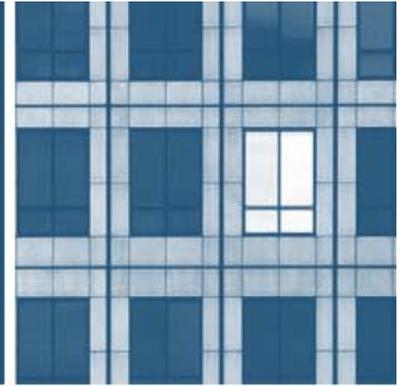


# On the Subject



## Employee Benefits

October 29, 2010

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Massachusetts' new criminal offender record information law prohibits most employers from asking about criminal history on an initial written job application. Employers that plan to hire in Massachusetts should reexamine application forms and employment policies to ensure compliance.

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### Hiring in Massachusetts? Criminal History Questions Must Be Removed from Job Applications by November 4, 2010

The Massachusetts Governor recently signed into law an act reforming the Commonwealth's criminal offender record information system. Under this new law, most Massachusetts employers will now be prohibited from asking about criminal history on an initial written job application. Massachusetts is among a growing number of states to "ban the box" on job applications, as part of an overall effort to be "tough" on crime. Yet, many employers have asked, "How is preventing us from asking applicants about criminal history being 'tough' on crime?" Supporters say that increasing job opportunities for ex-offenders reduces the likelihood of repeat offending. Those opposed argue that it is an unfair burden on legitimate business needs to know about criminal history, and question whether banning the box will have a meaningful impact on recidivism. Regardless of which way one leans in this debate, however, the Massachusetts law is now in place. As a result, employers that plan to hire in Massachusetts should reexamine application forms and employment policies to ensure compliance with the new law.

#### What the Law Requires

Three provisions of the new law directly affect Massachusetts employers. First, the ban-the-box provision is effective November 4, 2010. As of that date, employers are prohibited from asking job applicants about criminal history on the initial written job application. The law contains two limited exceptions:

employers may continue to ask about criminal history on job applications (1) for positions for which a federal or state law, regulation or accreditation disqualifies an applicant based on a conviction, or (2) if the employer is subject to an obligation under a federal or state law or regulation not to employ persons who have been convicted of a crime.

In addition to banning the box on the initial job application, the law creates two new provisions that will be effective February 6, 2012. The first provision creates new "notice" requirements for employers. Under these new requirements, an employer in possession of criminal record information about an applicant must provide the information to the applicant prior to questioning the applicant about it. In addition, similar to the requirements of the federal Fair Credit Reporting Act, if an employer decides not to hire an applicant in whole or in part because of the applicant's criminal record, the employer must provide the applicant with a copy of the record.

The second provision effective in 2012 is a new "policy" provision. This provision requires employers that conduct five or more criminal background investigations in a year to implement and maintain a written criminal record information policy. The written policy must include certain elements, such as procedures for (1) notifying applicants of the potential for an adverse decision based on the criminal record information, (2) providing a copy of the criminal record information and the written policy itself to applicants, and (3) providing information to applicants concerning the process for correcting misinformation on their criminal record.

Finally, the law imposes penalties (including imprisonment for up to one year or a fine of up to \$5,000 for an individual, \$50,000 for an entity) for those who request or require a person to provide a copy of his or her criminal record except in situations authorized by law. In addition, the law prohibits harassment of the subject of a criminal record, punishable by imprisonment of up to one year, or a fine of not more than \$5,000.

## What Does This Mean as of November 4, 2010?

Going forward, most Massachusetts employers can no longer inquire about criminal history on an initial job application, lest they risk the potential for harsh penalties. If a company has a store of preprinted form applications, one way to salvage them is to place a sticker over the question, or otherwise clearly indicate that the applicant should not answer that question when filling out the form. When redrafting the form, employers should consider either removing the question altogether or, if the form is multijurisdictional, inserting a clear statement that Massachusetts applicants should not provide information on criminal history.

After the initial job application, it is permissible to ask about a candidate's criminal history within the bounds of M.G.L. chapter 151B. For example, employers may permissibly ask "Have you ever been convicted of a felony? If yes, give dates and details of conviction" and "Have you been convicted of a misdemeanor within the past five years other than a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace?" This can be done orally during interviews, but the employer would not have written documentation of the response. As an alternative, therefore—or, in addition to the interview discussion—employers might consider instituting a second phase of the application process. For example, following the initial interview, the employer may have candidates complete a form listing references and providing information about criminal history consistent with the requirements of Massachusetts law. This form could also include a written certification by the candidate that the response is true, accurate and complete. In this manner, the employer will be able to collect the information and the certification, while complying with the requirements of the law.

Finally, given that the notice and policy provisions of the new law do not take effect until February 6, 2012, employers have a significant window of time to evaluate how to integrate these new requirements into their existing policies and procedures.

## Conclusion

While the new criminal offender record information law presents new challenges to Massachusetts employers using background checks during the hiring process, employers should still be able to gather information concerning criminal records consistent with the new law, as long as they do so after the initial written application and otherwise conform their questions to the requirements of Massachusetts law.

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