody, probation and parole for no more than one year; or
- (3) was convicted of a felony, and has been released from custody, probation or parole for not more than two years; or
- (4) was convicted of a felony and was either returned to prison for a parole violation or denied parole, but has been fully discharged from custody for not more than three years.

Mass. Gen. Laws ch. 6 § 172; 803 CMR 3.06. Currently, to request Public CORI, an employer must write to the Criminal History Systems Board ("CHSB") with the name, date of birth, and social security number, if available, of the individual on whom the CORI request is made. 803 CMR 3.06.

Currently, any person or organization may petition the CHSB for certification to receive more CORI than is publicly available. Mass. Gen. Laws ch. 6 § 172. The CHSB grants certification upon a showing that the public interest in disclosing CORI outweighs the individual's privacy and security interest in non-disclosure of his or her CORI. *Id.* For example, organizations who work with children or the elderly may have a public interest in accessing more CORI than is publicly available. The level of access to CORI that CHSB will grant to certified entities is only "that necessary for the actual performance of the actions or duties sustaining the public interest...." *Id.*

Currently, certified employers who want to access more than Public CORI must complete a request form and have the individual sign the form, acknowledging that the employer will request the information and confirming that the individual's identifying information is accurate. Once a certified employer receives non-Public CORI, there are certain processes it must follow. For example, the employer must share a copy of the CORI report with the individual and, prior to making any adverse employment decisions, allow the individual an opportunity to dispute the accuracy of the information. Such employers also must have a written CORI policy. 803 CMR 6.11.

When the CORI statute amendments become effective in February 2012, an employer requesting CORI to evaluate current or prospective employees will have access to (i) felony convictions for ten years following the individual's release from custody, (ii) misdemeanor convictions for five years following the individual's release from custody, and (iii) pending criminal charges. Additionally, unsealed convictions for certain crimes, such as murder, will be available to employers and certain entities, such as school committees or superintendents of schools, will have access to additional CORI.

To access CORI, employers will have to provide the Department with the individual's name, date of birth and the last four digits of his or her social security number. The employer will have to certify that the CORI request is for a reason permissible under the CORI statute and that the individual provided the employer with signed authorization to access the CORI. The employer must retain these acknowledgement forms for at least one year from the date the CORI request is submitted. The employer must also certify to the Department that it has verified the individual's identity by reviewing a government-issued identification.

Additionally, when the CORI statute amendments go into effect, employers who annually conduct five or more criminal background investigations, whether requesting CORI from the Department or from any other source, will have to maintain a CORI policy. The CORI policy will have to state that, in addition to any obligations required under state regulations, the employer will (i) notify an applicant of a potential adverse employment decision due to CORI; (ii) provide a copy of the CORI and the CORI policy to the applicant and (iii) provide information concerning the process for correcting a criminal record.

Although employers are permitted to ask about most CORI during an interview, as discussed above, when the CORI statute amendments become effective in February 2012, employers in possession of an applicant's CORI must provide a copy of the CORI to the applicant prior to asking the applicant about it. Also, if an employer makes an adverse decision about an applicant on the basis of CORI, such as not hiring him or her due to a criminal conviction, the employer must provide the applicant with a copy of the CORI in its possession, if it has not already done so.

Compliance with the CORI statute is particularly important given the steep penalties for violating the law. For example, willfully requesting or obtaining CORI under false pretenses can result in imprisonment for up to one year and a fine of up to \$5,000.00 Mass. Gen. Laws ch. 6. § 178. The CORI statute amendment maintains these penalties, but also adds a new fine of up to \$50,000 per violation for non- natural persons, such as towns or corporations.

The complete overhaul of the CORI system will impact how employers obtain background information

on applicants and employees. These changes will depend, in part, on the nature of the business. Employers are reminded to work with their MBJ attorney to address issues related to background checks and CORI requests.

The Bill Amends The Massachusetts Consumer Reporting Act

In addition to amending the CORI statute and the anti-discrimination statute, the Bill also modifies Massachusetts law regarding obtaining a consumer report for employment purposes. The Massachusetts Consumer Reporting Act, Mass. Gen. Laws ch. 93 §§ 50-67 ("MCRA"), sets forth the manner and scope of obtaining a consumer report. (This is the state counterpart of the better known federal law, Fair Credit Reporting Act or "FCRA.") The MCRA sets forth the types of information that a consumer reporting agency should not provide, such as information that is more than seven years old. Currently, the MCRA permits employers to obtain information that is more than seven years old when the inquiry relates to the employment of any individual who earns more than \$20,000. Beginning in February 2012, employers will no longer be permitted to obtain information that is more than seven years old.

If you have any questions about the Bill, the current CORI statute or the amendments to the CORI statute please contact your MBJ attorney.

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This alert was published on August 12, 2010.

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