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A PRIMER ON CORI REFORM FOR EMPLOYERS

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I. WHAT IS CORI? WHAT IS CORI REFORM?

The acronym “CORI” stands for “criminal offender record information.” The term CORI is commonly used to refer to the specific criminal offender record information that employers, landlords and others can obtain directly from the Commonwealth of Massachusetts.

In 2010, Governor Patrick signed a new law, commonly referred to as “CORI Reform,” that vastly changed the legal landscape with respect to access and use of CORI. Among the changes was the creation of a new agency, the Department of Criminal Justice Information Services (DCJIS), to oversee the authorized release of CORI, and to provide a public information system and network to support data collection and information sharing.

While CORI Reform deals largely with CORI obtained directly from DCJIS, the new law also impacts criminal offender record information obtained by employers from other sources, such as private background check companies, consumer reporting agencies (CRAs), private detectives and court records.¹

Most of the key provisions of CORI Reform went into effect on May 4, 2012. DCJIS issued CORI regulations, which became final on May 25, 2012.²

It should be noted that many other states have laws and regulations regarding whether and how an employer can obtain and use criminal history information about existing and prospective

employees. The Fair Credit Reporting Act (FCRA) imposes obligations as well. This primer deals exclusively with Massachusetts law, though some of the requirements of the FCRA are discussed below.³

Note also that the Massachusetts Executive Office of Health and Human Services (EOHHS), the Board of Early Education and Care (EEC), the Department of Mental Health (DMH) and other agencies have their own regulations related to CORI.⁴ Employers that are licensed and/or funded by such agencies must comply with these regulations as well as those issued by DCJIS. This primer only discusses the DCJIS regulations.

II. HOW DO EMPLOYERS GET ACCESS TO CORI?

Since May 7, 2012, DCJIS has been disseminating CORI through a new web-based service referred to as iCORI.⁵ Under the prior CORI law, only certain employers could get access to CORI. Effective May 4, 2012, *any* employer may register for an iCORI account to screen current and prospective employees, including “full-time, part-time, contract, internship employees or volunteers.”⁶

To register for an iCORI account, the employer must provide identifying information regarding the individual user and the business as required by DCJIS.⁷ The employer must also provide information regarding the purpose for requesting CORI, including any statutory, regulatory or accreditation requirements that mandate CORI or criminal history screening.⁸

To complete the registration process, the individual user must agree to comply with all iCORI terms and conditions.⁹ Per the regulations, the individual must also complete training.¹⁰ Specifically, individuals are required by DCJIS to certify that they have reviewed the training materials posted on the DCJIS website.¹¹ The regulations further state that a registration fee may be required.¹²

All iCORI registrations expire after one calendar year. After expiration, the registrant must renew the registration, including again completing the iCORI training.¹³ Employers that access CORI are subject to audit by DCJIS.¹⁴

III. WHAT INFORMATION CAN EMPLOYERS GET?

Effective May 4, 2012, any employer that registers annually for an iCORI account can get “Standard Access” to CORI.¹⁵ Standard Access includes felony convictions disposed of (including any period

1. MASS. GEN. LAWS ch. 6, §171A (requirements apply whether information is obtained from DCJIS or “any other source”).

2. 803 CMR 2.00 *et seq.*

3. *See* Parts XIII and XIV, *infra*.

4. *See, e.g.*, 101 CMR 15.00 *et seq.*, (EEOHS), 606 CMR 14.00 *et seq.* (EEC), and 104 CMR 34.00 *et seq.* (DMH).

5. 804 CMR 2.02 and 2.04.

6. MASS. GEN. LAWS ch. 6, §172(a)(3). The term “contract employee” is not defined in the statute or proposed regulations. 804 CMR 2.04(2) discusses an employer’s ability to register for an iCORI account but does not reference contractors.

7. 804 CMR 2.04(2).

8. *Id.*

9. *Id.*

10. *Id.*

11. *See* DCJIS publication “iCORI Quick Reference Guide: Register as an Organization.” <http://www.mass.gov/eopss/docs/chsb/register-as-an-organization-quick-reference-guides-2012.pdf>

12. 804 CMR 2.04(2).

13. 804 CMR 2.04(6).

14. MASS. GEN. LAWS ch. 6, §172(c), (f) (CORI Acknowledgement forms and secondary dissemination logs are subject to audit by DCJIS). For more information on DCJIS audits, *see* Part XVII, *infra*.

15. MASS. GEN. LAWS ch. 6, §172(a)(3); 804 CMR 2.04(2) and 2.05(4).

of incarceration) within the past ten years, misdemeanors disposed of within the past five years and pending charges.¹⁶ Standard Access also includes convictions for murder, voluntary and involuntary manslaughter, and certain sex offenses, regardless of how recent, unless sealed.¹⁷ If a crime is eligible to be included on a CORI report, prior misdemeanor and felony convictions are available for the entire period that the subject's last available conviction record is available.¹⁸ Standard Access does not include charges that did not result in a conviction, or offenses that are sealed, juvenile, civil or non-incarcerable.¹⁹

Employers such as banks, hospitals, schools, and nursing homes that are authorized or required to receive CORI pursuant to a statute, regulation or accreditation requirement can get access to broader information.²⁰ The regulations specify four levels of "Required Access," depending on the language of the underlying requirement.²¹ Employers should consult with counsel regarding whether they are subject to any statutory or regulatory requirement to conduct CORI checks, and their eligibility for and/or obligation to obtain broader information.

Per the regulations, if an employer uses a consumer reporting agency (CRA) to obtain CORI, that CRA will have the same level of access to CORI "as the iCORI-registered client on whose behalf the CRA is performing the CORI check."²² The reference in the regulations to a "registered" client suggests that, even if the employer is using a CRA to access CORI, the employer itself must still register. The regulations include more detailed provisions with respect to the type of information that the CRA can share with the employer, depending on the client's level of access and the annual salary for the position for which the applicant is being screened.²³ For example, if the iCORI registered client is entitled to Standard Access to CORI, and the annual salary for the position for which the subject is being screened is less than \$75,000, the CRA is not permitted to disclose pending cases that are seven or more years old and that did not result in a warrant; if the position pays more than \$75,000, all pending charges may be disclosed.²⁴

IV. SHOULD EMPLOYERS CONDUCT CORI CHECKS?

Some employers, like human service providers, are required by law to conduct CORI checks. Even if an employer is not legally required to conduct CORI checks, however, there are good business reasons to consider doing so. Knowledge is power. The more information a business has about an applicant or employee, the better the company can assess whether or not the individual is the right person for the job, and the better it can effectively mentor and supervise the

person if he/she is hired. Also, as discussed below, in some circumstances failing to conduct criminal background checks could subject an employer to a negligent hiring claim.²⁵

If an employer does conduct CORI checks, however, the employer will be subject to strict procedural requirements, as set forth in this note, and to audits by DCJIS. Failure to follow those requirements can subject an employer to civil and criminal liability.²⁶ Further, an employer that obtains or uses criminal history information in a discriminatory manner can be subject to liability.²⁷

V. CAN AN EMPLOYER BE SUED FOR NEGLIGENT HIRING IF THE EMPLOYER CHOOSES NOT TO CONDUCT CRIMINAL BACKGROUND CHECKS?

Depending on the nature of the position and the circumstances, if an employer fails to obtain criminal offender record information about an applicant or employee, and such individual engages in a harmful act, the employer could be exposed to a claim for negligent hiring. Massachusetts law imposes a duty on employers to exercise *reasonable care* in the hiring, supervision, and retention of employees who are brought into contact with members of the public.²⁸ Negligent hiring cases generally involve situations where (1) an employee engages in a violent, dangerous, or otherwise harmful act toward a member of the public and (2) the employer could *reasonably have anticipated* that such harm would occur, based on the employee's having engaged in similar acts in the past.²⁹ The plaintiff in such action would have to show that by obtaining the criminal information, the employer would actually have learned something that would have made the alleged harm foreseeable.³⁰

The new CORI law provides a "safe harbor" for employers from negligent hiring claims. If an employer makes a hiring decision within 90 days of receiving CORI through DCJIS, and if the employer followed the statute and DCJIS regulations pertaining to verification of the subject's identity, the employer cannot be sued for negligent hiring based on the employer's decision to rely solely on CORI and to not conduct additional criminal history checks.³¹ This "safe harbor" presumably would not apply if the employer did not check the individual's CORI at all, or if the employer obtained criminal offender information from another source, including a CRA.³²

VI. CAN AN EMPLOYER FACE DISCRIMINATION CLAIMS FOR CONDUCTING CRIMINAL BACKGROUND CHECKS?

The state and federal non-discrimination laws do not prohibit the use of criminal offender record information. Indeed, the CORI

16. MASS. GEN. LAWS ch. 6, §172(a)(3); 804 CMR 2.05(4).

17. *Id.*

18. *Id.*

19. MASS. GEN. LAWS ch. 6, §172(a)(3).

20. MASS. GEN. LAWS ch. 6, §172(a)(2).

21. 804 CMR 2.05(3)(b).

22. 804 CMR 11.04(1)(b).

23. 804 CMR 11.11.

24. 804 CMR 11.11(1).

25. See Part V, *infra*.

26. See Part XVII, *infra*.

27. See Part VI, *infra*.

28. See, e.g., *Foster v. The Loft, Inc.*, 26 Mass. App. Ct. 289, *rev. granted*, 403 Mass. 1102 (1988) (settled prior to review).

29. *Id.*

30. See, e.g., *Coughlin v. Titus & Bean Graphics, Inc.*, 54 Mass. App. Ct. 633, 639-41(2002) (defendant not liable for wrongful death where background check would not have provided any additional information that would have enabled defendant to reasonably foresee that employee posed a threat to members of the public, and where individual was not expected to have regular contact with the public in the normal course of business); *Doe v. Wendy's Old Fashioned Hamburgers of New York, Inc.*, 19 Mass. L. Rptr. 663, 2005 WL 1971036 (Mass. Super. June 16, 2005) (negligent hiring claim fails because there is no evidence from which a jury could conclude that Wendy's would have learned anything to make the alleged incident foreseeable if more stringent hiring procedures were enforced, including independently conducted criminal background investigations).

31. MASS. GEN. LAWS ch. 6, §172(e).

32. Note also that this safe harbor would only apply to claims brought under Massachusetts law. Other states have differing laws with regard to employer

Reform law specifically states that it should not be construed to prohibit a person from making an adverse decision on the basis of an individual's criminal history or to provide or permit a claim of an unlawful practice under the state non-discrimination law.³³ Further, the law provides another "safe harbor" that protects employers from liability for discriminatory hiring practices for failing to hire a person on the basis of erroneous CORI obtained from DCJIS.³⁴

That said, the law still prohibits both "disparate-treatment" and "disparate-impact" discrimination in how an employer obtains and/or uses criminal offender record information. Disparate treatment, or intentional discrimination, occurs when an employee or applicant is treated differently due to his or her protected class status.³⁵ Thus, an employer would be in violation of the law if it were to reject male applicants who have conviction records while accepting similarly-situated female applicants.

Disparate-impact discrimination occurs when a uniformly-applied neutral selection procedure disproportionately excludes people on the basis of protected class, and the procedure is not job-related and consistent with business necessity, or when the employer's business goals can be served in a less discriminatory way.³⁶ Thus, even in the absence of discriminatory intent, an employer violates the law when it uses a selection criterion (for example, excluding any applicant that has a felony on his/her record) if such criterion disproportionately excludes racial or ethnic minorities, unless the employer can show that the criterion is "job-related and consistent with business necessity" for the position in question.³⁷

To reduce the potential for such claims, employers should conduct criminal background checks on all current or prospective employees in a given job classification, so as to avoid an inconsistent practice that could give rise to an allegation of disparate treatment discrimination. Further, employers should not automatically reject any candidate with a criminal record (unless required to do so by law or regulation), but should instead consistently consider factors such as:

- a. the relevance of the crime to the position sought;
- b. the nature of the work to be performed;
- c. the time since the conviction;
- d. the age of the person at the time of the offense;
- e. the seriousness and circumstances of the offense;

access and use of criminal offender record information, and the extent to which an employer's failure to conduct a criminal background check could support a negligent hiring claim.

33. MASS. GEN. LAWS ch. 6, §171A.

34. Per MASS. GEN. LAWS ch. 6, §172(e), if an employer makes a hiring decision within ninety days of receiving CORI through DCJIS, and if the employer followed DCJIS regulations pertaining to verification of the subject's identity, the employer cannot be held liable for discriminatory hiring practices for the failure to hire a person on the basis of erroneous CORI obtained from DCJIS, if the employer would not have been liable had the information been accurate. This "safe harbor" would not apply if the employer did not obtain the criminal history information from DCJIS.

35. 42 U.S.C.A. §2000e-2(a).

36. 42 U.S.C.A. §2000e-2(k)(1)(A).

37. See generally, EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964, *as amended*, 42 U.S.C. §2000e *et seq.*, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm.

- f. whether the person has pending charges;
- g. any relevant evidence of rehabilitation or lack thereof;
- h. any other relevant information, including information provided by the person or requested by the employer.³⁸

Employers also need to remain mindful of the provisions of Massachusetts General Laws chapter 151B, section 4(9), which prohibits employers from requesting, keeping a record of, or otherwise discriminating against any individual by reason of his or her failure to furnish certain types of criminal record information.³⁹

VII. ARE EMPLOYERS LEGALLY OBLIGATED TO HAVE A WRITTEN POLICY WITH REGARD TO CRIMINAL BACKGROUND CHECKS?

Employers who annually conduct five or more criminal background checks per year, whether through DCJIS or some other source, are required to maintain a written criminal offender record information policy.⁴⁰ The policy must provide that the employer will (i) notify the applicant of the potential of an adverse decision based on criminal offender record information, (ii) provide a copy of the criminal offender record information and the policy to the applicant, and (iii) provide information concerning the process for correcting a criminal record.⁴¹

The regulations state that the written policy must meet the minimum standards of the DCJIS model policy.⁴² The DCJIS model policy is available on the DCJIS website.⁴³

VIII. IF AN EMPLOYER IS A UNIONIZED COMPANY, DOES THE EMPLOYER HAVE A DUTY TO BARGAIN WITH THE UNION ABOUT ISSUES ASSOCIATED WITH BACKGROUND CHECKS?

Depending on the circumstances and the language of the collective bargaining agreement, employers may have a duty to bargain about the decision to conduct background checks, the effects of such practice, and/or the policies and procedures involved.

IX. MAY EMPLOYERS ASK APPLICANTS TO VOLUNTARILY DISCLOSE INFORMATION ABOUT THEIR CRIMINAL RECORD?

It is unlawful to request or require that an individual provide a copy of his criminal offender record information, except through the specific procedures in the CORI Reform law.⁴⁴ An employer that does so can be subject to criminal sanctions.⁴⁵

Further, most employers are not permitted to include any

38. These factors are taken from the model CORI policy on the DCJIS website, available at <http://www.mass.gov/eopss/docs/chsb/dcjis-model-cori-policy-may-2012.pdf>. The EEOC recommends consideration of similar factors. See, EEOC Enforcement Guidance, available at http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm. Note that some other states (e.g., New York) have statutes that affirmatively require employers to consider such factors before taking adverse action against an individual based on a criminal record. See, e.g., N.Y. Correct. Law §752 (McKinney's 2010).

39. See Part IX, *infra*.

40. MASS. GEN. LAWS ch. 6, §171A.

41. *Id.* The DCJIS website has a publication that employers can provide to employees with information on how to correct CORI: <http://www.mass.gov/eopss/docs/chsb/cori-process-correcting-criminal-record-2012.pdf>

42. 803 CMR 2.15.

43. <http://www.mass.gov/eopss/docs/chsb/dcjis-model-cori-policy-may-2012.pdf>

44. MASS. GEN. LAWS ch. 6, §172(d).

45. MASS. GEN. LAWS ch. 6, §178. See Part XVII, *infra*.

questions about an applicant's criminal offender record in an initial application form.⁴⁶ This law, effective November 4, 2010, is enforced by the Massachusetts Commission Against Discrimination (MCAD). Per the MCAD's Fact Sheet on this so-called "ban the box" provision,⁴⁷ such questions may only be asked *after* an initial interview has been conducted.⁴⁸ Some employers do so by utilizing a supplemental written application form, which is presented to the applicant after the interview has concluded, but before a hiring decision is made.

Even after the interview, employers are prohibited by law from requesting, keeping a record of, or otherwise discriminating against any individual by reason of his or her failure to furnish information regarding: (i) an arrest, detention, or disposition regarding any violation of law in which no conviction resulted, or (ii) a first conviction for any of the following misdemeanors: drunkenness, simple assault, speeding, minor traffic violations, affray or disturbance of the peace, or (iii) any conviction of a misdemeanor where the date of such conviction or the completion of any period of incarceration resulting from the conviction, whichever date is later, occurred five or more years prior to the date of application for employment, unless the person has been convicted of any other offense within the immediate past five years.⁴⁹

X. WHAT DOCUMENTATION DOES AN EMPLOYER NEED TO SUBMIT TO DCJIS IN ORDER TO ACCESS AN INDIVIDUAL'S CORI?

Before an employer conducts a CORI check, it must have the individual sign an "Acknowledgement Form" authorizing the employer to obtain the person's criminal offender record information.⁵⁰

To query the iCORI database, the employer must submit the subject's name, date of birth and first six digits of his or her social security number. The employer must also certify under oath that (a) the requestor is an authorized designee of a qualifying entity, (b) the request is for a purpose authorized under the law, and (c) the subject has signed an Acknowledgement Form authorizing the requestor to obtain the subject's criminal offender record information.⁵¹ The requestor must also certify that he/she has verified the identity of the person by reviewing a form of government-issued identification.⁵²

The regulations further require that the employer actually submit the Acknowledgement Form to DCJIS, as opposed to simply certifying that one has been signed.⁵³ The regulations state that the employer must sign and date each form certifying that the subject was properly identified.⁵⁴ The regulations list the types of government-issued identifications that are acceptable, namely, a state-issued

driver's license, state-issued identification card with a photograph, passport or a military identification.⁵⁵ The regulations further provide that if an employer cannot verify the individual's identity and signature in person, the individual may sign the Acknowledgement Form in the presence of a notary.⁵⁶

CORI Acknowledgement Forms must be maintained for a period of one year from the date the request is submitted.⁵⁷ Such forms are subject to audit by DCJIS.⁵⁸

The regulations state that CORI Acknowledgement Forms shall be valid for a year from the date of signature or until the subject's employment ends, whichever comes first.⁵⁹ Per the regulations, an employer can "re-CORI" a subject during the one-year period, but must provide the subject at least 72 hours notice before submitting the request. If the subject objects to the re-CORI, however, the original Acknowledgement Form becomes invalid, and a new form must be obtained from the subject before a new CORI check can be conducted.⁶⁰

The regulations go on to note that nothing in the regulations should be construed to prohibit an employer from making an adverse decision on the basis of a subject's objection to a request for CORI.⁶¹ That said, employers should not assume that it is always lawful and appropriate to insist that an applicant or employee authorize the release of criminal history information.⁶²

XI. IF AN EMPLOYER OBTAINS A CORI REPORT OR OTHER REPORT CONTAINING CRIMINAL OFFENDER RECORD INFORMATION ABOUT AN EMPLOYEE OR APPLICANT, DOES THE EMPLOYER HAVE TO GIVE THAT PERSON A COPY?

If an employer has obtained criminal offender record information about an individual, regardless of whether that information comes from DCJIS or some other source, the employer must provide to the applicant the criminal history and its source (a) prior to asking him/her about it or (b) before making an adverse employment decision on the basis of such criminal history.⁶³ The statute notes that if a copy of the criminal history report was already provided to the person prior to questioning, the employer does not need to provide a second copy.⁶⁴

It should be noted that the regulations impose additional disclosure requirements on employers prior to taking adverse action. These requirements are discussed in more detail below.⁶⁵

Per the law, DCJIS maintains a log of all CORI requests, including who requested it, the date and the purpose of the inquiry. Individuals have the right to see which employers and other non-law

46. MASS. GEN. LAWS ch. 151B, §4(9½).

47. <http://www.mass.gov/mcad/documents/Criminal%20Records%20Fact%20Sheet.pdf>

48. MASS. GEN. LAWS ch. 151B, §4(9½).

49. MASS. GEN. LAWS ch. 151B, §4(9). The wording of the statute appears to create a practical dilemma for employers, since a properly-obtained CORI report may include such data. In *Bynes v. Sch. Comm. of Boston*, 411 Mass. 264, 266-69 (1991), however, the court held that the legislature's intent was to prevent employers from requesting such information directly from employees, not to proscribe them from seeking such information from other sources, or, presumably, from keeping a record of it. That said, employers that use third party background check companies should consider asking the company to exclude such information from their reports.

50. MASS. GEN. LAWS ch. 6, §172(a)(30)(c).

51. MASS. GEN. LAWS ch. 6, §172(a)(30)(c).

52. *Id.*

53. 803 CMR 2.09(1).

54. *Id.*

55. 803 CMR 2.09(3).

56. 803 CMR 2.09(5).

57. MASS. GEN. LAWS ch. 6, §172(a)(30)(c).

58. *Id.*

59. 803 CMR 2.09(9).

60. *Id.*

61. 803 CMR 2.09(12).

62. *See* Part VI, *infra*.

63. MASS. GEN. LAWS ch. 6, §172(c); 803 CMR 2.11.

64. MASS. GEN. LAWS ch. 6, §172(c).

65. *See* Part XII, *infra*.

enforcement entities have requested their CORI.⁶⁶ Such “self-audits” may be obtained without cost every 90 days.⁶⁷ The law further provides that, subject to funding and technology considerations, DCJIS shall establish a mechanism to alert individuals if a query is made about them.⁶⁸

XII. ARE THERE CERTAIN PROCEDURES AN EMPLOYER MUST FOLLOW BEFORE TAKING ADVERSE ACTION AGAINST AN EMPLOYEE AS THE RESULT OF A CRIMINAL BACKGROUND CHECK?

Yes. The statute provides that, prior to taking adverse action against an applicant based on the content of a criminal background check, whether obtained from DCJIS or some other source, the employer must provide the person with a copy.⁶⁹ The regulations additionally require that, before taking adverse action on an applicant’s application for employment based on the applicant’s CORI, an employer shall:

- a. comply with the applicable federal and state laws and regulations;
- b. notify the applicant in person, by telephone, fax, electronic or hard copy correspondence of the potential adverse employment action;
- c. provide a copy of the CORI report;
- d. provide a copy of the employer’s CORI policy, if applicable;⁷⁰
- e. identify the information in the applicant’s CORI that is the basis for the potential adverse action;
- f. provide the applicant with the opportunity to dispute the accuracy of the information in the CORI report;
- g. provide the applicant with a copy of DCJIS information regarding the process for correcting CORI;⁷¹ and
- h. document all steps taken to comply with these requirements.⁷²

The statute and regulations consistently use the word “applicant.” There is no reference to existing employees, as there is in the Fair Credit Reporting Act (FCRA).⁷³ That said, there are good reasons to follow these requirements with respect to existing employees as well as applicants. It is not uncommon for CORI and other criminal history reports to contain erroneous information. The employee is the person best able to alert the employer to such errors, before an

unwise or unfair decision is made. Further, if the report was obtained through a third party, the employer would be obligated, under the FCRA, to provide a copy to an existing employee, as well as to a prospective employee, prior to taking adverse action.⁷⁴ Finally, while all parts of the law consistently use the word “applicant,” one section, Massachusetts General Laws chapter 6, section 168(a), is arguably vague, and could possibly be construed as having broader application.⁷⁵

If the adverse employment decision is based on criminal offender record information received from a source other than DCJIS, such as a private background check company, slightly different procedures apply. The employer must not only provide the applicant with a copy of the criminal history, but must also identify the source of the information.⁷⁶ The requirement that the employer identify the specific information in the report that is the basis for the potential adverse action does not apply, but all other requirements are the same.⁷⁷ Note, however, that if the source is a “consumer reporting agency,” a term that is broadly defined in the regulations, there are additional requirements.⁷⁸

XIII. DO THE REQUIREMENTS OF THE FAIR CREDIT REPORTING ACT (FCRA) APPLY TO CORI CHECKS?

Virtually all background checks performed by *third parties* fall under the purview of the FCRA. Thus, employers who contract with third parties (*e.g.*, private background check companies, consumer reporting agencies, detectives or contracted recruitment professionals) to conduct any background check, including obtaining CORI from DCJIS, must comply with the FCRA’s authorization and disclosure requirements. The FCRA would not apply if an employer itself obtains information directly from DCJIS, but would apply if the employer engages a third party to do so on its behalf.

Many of the procedural requirements imposed by the FCRA are mirrored in the new CORI Reform law. The requirements are similar, but not identical. If an employer complies with the FCRA, the employer is not necessarily in compliance with Massachusetts law. The reverse is also true—compliance with CORI reform does not necessarily satisfy the FCRA. Employers need to comply with both laws.⁷⁹

XIV. IF AN EMPLOYER USES A THIRD PARTY TO CONDUCT CRIMINAL BACKGROUND CHECKS, AND COMPLIES WITH THE FCRA, DOES THE EMPLOYER NEED TO WORRY ABOUT CORI REFORM?

Yes. Most of the legal requirements imposed by the CORI Reform Law that are discussed in this note apply regardless of whether

66. MASS. GEN. LAWS ch. 6, §172(g); 803 CMR 2.24.

67. 803 CMR 2.24(4).

68. MASS. GEN. LAWS ch. 6, §172(g).

69. MASS. GEN. LAWS ch. 6, §§168(a), 171A and 172(c).

70. See Part VII, *supra*.

71. The DCJIS website has a publication that employers can provide to employees with information on how to correct CORI: <http://www.mass.gov/eopss/docs/chsb/cori-process-correcting-criminal-record-2012.pdf>.

72. 803 CMR 2.17.

73. 15 U.S.C. §1681(a)(k) (defines adverse action as “a denial of employment or any other decision for employment purpose that adversely affects any current or prospective employee”).

74. The FCRA additionally requires that the employer give the individual a “pre adverse action disclosure” statement that includes a copy of the actual consumer

report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act,” which is a document published by the Federal Trade Commission. 15 U.S.C. §§1681(a)(k) and (b)(3)(A).

75. MASS. GEN. LAWS ch. 6, §168(a) makes reference to “questioning a subject about his criminal history in connection with a decision regarding employment...or in connection with an adverse decision on such an application.”

76. 803 CMR 2.18.

77. *Id.*

78. See Part XIV, *infra*.

79. The CORI Reform statute specifically states that if a consumer reporting agency (CRA) is accessing CORI from DCJIS, such CRA shall be deemed to be in compliance with the CORI statute and regulations so long as the CRA’s practices are in compliance with the state and federal Fair Credit Reporting Acts. MASS. GEN. LAWS ch. 6, §167A(e). There is no similar language applicable to employers.

the employer obtained the criminal offender record information itself, or used a third party to do so. Similarly, these requirements apply whether the criminal record information was obtained directly from DCJIS or some other source.⁸⁰ Employers should choose third party background check companies carefully, and consider contract provisions to ensure that the information provided is accurate and that the third party complies with all applicable laws (state and federal).

Further, the regulations impose special requirements on employers that use consumer reporting agencies (CRAs) to conduct criminal background checks.⁸¹ These procedures incorporate and expand on those required under the FCRA. The term CRA is broadly defined in the regulations, and would encompass most private background check companies, private detectives and other persons or entities that employers commonly use to obtain criminal history information.⁸²

Obligations before obtaining criminal history information from a CRA:

If an employer wishes to use a CRA to request CORI from DCJIS, the employer must: (1) notify the applicant in writing, “in a separate document consisting solely of such notice,” that a consumer report may be used in the employment decision-making process, and (2) obtain the applicant’s separate written authorization to conduct a background screening before asking the CRA for the report. The regulations state that an employer may not substitute the CORI Acknowledgment Form for this written authorization.⁸³ The requirements of the FCRA are virtually identical.⁸⁴

The regulations also require employers to certify to the CRA that (a) they are in compliance with the FCRA, (b) that they will not misuse the information in the report in violation of federal or state laws or regulations, and (c) that they shall provide accurate identifying information to the CRA, as well as the purpose for which the individual’s CORI is being requested.⁸⁵ The certification requirements of the FCRA are very similar but not identical.⁸⁶ Employers and their background check vendors may need to make slight modifications to their FCRA-compliant forms to comply with the regulations.

Obligations before taking adverse action based on CORI obtained by a CRA from DCJIS:

The regulations state that, before taking adverse action on an

applicant’s application based on CORI that a CRA receives from DCJIS on an employer’s behalf, the employer itself must do the following:

- a. provide the applicant with a pre-adverse action disclosure that includes a copy of the consumer report and a copy of the document “A Summary of Your Rights under the Fair Credit Reporting Act,” which is a document published by the Federal Trade Commission;⁸⁷
- b. notify the applicant, either in person, or by telephone, fax or electronic or hard copy correspondence, of the potential adverse employment action;
- c. provide a copy of the CORI to the employment applicant;
- d. provide a copy of the employer’s CORI policy, if applicable;⁸⁸
- e. identify the information in the applicant’s CORI that is the basis for the potential adverse decision;
- f. provide the applicant with an opportunity to dispute the accuracy of the information contained in the CORI;
- g. provide the applicant with a copy of the DCJIS information regarding the procedures for correcting a criminal record;⁸⁹ and
- h. document all steps taken to comply with these requirements.⁹⁰

This requirement mirrors that of the FCRA, pursuant to which an employer must give the individual a “pre adverse action disclosure” statement that includes a copy of the actual consumer report and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act.” 15 U.S.C. §§1681(a)(k) and (b)(3)(A).

Obligations before taking adverse action based on criminal offender record information obtained by a CRA from a source other than DCJIS:

The regulations provide that if an employer uses a CRA to obtain criminal offender record information from a source other than DCJIS, and if the employer is “inclined to make an adverse employment decision based on that criminal history,” the employer must provide the individual with a copy of the consumer report and

80. See, e.g., MASS. GEN. LAWS ch. 6, §171A (requirements apply whether information is obtained from DCJIS or “any other source”).

81. 803 CMR 2.21.

82. 803 CMR 2.02 (defines CRA as “any person or organization which, for monetary fees, dues, or on a cooperative, nonprofit basis, regularly engages in whole, or in part, in the practice of assembling or evaluating consumer, criminal history, credit, or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports”).

83. 803 CMR 2.21(a).

84. The FCRA provides that, before getting a consumer report on an individual, the employer must (1) ask for and receive a clear written authorization form from the individual before asking the CRA for a report, and (2) notify the person in writing, in a document consisting “only of this notice,” that a report may be used for employment decisions. 15 U.S.C. §1681b(b)(2). Although the FCRA, like the proposed regulations, suggests that the disclosure and authorization must be separate documents, most background check companies combine them into a single form. The FTC has issued an opinion letter that approves

of this practice. (FTC Opinion Letter, Steer, 10/27/97). Since it appears that the proposed regulations were designed to track the requirements of the FCRA, one can hope that DCJIS would reach the same conclusion.

85. 803 CMR 2.21(b).

86. Pursuant to 15 U.S.C. §1681b(1), when getting a report from a CRA, the employer must certify that (a) the employer has complied with the FCRA and will not unlawfully use the information it receives, and (b) that the employer will comply with the requirements of the FCRA for adverse actions should such action be taken in whole or in part due to the report.

87. The proposed regulations state that the employer may provide this information by meeting with the applicant in person, or by telephone, electronic communication, fax or hard copy correspondence.

88. See Part VII, *supra*.

89. The DCJIS website has a publication that employers can provide to employees with information on how to correct CORI: <http://www.mass.gov/eopss/docs/chsb/cori-process-correcting-criminal-record-2012.pdf>.

90. 803 CMR 2.21(2).

follow all of the other requirements set forth above, except for the requirements to notify the applicant of the potential adverse decision, and to identify the information in the criminal offender record information report that is the basis for the potential adverse decision.⁹¹

Obligations after taking adverse action based on criminal offender record information obtained by a CRA:

The FCRA requires that, following taking adverse action against an existing or prospective employee based on a consumer report, the employer must give the individual a notice within a “reasonable” period of time that the action was actually taken, as well as other information.⁹² Neither the Massachusetts statute nor the regulations includes these obligations. That said, the regulations do speak of an employer’s requirement to comply with state *and federal* laws and regulations, and to certify to the CRA that it is in compliance.⁹³

XV. ARE THERE LIMITS ON THE EXTENT TO WHICH AN EMPLOYER CAN DISSEMINATE CORI?

Employers may share CORI with individuals within the organization who have a need to know the contents to serve the purpose for which the CORI was obtained. The statute further provides that, upon request, employers “shall” share CORI with government entities charged with overseeing, supervising or regulating them. Otherwise, employers are prohibited from disseminating CORI, except upon request by the individual about whom the CORI request was made.⁹⁴

Employers are required to keep a “secondary dissemination log” for a period of one year following the dissemination of any individual’s CORI.⁹⁵ The log must include (1) the name of the individual, (2) the individual’s date of birth, (3) the date of the dissemination, (4) the name and, per the regulations, the organization of the person to whom it was disseminated, and (5) the specific purpose of the dissemination.⁹⁶ Per the regulations, the log may be maintained electronically or on paper.⁹⁷ This log is subject to audit by DCJIS.⁹⁸

XVI. ARE THERE REQUIREMENTS WITH REGARD TO RETENTION, STORAGE AND DESTRUCTION OF CORI?

The regulations contain rigorous requirements with respect to the storage and retention of CORI. Hard copies must be stored in a separate locked and secure location, such as a file cabinet.⁹⁹ Employers must limit access to the locked location to employees who have been approved by the employer to access CORI, which, per

the statute, are only those with a need to know for the purposes for which the CORI was obtained.¹⁰⁰ If employers store CORI electronically, it must be password protected and encrypted.¹⁰¹ Once again, access must be limited to those who are approved to access CORI. CORI may not be stored using “public cloud storage methods.”¹⁰²

Unless otherwise provided by law or court order, an employer may not maintain a copy, electronic or otherwise, of CORI obtained from DCJIS for more than seven years from the last date of employment or volunteer services, or from the date of the final employment decision, whichever occurs later.¹⁰³ Although the statute specifically references CORI “obtained from DCJIS,” the regulations refer only to CORI, and thus could possibly be interpreted as applicable to criminal record information obtained from other sources.¹⁰⁴

Per the regulations, employers must destroy hard copies of CORI by shredding them.¹⁰⁵ To destroy electronic copies of CORI, the employer must delete them from the hard drive on which they are stored and from any back-up system.¹⁰⁶ The employer must further “appropriately clean all information by electronic or mechanical means” before disposing of or repurposing a computer used to store CORI.¹⁰⁷

XVII. WHAT CAN HAPPEN TO AN EMPLOYER WHO VIOLATES THE LAWS REGARDING CORI?

Complaints before the Criminal Record Review Board

The CORI Reform law creates a new entity within DCJIS called the “Criminal Record Review Board” (“CRRB”). The CRRB is empowered to hear complaints and investigate incidents alleging that an employer that requested or received criminal record information failed to provide the subject with a copy prior to questioning him/her about it, or in connection with an adverse decision.¹⁰⁸ If a violation is found, the CRRB may impose a civil fine of up to \$5,000 for each knowing violation, and may impose conditions on that employer’s continued access to CORI.¹⁰⁹ The CRRB may also refer a complaint for criminal prosecution.¹¹⁰

Criminal Penalties

A person or entity that (1) knowingly requests, obtains or attempts to obtain CORI or a self-audit from DCJIS under false pretenses, (2) knowingly communicates or attempts to communicate CORI except as permitted under the law, (3) knowingly falsifies CORI or related records or (4) “requests or requires” a person to provide a copy of his/her CORI except as authorized by law, can be

91. 803 CMR 2.21(3).

92. Per 15 U.S.C. §1681m(a), this adverse action notice must include: (a) disclosure that the employer is taking adverse action; (b) the name, address and telephone number of the CRA; (c) a statement that the CRA did not itself make the adverse action and cannot explain or give specific reasons for it; (d) notice of the individual’s right to dispute the accuracy or completeness of the information provided by the CRA; and (e) notice of the right to ask for additional free consumer reports from the CRA within the next 60 days. These notice requirements apply any time the consumer report was a factor in the decision, even if it was not the primary motivating factor.

93. 803 CMR 2.10(1) and 2.21(b)(1). Both of these sections relate to an employer’s obligations prior to taking the adverse action, not afterwards. Thus, it is not clear whether a violation of the FCRA’s post-adverse-decision notification requirements could be deemed a violation of Massachusetts law as well.

94. MASS. GEN. LAWS ch. 6, §172(f); 803 CMR 2.16.

95. 803 CMR 2.16(1).

96. 803 CMR 2.16(2).

97. 803 CMR 2.16(3).

98. MASS. GEN. LAWS ch. 6, §172(f).

99. 803 CMR 2.11(1).

100. *Id.*; MASS. GEN. LAWS ch. 6, §172(f).

101. 803 CMR 2.11(2).

102. 803 CMR 2.11(3).

103. MASS. GEN. LAWS ch. 6, §172(f); 803 CMR 2.11.

104. 803 CMR 2.11. The term “CORI” is not included in the definitions section of the proposed regulations, and thus is it not clear whether the term includes criminal record information obtained from sources other than DCJIS.

105. 803 CMR 2.12(1).

106. 803 CMR 2.12(2).

107. 803 CMR 2.12(3).

108. MASS. GEN. LAWS ch. 6, §168(b).

109. *Id.*

110. *Id.*

subject to criminal sanctions.¹¹¹ Each such offense is punishable by imprisonment for up to one year, a fine of up to \$5,000, or both.¹¹² If the offender is an entity, rather than a person, the penalty is up to \$50,000 per violation.¹¹³

The law further states that CORI may not be used to harass an individual. Harassment is defined as “willfully and maliciously engaging in a knowing pattern of conduct or series of acts over a period of time directed at a specific person, which seriously alarms that person and would cause a reasonable person to suffer emotional distress.”¹¹⁴ Violation of this provision carries a penalty of up to \$5,000, up to one year of imprisonment, or both.¹¹⁵

Private Right of Action

In addition, the law provides individuals with a private right of action. Any aggrieved person may institute a civil action in superior court for damages or injunctive relief.¹¹⁶ The statute provides that if a willful violation is found, the violator shall not be entitled to claim any absolute or qualified privilege, and shall be liable for actual damages, “exemplary damages” of not less than one hundred and not more than one thousand dollars for each violation, as well as costs and reasonable attorneys’ fees and disbursements incurred by the person bringing the action.¹¹⁷

DCJIS Audits

Employers that access CORI are also subject to audit by DCJIS.¹¹⁸ Per the regulations, DCJIS may inspect CORI-related documents “including, but not limited to” CORI Acknowledgement Forms, secondary dissemination logs, the employer’s CORI policy, and documentation of any adverse employment decisions based on CORI. During an audit, DCJIS shall assess the employer’s compliance with the statutory and regulatory requirements, including but not limited to:

- a. whether the employer is properly registered for the appropriate level of CORI access and provides correct registration information;
- b. if the employer is properly completing and retaining CORI Acknowledgement Forms;
- c. if the employer is requesting CORI in compliance with the regulations;
- d. if the employer is properly storing and safeguarding CORI;
- e. if the employer is properly maintaining a secondary dissemination log;

- f. if the employer is screening only those individuals permitted by law; and
- g. if the employer has a CORI policy that complies with DCJIS requirements.¹¹⁹

An employer that refuses to cooperate with or respond to a DCJIS audit may have its access to CORI revoked, and further may not obtain CORI through a consumer reporting agency.¹²⁰ DCJIS may initiate a complaint with CRRB against any employer for failure to respond to or to participate in an audit.¹²¹ DCJIS may also refer the audit results to state or federal law enforcement agencies for criminal investigation.¹²² Audit results may be published.¹²³

XVIII. WHERE CAN AN EMPLOYER TURN FOR ASSISTANCE IN COMPLYING WITH CORI REFORM AND OTHER LAWS RELATED TO CRIMINAL BACKGROUND CHECKS?

Employers should be cautious about relying wholly on forms and procedures obtained from private background check companies. In the author’s experience, these companies do not always comply fully with the FCRA, and may not be fully up to speed on the new Massachusetts law and regulations. Further, even if an employer uses a third party to conduct criminal background checks, that employer—as opposed to the third party—is still subject to certain procedural requirements.¹²⁴

It is anticipated that DCJIS will continue to update its website¹²⁵ to incorporate and explain the new statutory and regulatory requirements. For assistance with FCRA compliance, employers can consult the Federal Trade Commission website.¹²⁶

XIX. CONCLUSION

As with any new law, there is always a learning curve. Ultimately, however, compliance with the procedures mandated by the new CORI statute and regulations should not be overly burdensome for employers. The DCJIS website¹²⁷ contains helpful publications with step-by-step instructions. CORI Reform also brings potential business benefits. Employers that formerly had to rely on third parties to obtain criminal history information can now obtain it for themselves.¹²⁸ The policy requirement¹²⁹ will encourage employers to be more consistent in their use of background checks, which may help to reduce the potential for discrimination claims. Best of all, due to the notice procedures,¹³⁰ there is less risk that employers will unwittingly lose out on qualified, competent candidates due to incorrect or incomplete criminal history information, a winning result for both individuals and businesses.

111. MASS. GEN. LAWS ch. 6, §178.

112. *Id.*

113. *Id.*

114. MASS. GEN. LAWS ch. 6, §178½.

115. *Id.*

116. MASS. GEN. LAWS ch. 6, §177.

117. *Id.*

118. MASS. GEN. LAWS ch. 6, §172(c), (f) (CORI Acknowledgement Forms and secondary dissemination logs are subject to audit by DCJIS).

119. 803 CMR 2.22(4).

120. 803 CMR 2.22(2).

121. 803 CMR 2.22(6).

122. 803 CMR 2.22(7).

123. 803 CMR 2.22(5).

124. *See* Part XIV, *supra*.

125. <http://www.mass.gov/eopss/agencies/dcjis/>.

126. <http://business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know>.

127. <http://www.mass.gov/eopss/agencies/dcjis/>.

128. *See* Part III, *supra*.

129. *See* Part VII, *supra*.

130. *See* Parts XII and XIV, *supra*.

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