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**SUPPLEMENTAL**

**MEMORANDUM**

TO: Thomas Scott, Executive Director

Massachusetts Association of School Superintendents

FROM: Michael J. Long, Esq.

Rosann DiPietro, Attorney

RE: Employment Inquiries Related to Fingerprint-Based Criminal Background Checks

DATE: October 8, 2013

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We are writing to supplement our memorandum dated September 5, 2013 related to school employer inquiries concerning criminal background check information. We would ask that you kindly distribute this supplemental memorandum to MASS members.

As you know, in September 2013 the legislature further amended Chapter 71, Section 38R. Among other provisions, the amendment includes the following language:

Notwithstanding [subsections 9](http://web2.westlaw.com/find/default.wl?mt=22&db=1000042&docname=MAST151BS4&rp=%2ffind%2fdefault.wl&findtype=L&ordoc=8052044&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=T&pbc=96F0B495&referenceposition=SP%3b07ca0000c9361&rs=WLW13.07) and [9 1/2 of section 4 of chapter 151B](http://web2.westlaw.com/find/default.wl?mt=22&db=1000042&docname=MAST151BS4&rp=%2ffind%2fdefault.wl&findtype=L&ordoc=8052044&tc=-1&vr=2.0&fn=_top&sv=Split&tf=-1&referencepositiontype=T&pbc=96F0B495&referenceposition=SP%3b07ca0000c9361&rs=WLW13.07" \t "_top), if a school employer receives criminal record information from the state or national fingerprint-based criminal background checks that includes no disposition or is otherwise incomplete, the school employer may request that an individual provide additional information regarding the results of the criminal background checks to assist the school employer in determining the applicant's suitability for direct and unmonitored contact with children.

The restrictions imposed by MGL Chapter 151B, Section 4, subsections 9 and 9 ½, regarding inquiries into arrests that have no disposition or are otherwise incomplete, have been eased somewhat by these September 2013 amendments to Section 38R. Now, if the inquiry (a) is based on information from the fingerprint-based check (as opposed to the CORI check) and (b) is necessary to determine “suitability for direct and unmonitored contact with children,” such inquiry is permitted, notwithstanding the provisions of subsections 9 and 9 ½, which we discussed extensively in our September 5, 2013 memorandum.

Other changes to Section 38R pursuant to the September 2013 amendments include the opportunity of school districts to rely on “suitability determinations” made by previous Massachusetts employers, as well as a subtle change in the language as to which current or prospective employees or volunteers must undergo a CORI check. The “direct and unmonitored contact with children” test appears to apply to all individuals, whereas the previous version of this statute was routinely interpreted as requiring an automatic CORI of any individual who was a current or prospective direct employee or volunteer. Emergency regulations adopted by the Board of Elementary and Secondary Education, which MASS distributed to its members recently, address both of these issues as well as other logistical concerns regarding implementation of the statutory amendments.

As always, we would encourage MASS members to contact their local district legal counsel regarding application of these amendments to any individual circumstances.