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New Massachusetts Laws Affect Employment Applications and Personnel Files

Two new bills, signed into law by Massachusetts Governor Deval Patrick in August of 2010, contain important provisions affecting personnel practices for employers doing business in Massachusetts. The new laws regulate criminal record inquiries on job applications, and create new notification requirements related to employee personnel files.

Prohibition of Criminal Record Inquiries on Applications

The new provision regarding employment applications is contained in comprehensive legislation amending the Massachusetts Criminal Offender Record Information Act (the "CORI Act"). The CORI Act regulates the procedures pursuant to which employers and other parties are permitted access to the Massachusetts government databases containing criminal records.

Most of the amendments to the CORI Act do not take effect for 18 months; or until 2012. However, one important aspect of the legislation, regarding job application forms, becomes effective on November 4, 2010.

Current Massachusetts law limits, but does not prohibit, criminal record inquiries on job applications. Employment applications may ask about an applicant's criminal record except for information regarding: (i) an arrest, detention or disposition in which no conviction resulted; (ii) a first conviction for certain misdemeanors; or (iii) any misdemeanor conviction where the date of conviction or completion of incarceration occurred five years or more prior to the date of the application.

The new legislation implements a substantially broader prohibition by making it illegal for employers to request on an "initial written application form criminal offender record information." The legislation defines the term "criminal offender record information" to include any records and data compiled by a Massachusetts criminal justice agency that identify an individual and relate to "the nature or disposition of a criminal charge, an arrest, a pre-trial proceeding, other judicial proceedings, sentencing, incarceration, rehabilitation, or release."

The only exceptions to the employment application proscription are: (i) when the applicant is applying for a position for which a state or federal law or regulation creates a disqualification based on a criminal conviction; or (ii) the employer is subject to an obligation imposed by state or federal law or regulation not to employ persons who have been convicted of certain criminal offenses. Unless an employer can demonstrate that it falls within one of these exceptions, Massachusetts employers should revise their written employment application forms, no later than November of 2010, to remove any questions that ask an applicant about his or her prior criminal history.

It must be emphasized that the CORI legislation only pertains to questions on an "initial written application form." Thus, subject to other applicable legal constraints, employers may still make appropriate criminal record inquiries later in the application process. In addition, by limiting its scope to application forms, this provision does not prohibit an employer's use of criminal record background checks. However, employers that utilize background checks must comply with applicable law, particularly with respect to notices, authorizations, and disclosures.

Other aspects of the legislation amending the CORI Act, effective in 2012, change the amount of criminal record information available to employers and institute new procedures for obtaining such information. In advance of the 2012 deadline, it is anticipated that state agencies will issue regulatory guidance to assist employers with those obligations. However, it is important that in the short term (i.e., no later than November 4, 2010), employers review and revise their employment documents to ensure that their written applications forms do not create a *per se* violation of the new law.

Changes to Massachusetts Personnel Records Statute

As part of an economic development and stimulus bill, effective August 1, 2010, the Massachusetts Legislature amended the Massachusetts Personnel Records Statute (found at M.G.L.c. 149, §52C) in a manner that has ramifications for day-to-day personnel practices. The Personnel Records Statute sets forth documents that must be contained in an individual's personnel file and provides rights of access to a personnel file upon the request of a current or former employee. The new legislation signals a significant departure from prior law by imposing an affirmative notice obligation on employers when they place certain information in a personnel file.

Specifically, the new law requires an employer to "notify an employee within 10 days of the employer placing in the employee's personnel record any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualification for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action." Therefore, effective immediately, Massachusetts employers should review their personal practices to include this notification requirement. The Personnel Records Statute is enforced by the Massachusetts Attorney General and violations are punishable by fines ranging from \$500 to \$2,500.

The personnel records legislation keeps in place the requirement that an employer allow an employee or former employee to review his or her personnel record within five business days of receiving a written request to do so. However, the new law provides that an employer will not be required to allow an employee to review his or her personnel file on more than two separate occasions in a calendar year; provided, however, that notification and review caused by the employer's placing of negative information in the personnel record does not count toward this limit.

It is suggested that companies doing business in Massachusetts review and update their human resources practices and documentation to ensure compliance with these new laws.

For more insight into labor and employment issues, please visit GT's LE Blog at <http://www.gtleblog.com/>.

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