



For your information

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Massachusetts Finalizes Criminal Records Regulations

The Massachusetts Criminal Offender Record Information Reform Law of 2010 changed who has access to state criminal history information and how that information may be obtained. Recently, the Massachusetts Department of Criminal Justice Information Services issued final regulations clarifying how employers may obtain and use the information in hiring and other employment decisions. Massachusetts employers and out-of-state employers that seek to hire in Massachusetts will have to familiarize themselves with these regulations if they conduct criminal background checks or plan to do so in the future.

Background

Many companies routinely conduct background checks, and the use of arrest and conviction records in employment decisions is the subject of increased attention at both the federal and state levels. (See our May 11, 2012 [For Your Information](#).) Constraints on how employers may access and use criminal histories are geared toward reducing obstacles ex-offenders face in securing employment and minimizing discrimination against them because of their past.

The Massachusetts Criminal Offender Record Information Reform Law of 2010 (CORI Reform) changed who has access to Massachusetts Criminal Offender Record Information (CORI) and how CORI may be accessed. CORI Reform created the Department of Criminal Justice Information Services (DCJIS) to effect those changes. DCJIS recently issued [final regulations](#) that clarify how employers may lawfully obtain criminal histories and use that information in employment decisions.

Obtaining Criminal History

[Chapter 151B](#) of the Massachusetts General Laws (the Massachusetts Fair Employment Practices Act) prohibits employers with six or more employees from asking an applicant or employee for information regarding: (i) an arrest; (ii) a first conviction for certain misdemeanors; or (iii) a misdemeanor conviction that occurred more than five years prior to the application or request for information. CORI Reform amended the law to prohibit employers from requesting any criminal history information on initial job applications, with certain limited exceptions. For example, the prohibition does not apply if a criminal conviction would disqualify the applicant for the position(s) sought under federal or state law. Although CORI Reform did not bar criminal background checks, it affects how those checks may be conducted.

Written CORI Policy Requirement

Employers that conduct background checks may obtain CORI directly from DCJIS or from other sources, including consumer reporting agencies. The final regulations require any employer that annually conducts five or more criminal background investigations, whether through DCJIS or any other source, to maintain a written CORI policy that satisfies the minimum standards of the DCJIS [model policy](#). Among other things, the policy must describe how the employer will conduct CORI screening, limit access to CORI within its organization, and provide necessary disclosures.

The New State Database

CORI Reform created a new state-run criminal record database called iCORI, which can be used by employers to screen current and prospective employees, interns, or volunteers. Because the database contains information only from Massachusetts courts, employers seeking information regarding out-of-state or federal convictions will have to use alternate means to check records from other jurisdictions.

Using iCORI

To use the online service to access CORI, employers must register annually on the iCORI [website](#), designate an individual user who must complete online training, and request and receive CORI online. Most employers using iCORI will have “Standard Access” to CORI, which limits the types of information that employers can obtain to:

- Pending criminal charges
- Felony convictions within ten years after the disposition date or incarceration release date, whichever is later
- Misdemeanor convictions within five years after the disposition date or incarceration release date, whichever is later
- Murder, manslaughter, and sex-offense convictions.

Employers, such as hospitals and banks, that must obtain CORI to comply with statutory, regulatory, or accreditation requirements will have “Required Access,” yielding them certain additional information. Employers that federal or state law authorizes or requires to conduct CORI checks, such as schools and nursing homes, will have the same access to CORI as currently.

Before submitting a CORI request through iCORI, the employer must verify the subject’s identity in a manner authorized by DCJIS and obtain a signed, dated CORI acknowledgement form for each person to be checked. Employers that obtain a criminal history record from the CORI database in connection with an employment decision must provide a copy (including its source) to the applicant or employee before questioning him or her about the criminal history. Before taking an adverse action based on CORI, the employer also must:

- Notify the individual of the potential employment action

- Provide the individual with copies of his or her CORI, the employer's CORI policy, and DCJIS information on how to correct criminal records
- Specify the information in the individual's CORI report that is the basis for the potential adverse decision
- Provide the individual with an opportunity to dispute the accuracy of the information
- Document compliance with these requirements.

Any CORI subject who does not receive a copy of his or her record before questioning or an adverse decision can file a complaint with the new Criminal Records Review Board.

Safe Harbor

Employers that rely on CORI from the DCJIS to make employment decisions may enjoy a "safe harbor" from liability for certain discriminatory employment practices if certain conditions are satisfied. To qualify, an employer must base its decisions on iCORI information within 90 days of obtaining it, provided the employer properly verified the individual's identity and would not be liable if the information was accurate. The employer will escape liability for negligent hiring claims if the employer accesses the iCORI database directly and relies solely on inaccurate information in the database without performing any other criminal background checks. The safe harbor is not available if employers use information from private companies.

Using a Consumer Reporting Agency

The final regulations allow employers to use consumer reporting agencies to obtain CORI from the DCJIS. As with the requirements under the [Fair Credit Reporting Act \(FCRA\)](#) and its Massachusetts equivalent, the employer must provide advance written notice to the applicant or employee that it intends to obtain CORI information and secure the individual's "separate written authorization" to conduct the background check. The employer also must obtain a separate, signed CORI acknowledgement form before the CORI check is made, and provide appropriate notice when any adverse employment decision is based on information reported in the check.

Employers also may designate a consumer reporting agency to obtain and use CORI from the DCJIS to decide, on behalf of the employer, whether an applicant is employment-eligible. In such circumstances, the consumer reporting agency must satisfy all employer requirements under both the FCRA and CORI Reform.

Maintaining and Disseminating CORI Records

The final regulations require an employer that is overseen, regulated, or supervised by a governmental entity to provide CORI to that entity on request. An employer may disseminate CORI to the subject applicant or employee, to an administrative agency or court, or to staff who are authorized to request, receive, or review CORI for the purposes of evaluating the subject's application for employment.

Required Records

Employers must maintain an individual's signed CORI acknowledgement forms for at least one year after they are signed. The final regulations also require an employer that disseminates CORI outside its organization to maintain electronically or on paper a special "secondary dissemination log" for a one-year period following dissemination. The log must specify: (1) the subject's name; (2) the subject's date of birth; (3) the date and time of dissemination; (4) the name of the individual who received the information and, if applicable, that person's employer; and (5) the reason for the dissemination.

Storage and Retention

All hard copies of CORI must be stored in a separate, locked, and secure location, with access limited to employees who are authorized to access CORI. Electronically stored CORI must be encrypted and password-protected, and cannot be stored in public clouds. The final regulations prohibit employers from retaining CORI for more than seven years from the date of employment or final employment, whichever occurs later. Employers must destroy hard copies of CORI by shredding, and electronic copies by deleting them from both the hard drive on which they are stored and any back-up system.

Conclusion

CORI Reform imposes new obligations on Massachusetts employers and out-of-state employers that seek to hire in Massachusetts. Employers that currently conduct criminal background checks or plan to do so in the future should familiarize themselves with what they now must do to comply with recently issued DCJIS regulations interpreting CORI Reform requirements.

Buck Can Help

- Evaluate the impact of DCJIS regulations on your hiring practices
- Review EEO, nondiscrimination, anti-harassment, recordkeeping, and privacy policies
- Implement a written CORI policy