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Massachusetts Restricts Use Of Criminal Convictions On Applications

New Massachusetts employment legislation on the use of criminal convictions in the employment process focuses on what has always been a knotty problem. Some states try to limit employers from asking questions about convictions. In Hawaii, for example, employers are prohibited from asking any questions about an applicant's criminal history until after a conditional offer is made. States like New Jersey and New York are less restrictive; employers here may ask about convictions reasonably related to a job, but not about arrest records. Conviction inquiries should be limited to job-related matters. New York goes further by prohibiting employers from discriminating based on convictions unless (1) there is a direct relationship between the criminal offense and the employment sought or (2) that hiring would involve unreasonable risk to property, safety, or welfare of individuals or the general public. An applicant who is refused employment because of a criminal record may request and receive from the employer within 30 days a written statement of the reasons employment was denied.

On August 6, 2010, Massachusetts Governor Deval Patrick signed legislation which, among other things, includes a so-called "ban the box" provision, which bars employers from requiring applicants to check a box if they have a criminal history. This provision, which

becomes effective on November 4, 2010, bans both public and private employers from requesting criminal record information on initial job applications.



The legislation contains a narrow exception that permits employers to inquire about an applicant's history on a job application if: (1) the applicant is applying for a position for which any federal or state law or regulation creates a mandatory or presumptive disqualification based on a conviction of certain criminal offenses; or (2) the employer is subject to an obligation under any federal or state regulation not to employ persons for one or more positions who have been convicted of certain criminal offenses. The new law does not require employers to wait until a conditional offer of employment has been made before questioning the applicant's criminal record, but rather only bars employers from requesting criminal history information on the initial written application form. Accordingly, employers may ask about an applicant's criminal history during the interview process. A Massachusetts employer may not, however, ask an employee about arrests that do not result in convictions and convictions for certain misdemeanors. ■

New York Enacts Law Protecting Employees When Health Insurers Discontinue Group Plans

On August 19, 2010, Governor Paterson signed into law a health care bill designed to protect employees in the event a health insurer or health maintenance organization (HMO) discontinues a class of policies or a contract. The bill (9243-B), which becomes effective on January 1, 2011, requires health insurers to certify to the Superintendent of Insurance: (1) that at least 90 days' written notice of discontinuation of coverage has been provided to all insured individuals covered by a

group health plan; (2) that sufficient notice has been given to all policyholders of their option to purchase alternative, replacement health insurance products offered by the insurer; and (3) that a group health plan has not been discontinued specifically to drop an individual high-cost policyholder from the plan. The bill also creates a review process for the Superintendent of Insurance to ensure that policyholders with serious medical conditions who have utilized related insurance benefits in the 12-month period preceding the discontinuation of their group plan keep their present coverage, if similar coverage is not made available in the insurer's replacement plan. ■

Illinois Toughens Restrictions On Credit Checks Of Employees

Starting January 1, 2011, Illinois will prohibit all but a handful of employers from: **inquiring into an applicant's or an employee's credit history; ordering a credit report on an applicant or employee from a consumer reporting agency; or taking any adverse employment action (such as refusing to hire) because of that individual's credit history or credit report.** Employers in the following industries are specifically exempted from the Act's coverage: banks and other financial institutions; businesses engaged in insurance; state law enforcement agencies; state and local government agencies that require credit reports; and qualified debt collection agencies.

Also, any business can conduct a credit check on an applicant or employee if it can establish creditworthiness is a bona fide job qualification.

The Act does not prevent an employer from obtaining a background report or investigatory report from a consumer reporting agency, as allowed under the Fair Credit Reporting Act, as long as the report obtained does not include credit information. Further, if an employer is permitted to obtain credit information, no specific disclosures are required on any type of consent form.

An aggrieved individual can bring a private cause of action in state court to enforce the Act and can seek injunctive relief and damages as well as costs and attorneys' fees. ■

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LABOR & EMPLOYMENT LAW ALERT

The IRS Continues Worker Classification Audits

In February, the IRS launched an audit program focusing on employment tax liabilities for worker misclassification, *i.e.*, improperly treating workers as independent contractors rather than common law employees who are subject to employment taxes. This has been a major issue on both the federal and state levels, with some studies estimating that there is a \$345 billion tax gap between what taxpayers should have paid and what they actually paid on a timely basis. Employment taxes may not be the only concern for employers who are found to have misclassified workers. Employers must comply with other employment laws, such as statutes regulating workers' compensation, minimum wage, and employment law discrimination. Reclassifying contractors as employees after an audit implicates additional payments to tax-favored retirement and benefit plans. Specifically, a failure to follow the plan terms can result in plan disqualification if corrective actions are not taken. If the worker, once reclassified, is still eligible for participation under the plan documents, employer corrective contributions

will be required, plus interest, to restore the worker's pension benefit in accordance with IRS rules.

We therefore recommend that employers immediately take steps to determine whether they have misclassified workers as independent contractors rather than employees. Relief from retroactive application of taxes may be available under Section 530 of the Revenue Act of 1978. Welfare and pension documents should be reviewed to determine whether misclassified workers are excluded from participation. If not, retroactive amendments may be appropriate. Employee handbooks should also be reviewed and amended to state that certain workers, even if reclassified as employees, will not be eligible for participation.

The bottom line is that misclassification of workers can result in severe penalties and costs to an unwary employer or plan sponsor. An internal audit should be undertaken to mitigate adverse consequences. The earlier an employer determines that a problem exists, the more flexibility it will have in making corrections at lower costs. ■

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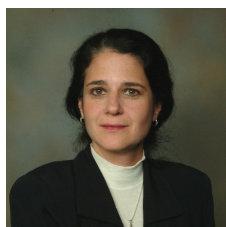
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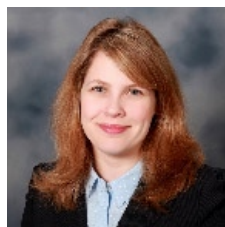
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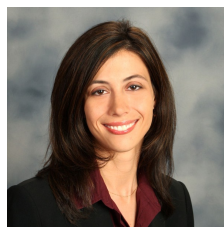
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