



SEPTEMBER 2010

2009-2010 Legislative Session Brings Substantial Changes to the Massachusetts Workplace

In the past few months, the Commonwealth of Massachusetts has enacted, amended, or implemented several statutes that will have, or have already had, a substantial impact on the workplace. The legislation affects initial applications for employment, criminal background checks, personnel records, no-texting-while-driving laws, and workplace harassment (distinct from the anti-harassment legislation of federal and state anti-discrimination statutes), and there is even a new cause of action for failure to provide workers' compensation insurance.

EXTENSIVE REFORM OF THE CRIMINAL OFFENDER RECORD INFORMATION (CORI) ACT

In August 2010, Governor Deval Patrick signed legislation that drastically amends the CORI Act. Most of the amendments relate to the criminal background information that will be available from a yet-to-be-created Criminal Justice Information Services Department as well as the procedures to request, safeguard, and dispose of the information. The new system will be Internet-based and will require employers who request five or more criminal history checks per year to have a written CORI policy. Employers will also be required to provide applicants with a copy of their criminal history record if they have questions for them about information on the record or if they intend to deny employment based on information contained in the record. These amendments are effective February 6, 2012.

As of November 4, 2010, employers are prohibited from asking any questions about an applicant's criminal record on an "initial written application form." There are only two exceptions to this prohibition: (1) if the criminal conviction would disqualify the applicant from the position under federal or state law or regulation; or (2) if the employer is prohibited by federal or state law or regulation from employing an applicant with a criminal conviction. These exceptions would generally cover individuals or agencies that provide services to children, the disabled, or the elderly.

Although it is still permissible to ask questions about criminal history during an interview, employers must make sure they comply with existing law and not ask questions already prohibited. An employer cannot ask an applicant questions about the following:

- Arrests that did not result in conviction

- Sealed records
- Crimes committed as a juvenile unless the individual was charged as an adult
- Convictions for misdemeanors where the date of conviction predates the inquiry by more than 5 years
- First convictions for misdemeanors involving drunkenness, simple assault, speeding, minor traffic violations, affray, or disturbing the peace

Employers are still prohibited from asking applicants to obtain a copy of their CORI record for the employer.

Massachusetts employers (except for those covered under the two exceptions noted above) must delete any questions about criminal history from their initial applications for employment before November 4, 2010.

PERSONNEL RECORDS: NOTICE OF NEGATIVE INFORMATION AND ACCESS BY EMPLOYEE

As of August 5, 2010, an amendment to the Personnel Record Act, M.G.L. c. 149, § 52C, requires that an employer notify employees whenever information that "is, has been used or may be used" to negatively affect them has been placed in their personnel record. The notice must be provided within 10 days of the information being placed in the file. Employees can then request access to their personnel file by submitting a written request. The employer must allow employees the opportunity to review their file within 5 business days of receiving their request.

The statute defines "personnel record" as "a record kept by an employer that identifies an employee, to the extent that the record is used or has been used, or may affect or be used relative to that employee's qualifications for employment, promotion, transfer, additional compensation or disciplinary action." To trigger the notice obligation, employers must first determine whether the information is a "personnel record." If so, the document must be "placed" in the file. If the information is "negative," the employee must be informed within the 10-day period.

Other than the review triggered by the notice of negative information (which does not count towards the annual limit), employees are now limited to two reviews of their personnel record per year. As with the notice of negative information, employees must submit a written request and the employer must grant access within five business days.

Managers must be made aware that any employee-related communications with the Human Resources Department (or with other supervisors) that contain negative information about an employee may not be confidential but may become part of the employee's personnel record. Employers should develop procedures to make sure that (1) the appropriate information be included in the employee's personnel record; (2) notice to the employee be given in a timely manner; and (3) access to the record be given within the proper timeframe.

Fines for noncompliance range from \$500 to \$2,500 per violation. The Attorney General's Office is responsible for the enforcement of the statute.

DATA PRIVACY LAW — SECURITY AND BREACH NOTIFICATION

In response to highly publicized reports of theft of confidential consumer information, Massachusetts enacted the Data Privacy Act. On March 1, 2010, the regulations implementing the act became effective. The regulations apply to those who collect and retain personal

information about Massachusetts residents for commercial purposes and for purposes of employment.

Personal information is defined as the following:

"A Massachusetts resident's first name and last name or first initial and last name in combination with any one or more of the following data elements that relate to such resident:

- (a) Social Security number;
- (b) driver's license number or state-issued identification card number; or
- (c) financial account number, or credit or debit card number, with or without any required security code, access code, personal identification number or password, that would permit access to a resident's financial account[.]"

Information obtained from public records is excluded from the definition of "personal information."

Given the breadth of the definition, it is clear that employment records such as payroll and wage statement records (which contain names and social security numbers), direct deposit forms (which include names and bank account numbers), 401K statements (which include names and bank account numbers), and other similar information are covered by the statute. Consequently, employers have an obligation to protect the security and integrity of the information.

To do so, employers must have a comprehensive, written information security program (WISP) that performs the following:

- Designates one or more individuals who are responsible for the security program
- Assesses reasonable risk of breach, both by internal and external sources
- Evaluates security measures, including authentication protocol, access to information, user ID requirement, encryption, monitoring, and firewall/virus protection
- Conducts periodic employee training and employee monitoring
- Institutes disciplinary action for employee violation

An employer who uses third-party vendors has the obligation to select and retain vendors "capable of maintaining appropriate security measures."

Compliance with the statute is enforced by the Office of the Attorney General.

For additional information, please review the following publications by the Office of Consumer Affairs and Business Regulation:

Small Business Guide: http://www.mass.gov/Eoca/docs/idtheft/sec_plan_smallbiz_guide.pdf

Compliance Checklist: http://www.mass.gov/Eoca/docs/idtheft/compliance_checklist.pdf

Regulations: <http://www.mass.gov/Eoca/docs/idtheft/201CMR1700reg.pdf>

PREVENTION OF ABUSE AND HARASSMENT — NO LONGER LIMITED TO DOMESTIC

RELATIONS

"An Act Relative to Harassment Prevention Orders," became effective in May 2010. This new statute allows victims to obtain a harassment prevention order if they have been subjected to "at least three acts of fear, intimidation, abuse or property damage" or who "by force, threat or duress" involuntarily engage in sexual relations.

Though not explicitly workplace-related, this statute does not require a familial or household relationship between the parties; it applies regardless of the relationship of the parties.

The proceeding to obtain a prevention order is a civil matter, and remedies include a no-contact order, an order to stay away from the plaintiff's home or workplace, and monetary compensation; however, a violation of a prevention order is criminal in nature, with penalties of up to \$5,000 and/or imprisonment of up to 2 ½ years.

NO TEXTING OR E-MAILING WHILE DRIVING — EVEN AT A RED LIGHT

The Massachusetts Safe Driving Act prohibits drivers from using a "mobile telephone, or any handheld device capable of accessing the internet, to manually compose, send or read an electronic message while operating a motor vehicle." The prohibition does not apply if the vehicle is stationary and is not located in a part of the public way intended for travel. Fines range from \$100 for a first offense to \$500 for a third or subsequent offense.

The effective date for the act is October 2, 2010. Employers should review their policies to ensure compliance with the new restriction.

A NEW PRIVATE RIGHT OF ACTION FOR ENFORCEMENT OF THE WORKERS' COMPENSATION ACT

An amendment to the Workers' Compensation Act allows any three private citizens to bring a civil action against an employer for failure to provide workers' compensation insurance.

To bring the claim, the plaintiffs must provide the employer and any insurer with notice of their intent to sue, together with the substance of the allegations, 90 days prior to filing the lawsuit. To prevail, the plaintiffs must show, by a preponderance of the evidence, that the employer failed to comply with the law.

If the plaintiffs win, the employer is liable for all of the following:

- The lesser of 25 percent of the amount the employer failed to pay or \$25,000
- Compensatory and liquidated damages equal to the lesser of 25 percent of the amount that should have been paid or \$25,000
- Reasonable attorney's fees and costs

There is a six-year statute of limitations to bring an action under this new provision.

This provision greatly increases exposure for misclassification of workers as independent contractors. Any employer who does not provide workers' compensation insurance to some workers under the assumption that they are independent contractors should conduct a very rigorous review to ensure that the workers are properly classified. Keep in mind that the 2004 amendments to the Massachusetts Independent Contractor Law make it extremely difficult to truly qualify as an "independent contractor" in the Commonwealth.

For more information on these changes, or any other Massachusetts employment issue, please contact a member of our Labor and Employment group:

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