Rose, Chinitz & Rose

COUNSELLORS AT LAW

One Beacon Street, 4th Floor
Boston • Massachusetts • 02108

Client Advisory

All Massachusetts employers need to be aware of recent changes to the Massachusetts Personnel Records and the Criminal Offender Record Information statutes.

I. AMENDMENT TO THE MASSACHUSETTS PERSONNEL RECORDS STATUTE

Effective as of August 1, 2010, the Massachusetts Personnel Records statute, Mass. G. L. c. 149, § 52C, was amended in ways that are significant to Massachusetts employers.

Employers must now notify employees within 10 days after the employer places negative information in the employee's personnel record. Negative information is defined as "any information to the extent that the information is, has been used or may be used, to negatively affect the employee's qualifications for employment, promotion, transfer, additional compensation or the possibility that the employee will be subject to disciplinary action."

The Personnel Records statute broadly defines a "personnel record" as any document "kept by an employer that identifies an employee" and is relevant to "that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." Considering this broad definition and the amendment to the statute, employers will likely have to change the way they think about and identify the types of documents that constitute a personnel record and what types of documents will trigger the new notice requirements.

For example, will an email sent by a supervisor to human resources criticizing an employee's performance be subject to the new notice provision? Similarly, what if two supervisors are critiquing an employee's performance? Should that communication be forwarded to human resources and the employee subsequently notified? What is the consequence if the employee is not given notice of either of the communications in these two scenarios within 10 days of their creation? Will the employer be barred from using that information as the basis of a termination or disciplinary action if it later chooses to take action against the employee? How will an employer know now whether a particular communication "may be used" in the future to negatively affect the employee's employment. At what point does an email constitute "negative information" based on the statutory definition? These and many other questions will be the subject of debate among employment lawyers and human resources professionals and will also be addressed in employment litigation in the upcoming months.

This amendment to the statute highlights many practical issues concerning "negative" communications about employees. There is a conventional rule to "document everything" and email has become the chosen method of communication and documentation. Yet, managers (and others) continue to be careless about the content and tone of email communications. Now that

many "negative" email communications must be shared with employees, managers must use more care and thought in authoring emails. The statute also raises the question of whether fewer communications should be reduced to writing – recognizing that "negative" communications about employees may diminish morale, damage working relationships, and hinder productivity.

The amendment also limits the number of times an employee can request to review his/her personnel file to twice per year. A review arising out of the placement of a negative document into the personnel file, however, does not count toward that limit.

Employers are recommended to adopt a standardized approach for the way in which "negative" personnel records will be handled and to create a system that chronicles the fact that the employee has been notified of the "negative" information. Employers should also immediately begin notifying employees within ten days of the placement of negative information in their personnel records.

II. CHANGES TO THE CRIMINAL OFFENDER RECORD INFORMATION STATUTE

The Massachusetts Legislature has recently made significant changes to the Criminal Offender Record Information (CORI) law. Several of these changes will impact the ways in which employers can use criminal history records during the hiring process.

1. Employers May Not Ask Questions About Any Convictions On An Initial Job Application

Employers are now prohibited from asking applicants about their criminal offender record information, including information about arrests, criminal charges, and incarceration, on an "initial written application form." Previously, employers had been permitted to ask applicants about felony convictions and certain misdemeanor convictions. There are two limited exceptions to the conviction question ban on initial applications: if a law or regulation (a) requires that an applicant be disqualified from the applied-for position because of a conviction of a criminal offense, or (b) prohibits the employer or an affiliate from employing an individual who has been convicted of criminal offenses.

An employer may still ask an applicant during the interview process about criminal convictions provided that the employer does not ask about: (a) arrests, detentions or dispositions not resulting in a conviction, (b) first conviction of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbance of the peace, or (c) convictions of a misdemeanor where the date of conviction or end of incarceration, whichever is later, is more than 5 years from the date of the request for the information.

2. Employers Will Receive Less Information on a CORI Report

While employers may still obtain criminal information from the CORI database, they will no longer be able to receive felony convictions that have been closed for more than ten years or misdemeanor convictions that have been closed for more than five years.

3. Employers May Not Retain CORI Information Indefinitely

Employers may no longer retain a terminated employee's CORI information for more than seven years after the employee's last day of employment. Similarly, employers cannot retain an unsuccessful applicant's CORI information for more than seven years from the date of the decision not to hire.

4. Employers conducting More Than Four CORI Checks Per Year Must Have a Written Policy

If an employer conducts more than four CORI investigations per year, the employer must have a written policy in place which notifies job applicants of the following: 1) that the employer will provide the applicant copies of the policy and the information obtained during the criminal background investigation, 2) that the criminal background investigation may result in an adverse employment decision, and 3) the steps applicants can take to correct their criminal record. Applicants must be provided with a copy of the employer's written policy as well as any information obtained about the applicant during the criminal background investigation.

5. New Liability Protection for Employers

Under the new CORI law, employers may no longer be held liable for negligent hiring where the employer relied solely on CORI records and did not conduct an additional criminal background check before hiring the applicant. Moreover, employers are now protected from liability for failing to hire an applicant due to erroneous information contained in the applicant's CORI record.

The changes in the CORI law regarding the initial application process go into effect on November 4, 2010. The other changes to the CORI law do not go into effect until February 6, 2010.

For more information on the Personnel Records or CORI statutes, please contact your Rose, Chinitz & Rose attorney.

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