May 11, 2016

Massachusetts Department of Criminal Justice Information Services
Office of the General Counsel
200 Arlington Street, Suite 2200
Chelsea, Massachusetts 02150

RE: *Proposed Revisions to DCJIS Regulations Governing Criminal Offender Record Information*

On behalf of the National Association of Professional Background Screeners, we are pleased to offer preliminary comments on the Department of Criminal Justice Information Services (DCJIS) proposed revisions to the Massachusetts Criminal Offender Record Information (CORI) system. NAPBS was established to represent the interest of companies offering employment and tenant background screening services. The Association currently represents over 750 member companies engaged in employment and tenant background screening across the United States. NAPBS member companies are defined as "consumer reporting agencies" (CRAs) under the CORI system. In reviewing the proposed revisions, NAPBS has several concerns, as well as comments and questions we would like to raise pertaining to 803 CMR 2.00 and 803 CMR 11.00 which are outlined below. NAPBS also intends to submit further, detailed comments pursuant to DCJIS's request.

803 CMR 2.00 – CORI Revisions

Proposed 2.02

Under the proposed revisions, vendors or vendor applicant would be included in the definitions of "employee" and "employment applicant." Typically, vendors are not covered as "employees" akin to actual employees or volunteers in similar laws or regulations. Including vendors as employees appears to be an overly broad designation that may lead to further confusion for employers. We respectfully request clarification as to the reasoning behind such broad definitions.

Proposed 2.03

Section 2.03 of the proposed regulations sets forth what information is included in the definition of criminal offender record information and what information is excluded from the definition. Specifically, the regulations state in Sections 2.03(5)(j) and (k) that "CORI shall not include: … (j) published records of public court or administrative proceedings [and] (k) published records of public judicial, administrative, or legislative proceedings." As DCJIS is aware, many CRAs obtain documents directly from federal, state, and county court houses that include information pertaining to criminal proceedings. NAPBS interprets Sections 2.03(5)(j) and (k) to exclude any documents that are obtained directly from a state or federal court (as well as from an administrative agency proceeding) or other non-DCJIS source that compiles such information including transcripts of court proceedings and any court documents related to the disposition of criminal charges or any related matter.

In order to provide clear guidance to CRAs and employers, NAPBS proposes that DCJIS clarify the language in Section 803 CMR 2.03(5)(j), (k) as follows:

(5) CORI shall not include:

(j) published records of public court or administrative proceedings, including records maintained by a court or agency pertaining to the filing, status or disposition of any criminal proceedings before such court or agency.

(k) published records of public judicial, administrative, or legislative proceedings, including records maintained by a court, agency, or legislative body pertaining to the filing, status or disposition of any criminal proceedings before such court, agency or legislative body.

Proposed 2.16

The proposed regulations require any employers that annually conduct five or more criminal investigations to maintain a CORI policy that meets the DCJIS minimum standards, whether the information was received from the DCJIS or any other source. This regulation is similar to the current standard which has raised confusion since it was enacted. Particularly it is unclear whether an employer that is conducting only criminal investigations through county and/or federal sources must comply with this requirement. If the intent is that employers who aren't receiving information from DCJIS must still maintain a CORI policy, we request further information as to the intent behind this reasoning so that we can better help our clients understand why this is a requirement.

Proposed 2.18

We continue to have concerns with the adverse action requirements outlined in both the current and proposed regulations. The adverse action process mandated by the regulations extends far beyond the requirements employers must already meet under the Federal Fair Credit Reporting Act (which applies when using a Consumer Reporting Agency to perform the background investigation). We would request that the adverse action requirements under the regulations be altered to apply only to those that obtain criminal history information without using a third party.

Further, the proposed regulation includes a new requirement to "identify the source of the criminal history information." Given that these adverse action parameters apply to criminal history information obtained via the DCJIS or through other sources, what are employers obligated to reveal? If an employer uses a CRA to conduct a criminal background check via a county court, is the employer required to reveal the CRA name, the county court name or both? More clarification is needed on why provision was proposed.

NAPBS supports the revisions to the following sections:

- 2.09: NAPBS appreciates that the proposed revisions continue to allow for the submission of a CORI Acknowledgment Form before a notary public, and supports the removal of the requirement to provide written notice to an individual at least 72 hours prior to a CORI request if submitting another request within one year.
- 2.10: NAPBS supports authorizing the collection of CORI Acknowledgement Forms through electronic means.

- 2.11: NAPBS supports the proposal not to require re-verification of identity on subsequent CORI Acknowledgement Form(s) if all information matches the prior form.

803 CMR 11.00 – Consumer Reporting Agency Revisions

Proposed 11.08 & 11.12

Section 11.08 of the proposed revisions does not alter the current state of affairs under which a CRA is prohibited from storing CORI (either physically or electronically) unless the CRA is acting as the "decision maker" with respect as to whether or not to hire an individual. This requirement does not align with the role many CRAs play in the background screening process. Indeed, CRAs are not, and do not wish to be, the decision makers with respect to employment decisions. Further, CRAs are obligated by the U.S. Fair Credit Reporting Act (FCRA) to retain information used to create consumer reports. The current and proposed regulations require CRAs to choose between: (a) not offering clients the ability to conduct a check through the CORI system, (2) violating federal law requirements by not storing CORI data if the service was offered to clients or (3) acting as a decision maker which in turn effectively makes the CRA akin to an employer. None of these options are workable solutions. NAPBS strongly opposes these mandates and respectfully requests that the proposed regulations allow CRAs to meet their FCRA requirements without becoming an employer. This request extends to Section 11.12 which further brings the CRA into the employer discussion by mandating the CRA perform the same adverse action process required by employers in 803 CMR 2.00.

Conclusion

We appreciate consideration of these points and are happy to answer any questions DCJIS may have concerning the impact of the proposed revisions on our members. As stated above, NAPBS will also submit more detailed comments in the near future.

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