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A new Connecticut law will restrict the use of credit history information by employers.

Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut

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Effective October 1, 2011, employers in Connecticut will face new restrictions on the use of credit reports regarding current or prospective employees as a result of the recent enactment this month of Connecticut Public Act 11-223. In enacting the new law, Connecticut becomes the sixth state limiting employers' use of credit reports, following Hawaii, Washington, Oregon,[1] Illinois,[2] and Maryland.[3] Similar laws are pending in several other states and at the federal level. The Equal Employment Opportunity Commission (EEOC) is also conducting related investigations and pursuing at least one disparate impact claim based on the use of credit reports. Thus, employers who use credit history information to inform hiring or personnel decisions in states that have enacted credit check laws should review their policies for compliance, and employers everywhere should continue to monitor developments in this evolving area of the law.

The New Law's Provisions

The new Connecticut law generally prohibits employers (defined as businesses with at least one employee) from requiring employees or prospective employees to consent to a request for a credit report that contains information about their credit score, credit account balances, payment history, or savings or checking account balances or account numbers as a condition of employment. The law imposes a $300 civil penalty for violations, but does not provide for a private civil action. Rather, aggrieved individuals must file a complaint with the Connecticut Labor Commissioner's office, which is empowered to investigate and impose penalties.

The law contains exceptions, however, if the employer is a financial institution, or, for all employers, if the report is required by law, or is substantially related to the employee's current or potential job or "the employer has a bona fide purpose for requesting or using information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant." *Substantially related to the employee's current or potential job* is defined as:

> (a) managerial positions involving setting the direction or control of a business, division, or business unit;

(b) positions involving access to customer, employee, or employer personal or financial information, other than simple retail transactions;

(c) positions involving a fiduciary responsibility to the employer;

(d) positions providing an expense account or corporate credit card;

(e) positions involving access to confidential, proprietary, or trade secret information; and

(f) positions involving access to the employer's non-financial assets valued at $2,005 or more.

All employers also may utilize credit reports if they reasonably believe "that the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment."

As the law fails to specifically define many of the key phrases in these exceptions (*e.g.*, what it means to "set the direction or control" of a business unit, the scope of "non-financial assets," and how broadly "confidential" business information should be construed), employers will have to exercise reasoned judgment in deciding when and when not to seek to invoke the exceptions.

Action Steps for Employers

Before October 1, 2011, employers operating in Connecticut that currently require employees or applicants to consent to credit screening should evaluate whether any of the exceptions apply, including whether they can invoke one or more of the exceptions for positions for which credit history information may be used in the screening process. In addition, employers who intend to invoke one or more of the exceptions should evaluate how to incorporate the disclosures into the hiring and personnel process, and then plan for implementation accordingly.

Of course, when conducting employment-related background screening, employers should be mindful of the various other laws that relate to the use of credit information in employment. For example, the EEOC has demonstrated a renewed and vigorous interest in whether routine pre-employment credit screening has a "disparate impact" on protected class members for purposes of unlawful discrimination under Title VII of the Civil Rights Act of 1964. Likewise, employers must follow the requirements of the federal Fair Credit Reporting Act (FCRA), including the FCRA's provisions requiring advance consent for the background check and providing appropriate notices when any adverse employment decision is made based, in whole or in part, on the information disclosed in a background report.

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[1] Howard Rubin and Janice Kim, *Oregon's Job Applicant Fairness Act Update – BOLI Issues Final Rules*, Littler ASAP (June 2010).

[2] Amanda Innskeep, *Changes in Illinois Labor and Employment Law Coming in 2011*, Littler ASAP (December 2010).

[3] Rod Fliegel, Steven Kaplan and Emily Tyler, *Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History*, Littler ASAP (April 2011).