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SPECIAL FEATURE

Second wave of CORI reform: implications for employers

By David C. Henderson

In August 2010, Massachusetts enacted a statute that set in motion two waves of reform in the state's Criminal Offender Record Information system.

Employers already have had more than a year to implement the "ban the box" reform that, since November 2010, has barred requests for criminal offender information on most initial written employment applications.

The second wave of CORI reform is scheduled to take effect on May 4, however, and it, too, has important implications for Massachusetts employers.

Generally, the second set of changes will provide employers with easier access to criminal information in exchange for greater responsibility, both in terms of documentation and in protecting and not misusing the information.

Greater but still limited access to information

- **As before, a criminal record that has been sealed will not be accessible in the typical employment situation.**

Anyone with a criminal record can apply to the Department of Criminal Justice Information Services, or DCJIS, to have the record sealed after a prescribed waiting period, and if the record is sealed, it will be accessible only in very limited circumstances far removed from the usual employment context.

In general, the mandatory waiting period before sealing will be 10 years after disposition of a felony conviction (including any period of incarceration or custody), five years after disposition of a misdemeanor conviction (including any period of incarceration and custody), and for as long as any criminal charge is pending (including any period in which the case is continued without a finding until such time as the case is dismissed).

Even after the prescribed waiting period, a subject's record will not be sealed automatically but will require application to the DCJIS.

There are two major qualifications to the above rules about "waiting periods."

First, any intervening felony or misdemeanor conviction will "reset the clock" for the waiting period.

Second, certain sex offenses will require a waiting period of 15 years following their disposition, and a sex offense of a person classified as a Level 2 or Level 3 sex offender will not be eligible for sealing at all.

- **A limited amount of criminal offender information in an unsealed record will continue to be available to almost *anyone* who requests it.**

The DCJIS will maintain the state's criminal offender information in an electronic database. By making a written request to the DCJIS, "any member of the general public" will be able to access a specific individual's information in the database concerning any (a) felony conviction punishable by imprisonment for five years or more; (b) conviction resulting in a sentence of imprisonment, until the conclusion of any incarceration, probation, or parole; (c) felony conviction, until two years after release from custody; and (d) misdemeanor conviction, until one year after release from custody.

Also, convictions for murder, voluntary manslaughter, involuntary manslaughter and sex offenses punishable by incarceration in state prison will remain in the CORI database indefinitely and be available to authorized requestors unless sealed under the rules discussed above.

- **An employer will be able to obtain *more* criminal offender information than a mere member of the general public *if* the information is sought for the purpose of evaluating a current or prospective employee and *if* the subject signs an acknowledgement of consent.**

Under prior law, private-sector employers had to be *certified* to access criminal offender information, and only a small percentage of employers were able to obtain that certification.

"CORI certification" generally required convincing the Massachusetts Criminal History Systems Board that "the public interest in disseminating such information to these parties clearly outweighs the interest in security and privacy."

Under the new law, however, employers generally will have a "standard" level of access to the CORI database that will allow them to obtain information about a current or prospective employee's (a) felony convictions for 10 years after disposition (including any period of incarceration or custody), (b) misdemeanor convictions for five years after disposition (including any period of incarceration or custody), and (c) pending criminal charges (including cases continued without a finding until such time as the case is dismissed).

Also, employers with an additional need for criminal offender information because of a specific statutory, regulatory or accreditation requirement will be afforded the higher degree of access they need.

In all cases, information about prior misdemeanor and felony conviction records will be avail-

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able for the entire period that the subject's last conviction record is available, and information about convictions for murder, voluntary manslaughter, involuntary manslaughter and sex offenses punishable by incarceration in state prison will remain in the CORI database indefinitely and be available to authorized requestors unless the record is sealed.

The greater responsibility corresponding to enhanced employer access is substantial. To obtain the criminal offender information authorized for an employer, the requestor must certify under penalties of perjury that (a) the requestor is an authorized designee of the employer, (b) the request is for the purpose of evaluating a current or prospective employee, (c) the subject has signed an acknowledgement form authorizing the requestor to obtain the subject's criminal offender record information, and (d) the requestor has verified the identity of the subject by reviewing a form of government-issued identification.

Responsibilities in managing information

- **An employer with an applicant's criminal offender information must provide it to him in two situations.**

In connection with *any* decision regarding employment, a person in possession of an applicant's criminal offender record information must provide the applicant with it prior to questioning the applicant about it. The requirement exists without regard to whether the record was obtained from the DCJIS or any other source.

Also, an employer who makes a decision adverse to an applicant on the basis of his criminal history will have to provide the applicant with the criminal history in the employer's possession. That, too, is an absolute requirement. The requirement exists without regard to how or where the employer obtained the criminal history record.

Failure to provide criminal history information to an applicant may subject an employer to administrative investigation, hearing and sanctions by the Criminal Record Review Board, or CRRB, a division of the DCJIS. Fines can be up to $5,000 for each knowing violation.

- **Only in limited circumstances will an employer be allowed to disseminate criminal offender information.**

In some situations, a subject might consent to the sharing of his criminal offender information with another party. There also are limited circumstances in which the information can be shared with government entities.

An employer also may share the information with individuals "within the requesting entity" who have a need to know the contents of the criminal record to serve the purpose for which the information was obtained.

But otherwise, it is unlawful for an employer to disseminate criminal offender information.

- **Employers will have additional documentation, record retention and record disposal obligations.**

Employers and/or their agents will have at least four new obligations pertaining to documentation.

First, an employer or agent who requests criminal offender information for the purpose of evaluating a current or prospective employee will have to maintain the subject's consent acknowledgement form for a period of one year from the date the request for information is submitted.

Second, an employer (or any other person) conducting five or more criminal background investigations a year must have a written CORI policy that meets prescribed standards. The policy must provide for (a) notifying the applicant of the potential adverse decision based on the criminal offender record information; (b) providing a copy of the criminal offender record information and the policy to the applicant; and (c) providing information to the applicant concerning the process for correcting a criminal record.

Third, an employer who disseminates criminal offender information must maintain a secondary dissemination log for a period of one year following the dissemination.

Fourth, an employer who requests criminal offender information must have a policy that ensures timely disposal of the information. That is because an employer cannot maintain criminal offender record information for more than seven years from the last date of employment or from the date of the final decision regarding the subject.

Criminal sanctions for violations

Under the new law, anyone who receives or obtains criminal offender information in violation of the CORI laws will be prohibited from collecting, storing, disseminating or using such information in any way or for any purpose.

But for others, the sanction can be far more severe. That includes anyone who (a) knowingly requests, obtains or attempts to obtain criminal offender information under false pretenses; (b) knowingly communicates or attempts to communicate criminal offender information to any other individual or entity except in accordance with the provisions of the law; (c) knowingly falsifies criminal offender information or any related records; or (d) requests or requires a person to provide a copy of his criminal offender record except as authorized by the law.

Individuals convicted of those crimes "shall for each offense be punished by imprisonment in a jail or house of correction for not more than 1 year or by a fine of not more than $5,000 or by both such fine and imprisonment"; and when the offense is by an entity that is not a natural person, "the amount of the fine may not be more than $50,000 for each violation."

Two new protections for employers

Under the new law, two statutory defenses are established.

First, an employer who follows proper procedures and makes a hiring decision within 90 days of receiving criminal offender information from the state will not be liable for negligent hiring practices by reason of relying solely on information from the state that turns out to be erroneous.

Second, no employer will be liable for discriminatory employment practices for failing to hire a person on the basis of erroneous criminal offender information in a report requested and received from the state, provided that the hiring decision is made within 90 days of receiving the criminal offender information and the employer otherwise follows proper procedures.

Conclusion

The second wave of CORI reform acknowledges that employers need ready access to criminal offender information about employees and prospective employees.

At the same time, the law balances the enhanced access with greater employer responsibility.

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