

## Practice Tips

# CORI Reform — Providing Ex-Offenders with Increased Opportunities without Compromising Employers' Needs

By Gregory I. Massing

Criminal offender record information (CORI) reform legislation enacted on August 6, 2010, represents the culmination of a change in philosophy initiated by the Patrick Administration and a conciliation of the interests of law enforcement agencies, crime victim advocacy groups, and businesses. For years prior to the bill's introduction in May 2009, employers and advocates for ex-offenders alike recognized that the CORI system was badly in need of reform. The rules governing the availability of criminal records simply were not working, to the detriment of public safety. As Governor Patrick stated when he introduced his CORI reform bill (House Bill No. 4701: An Act to Enhance Public Safety and Reduce Recidivism by Increasing Employment Opportunities), "A good job is the best tool to prevent repeat offending." The Governor underscored the need for reform by remarking that the old system often turned "even a minor offense into a life sentence by permanently keeping [ex-offenders] out of a job."

Prior to May 2009, the numerous attempts to reform the CORI system had focused on *restricting* access to CORI. Proposals to permit expunging criminal records and to shorten the waiting periods for sealing records (to three years, instead of ten, for misdemeanors, and to seven years, instead of fifteen, for felonies) predominated. Such proposals, which had lingered in the legislature for years, were self-defeating. The business and law enforcement communities, two groups that are very influential with lawmakers, naturally resisted the idea of restricting access to information that is critical to them. Employers have a legitimate business reason to want to know if a prospective employee recently was convicted of a crime or is currently facing criminal charges, while law



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enforcement officials have numerous reasons to inquire into individuals' entire criminal record, including charges that resulted in dismissal.

Worse, proposals to restrict access were doomed to irrelevance for a more fundamental reason: in the information age, rapid increases in the availability, dissemination, and storage of information makes criminal records readily available in various forms. On the other hand, true CORI — complete records of individuals' criminal docket activity maintained by the state's Criminal History Systems Board (CHSB) — is available to only a relatively small segment of employers, generally those who provide services to vulnerable populations. Only about 5,000 private employers, just 3% of private businesses in the Commonwealth, are "CORI certified," having convinced a two-thirds majority of the CHSB that the public interest in providing them with CORI "clearly outweighs the interest in security and privacy" of job applicants. G.L. c. 6, § 172. Most private employers, such as retail stores and the food service industry, do not have access to CORI, and if they do obtain criminal history of prospective employees, they get it from other sources, such as credit reporting agencies, the Internet, or job application forms completed by applicants.

### **A Shift in Emphasis**

Faced with this reality, the Governor's bill turned the debate on its head by proposing to *expand* the availability of official CORI — in exchange for reasonable restrictions on the type of information available and procedural protections for job seekers. Under the Governor's proposal, official CORI would be available on-line, for a modest fee, to any employer, landlord, or

volunteer organization that needs it to screen potential or current employees, tenants, or volunteers. Rather than applying for CORI access from the CHSB, users will be able to obtain CORI instantly, on line, by self-certifying that they want CORI for a legitimate purpose and that they have obtained the subject's permission. Furthermore, employers that rely on official CORI reports to make hiring decisions within 90 days of receiving the report would receive legal protections: they cannot be held liable for negligent hiring solely for failing to check other sources of criminal history, and if they make an adverse employment decision based on an erroneous CORI report, they cannot be held liable for employment discrimination to any greater extent than if the report had been accurate. The bill that the legislature ultimately passed — chapter 256 of the Acts of 2010, which goes into effect in two phases, in part as of November 4, 2010, and most 18 months later, on May 4, 2012 — included this expanded access and accompanying protections.

### **Reasonable Restrictions on the Content of CORI**

At the same time, the CORI reform legislation offers increased protection for ex-offenders whose official records will become more widely available. The waiting periods for sealing criminal records under G.L. c. 276, § 100A, will be decreased to five years for misdemeanors and ten years for felonies, to be counted from the date of conviction or release from any period of incarceration, so long as the individual is not convicted of a crime during that period. Time successfully served on probation or parole will count toward the waiting period, thus rewarding successful re-entry efforts.

Moreover, the CORI report that most users receive on-line will not include any convictions that are eligible for sealing under the new five- and ten-year time frames (except for murder, manslaughter, and felony sex offense convictions, which will be reported) or any closed cases that ended in dismissals. However, if an offender is convicted of a new crime at any time, all prior convictions will appear on the CORI report that employers receive, unless the individual has had the record officially sealed by the department of probation under G.L. c. 276, § 100A. These time periods, which match the time periods for using criminal records to impeach witnesses in court under G.L. c. 233, § 21, reflect the fact that past convictions followed by a lengthy period of law-abiding conduct simply are not relevant in predicting future criminal activity or assessing credibility.

The legislation also recognizes that some employers and organizations require additional access to CORI because of a statutory, regulatory, or accreditation requirement. For example, schools, camps for children, banks, security guard companies, hospitals, day care centers, nursing homes, and assisted living facilities are all either permitted or required by law to obtain all available, unsealed records of conviction and non-conviction records of their employees. These entities will still be able to obtain this additional information.

### **“Ban the Box” and Other Procedural Protections for Ex-Offenders**

In addition to these content restrictions, the subjects of CORI checks will receive new procedural protections. Effective November 4, 2010 — the only major aspect of CORI reform discussed

in this article with a 2010 effective date — employers are no longer permitted to ask job applicants about criminal history on an initial written application form. This so-called “ban the box” provision amends G.L. c. 151B, § 4, by adding a new subsection 9½ making it an unfair employment practice to ask about CORI on an “initial written application form” unless the applicant “is applying for a position for which any federal or state law or regulation creates mandatory or presumptive disqualification based on a conviction for 1 or more types of criminal offenses” or unless the employer is subject to a federal or state law that prohibits it from employing persons in certain positions because of certain types of criminal convictions. (Banks and credit unions, for example, may not employ individuals convicted of a crime involving dishonesty or breach of trust.) The Massachusetts Commission Against Discrimination (MCAD) is responsible for enforcing c. 151B. The “ban the box” provision effectively forces employers to consider ex-offenders’ job qualifications on the merits, rather than automatically reject applicants who honestly answer the question in the affirmative. Later on in the hiring process employers may inquire about criminal history, but such inquiries will continue to be restricted, as has long been the case, to felony convictions and misdemeanor convictions in the last five years. See G.L. c. 151B, § 4(9), which was not affected by the addition of § 4(9½).

Nothing in the legislation prohibits employers from making adverse decisions based on criminal records; however, the Equal Employment Opportunity Commission and the MCAD have long cautioned that reliance on criminal records may be discriminatory to the extent such reliance has a disparate impact on protected populations.

Also, effective May 4, 2012, if the employer does obtain criminal background information about the applicant later in the hiring process, no matter what the source, the employer must share the information with the applicant before questioning the applicant about it — giving otherwise qualified ex-offenders the opportunity to explain their past and how they have overcome it, as well as giving applicants with no criminal past the chance to question the accuracy of the record. The employer will also be required to give the applicant a copy of the record “if the [employer] makes a decision adverse to the applicant on the basis of his criminal history.” (The same disclosure rules apply to housing, volunteer opportunity, and licensing decisions.) To make sure CORI users are following the rules, subjects of CORI checks will have the ability to obtain free of charge, every 90 days, a list of everyone who has obtained their criminal history except for criminal justice agencies. Complaints about misuse of CORI can be filed with the Criminal Records Review Board, created by the legislation, which will have subpoena power, the authority to issue civil sanctions up to \$5,000, and the ability to refer complaints for criminal prosecution.

## **Two-Phase Implementation**

The two-phase implementation of the CORI reform legislation is a direct result of the exchange of increased access for content restrictions and procedural protections. Because increased access for employers depends

primarily on technological advances, the legislature gave the Commonwealth 18 months to accomplish the necessary upgrades to the ancient mainframe computers that currently house CORI, to interface with the trial courts’ new MassCourts data systems, and create the web-based application for users. In turn, subjects of CORI reports will not receive the increased protections afforded by the legislation (except for the “ban the box” provision) until employers receive their increased access. The legislature required the operational arm of the CHSB, renamed the Massachusetts Department of Criminal Information Systems, to report regularly on its progress in rolling out the new CORI system.

In the 18-month interim period, the 20-member CHSB will continue to entertain employers’ applications for CORI certification and to hear complaints for improper access or dissemination of CORI. The legislation slightly changed the membership of the board, as well as its standard for evaluating applications for access, to place an increased emphasis on workforce development and “the importance and value of successful reintegration of ex-offenders.”

In short, the CORI reform legislation seeks to demystify criminal records and to give ex-offenders seeking employment opportunities great opportunities to advocate for themselves in the job market. ■