



Client Alert

Employment Law



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Upcoming Changes to the Massachusetts “Ban the Box” Law

In April 2018, Massachusetts enacted a new Criminal Justice Reform Act. This new law takes effect on October 13, 2018, and further limits employers’ ability to inquire about an applicant’s criminal record.

EXISTING LAW

The law currently prohibits employers from inquiring about a criminal record in the initial written application. It also prohibits employers from inquiring about the following types of criminal records at all during the application process:

- (1) An arrest, detention, or disposition regarding any violation of law in which no conviction resulted;
- (2) A first conviction of a misdemeanor for drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace; or
- (3) Any conviction of misdemeanor where the date of conviction or completion of incarceration occurred five or more years prior to the date of application for employment, unless the applicant has been convicted of any offense in that five-year period.

CHANGES TO EXISTING LAW

Effective October 13, the existing law will change as follows:

Decreased Period for Misdemeanor Convictions. Employers will be prohibited from inquiring about misdemeanors where the date of the conviction or completion of incarceration occurred three or more years prior to the date of application, unless the applicant has been convicted of any offense within that three-year period.

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Prohibition on Inquiring about Expunged Records. Employers will be prohibited from inquiring about criminal records that have been sealed or expunged.

Mandatory Notice to Applicants. Any document or application form that inquires about criminal records will need to include the following statement about expunged records: “An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer ‘no record’ with respect to an inquiry herein relative to prior arrests, criminal court appearances or convictions. An applicant for employment with a record expunged pursuant to section 100F, section 100G, section 100H or section 100K of chapter 276 of the General Laws may answer ‘no record’ to an inquiry herein relative to prior arrests, criminal court appearances, juvenile court appearances, adjudications or convictions.”

Protection from Negligent Hiring Claims. Because the new law further limits employers’ access to criminal records, the law provides that employers defending against negligent hiring claims will be presumed to have no notice or ability to know of sealed or expunged records, misdemeanor convictions protected from disclosure, and other crimes that DCJIS cannot lawfully disclose.

WHAT IT MEANS FOR EMPLOYERS

Many employers in Massachusetts no longer directly ask applicants about their criminal history. To the extent criminal background screening is needed, these employers rely on information provided directly by the Massachusetts Department of Criminal Justice Information Systems (DCJIS). The net effect of the new changes for these employers is that they may begin receiving more limited criminal background information.

Employers who directly inquire about criminal history should take the following steps:

- Review initial written job applications to ensure they do not inquire about criminal records (since 2010, such inquiry has been prohibited on the initial application form);
- Revise supplemental job applications and other pre-hire forms to ensure they do not make any inquiries about misdemeanor convictions or periods of incarceration from three or more years prior to the date of application or expunged or sealed criminal records;
- Include the mandatory notice regarding expunged criminal records on any forms that inquire about criminal records; and
- Train or re-train supervisors and interviewers regarding appropriate questioning in interviews.

FOR MORE INFORMATION

Please contact Michael C. Birch or any other member of HRW’s employment law team.