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School Law Alert

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New Massachusetts Legislation Mandates Changes in Hiring Practices

Massachusetts has enacted new legislation that will require changes in hiring practices for employers, including public and private schools, who conduct criminal background checks or who ask about convictions on job applications. Asking about criminal convictions on a job application will now be prohibited, with very narrow exceptions relating to state and federal job requirements. When and how an applicant can be questioned about past criminal convictions has also been changed. There are benefits to employers under the new law, however, as Massachusetts is developing a fee-based online service for accessing criminal histories. The law places some restrictions on the use of such information, and also establishes some record keeping obligations. These provisions take effect in February 2012 as Massachusetts prepares its online system and new regulations. The changes will apply to an employer's operations in Massachusetts, regardless of whether or not the employer is based in Massachusetts.

The new law prohibits questions on a job application that ask about criminal convictions, and only allows such an inquiry during a job interview after the initial screening. If the employer seeks an applicant's criminal record, the law also specifies how and when that information may be used. First the information may only be shared with persons within the organization with a "need to know" if they are involved in the employment decision. Second, if the interviewer has a copy of the applicant's criminal offender record, then he/she can only ask about past convictions after the applicant has been given a copy of the criminal background check. The applicant will then have a chance to correct errors or explain the situation and justify why past mistakes should not hinder employment.

If the criminal background record has been obtained and is used as a basis for denying the applicant a job, even if no questions are asked in the interview, the employer must provide the applicant with a copy of the criminal history information. The failure to do so will expose the employer to possible fines. Significantly, however, turning down someone for employment because of his/her past criminal record does not impose additional liability where the employer has obtained and used criminal offender record information. Applicants will continue to have all rights they had previously, including protection against discrimination.

Employers who make 5 or more inquiries to the state about criminal records must have a written criminal offender record information policy. The policy must provide that an applicant be notified that the adverse decision was based on the criminal offender record information; that the applicant be given a copy of the criminal offender record information and the employer's

Questions?

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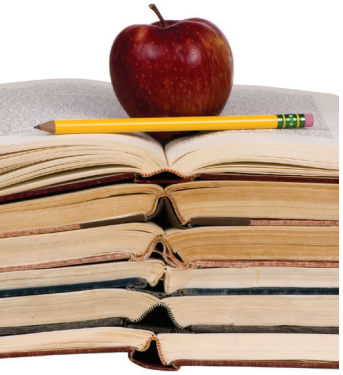

policy; and the applicant be advised of the process for correcting errors in the criminal record.

The information available from the state will be limited as follows: to 10 years following the disposition for felony convictions, including any period of incarceration or custody; to 5 years following the disposition for misdemeanor convictions, including any period of incarceration or custody; and to pending criminal charges. To the extent the applicant has a prior criminal record, those records will also be available for the entire time that the last conviction's records are available. While these requirements are on the horizon, it is important to begin to adjust to these changes.

It should be noted that the new law does not alter the existing obligation imposed by G.L. c. 71, § 38R which requires, among other things, that all schools (including private schools) conduct criminal background checks on current and prospective employees and volunteers, including those who regularly provide school related transportation to students, who may have direct and unmonitored contact with children. Criminal offender record information ("CORI") must be obtained from the Criminal History Systems Board ("CHSB") at least every three years during an individual's term of employment or service. In addition, G.L. c. 6, § 172I, requires schools to obtain CORI of employees of taxicab companies that have contracted with the schools to provide transportation to pupils under G.L. c. 71, § 7A. Contracting taxicab companies are required to submit the names of employees who may have direct and unmonitored contact with pupils to the appropriate school committee or school superintendent prior to those drivers transporting any pupil.

The new law also does not alter existing requirements under G.L. c. 71, § 38R which allows schools to conduct CORI checks on subcontractors or laborers commissioned to do work on school grounds that may have direct and unmonitored contact with children. This includes school bus or van drivers employed by a transportation company under contract with the district to provide transportation services to students. Lastly, the legislation does not restrict the hiring authority for any employer from reserving the exclusive right to make employment decisions. An employer may still consider factors consistent with a school policy when reviewing an applicant's CORI information as part of the hiring process.

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