NEW LIMITS ON EMPLOYER RIGHTS TO OBTAIN CREDIT REPORTS

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On October 9, 2011, California Governor Brown signed several employment-related bills into law that affect California employers. One of these bills, Assembly Bill 22, prevents most employers from obtaining preemployment credit information or reports about job applicants, with certain exceptions.

By way of background, the types and means of acquiring background information, including credit reports, about prospective employees are already regulated by law. Federal law is governed by the Fair Credit Reporting Act ("FCRA") and administered by the Federal Trade Commission. California has its own similar, but in some respects stricter, regulations contained in the Consumer Credit Reporting Agencies Act ("CCRA") as set forth in California Civil Code Sections 1785.1 et seq. In general, certain procedures must be followed and written consent must be received from applicants to obtain their credit report. Notices must inform applicants that a credit report will be used in the hiring decision, the source of the report and there must be a space, by way of a check box, for the applicant to request a free copy of the report. Whenever the employer bases an adverse employment decision on information contained in the credit report, it must advise the applicant of that fact and provide the name and address of the consumer credit agency making the report to enable the applicant to contest the information gathered in the report.

In enacting AB 22, the Legislature adopted the view that employers should not have the right to obtain confidential credit information if it is not directly relevant to a prospective employee's job and that these reports otherwise have little value predicting a person's ability to perform particular job duties. Additionally, it recognizes that credit reports are sometimes inaccurate and can unfairly influence an employer's hiring decision.

Starting on January 1, 2012, with the exception of certain financial institutions, employers will be prohibited from obtaining consumer credit reports of job applicants. However, this general ban of obtaining credit reports has a number of exceptions.

Applicants applying for managerial positions are exempted from the ban against obtaining credit reports. A "managerial position" means an employee in such a position that would be covered by the Executive Exemption in the California Industrial Welfare Commission Wage Orders. In other words, the position will involve managing the business or one of its departments or units, which will have authority to hire or fire employees or have influence over such decisions, directing the work of two or more employees, and regularly exercising discretion and independent judgment on matters of significance. Whether a position meets the Executive Exemption will have to be determined on a case-by-case basis.

Similarly, employers will still be entitled to obtain credit reports for applicants applying for positions that will involve regular access to all of the following (i) bank or credit card information, (ii) social security numbers, and (iii) date of birth. However, if the job merely involves routine solicitation or processing of credit card applications in a retail establishment, obtaining a credit report will not be allowed.

Additionally, if a position will allow the person to be a signatory on the bank or credit card account of the employer, authorize the transfer of money on behalf of the employer, or the person will be authorized to enter into financial contracts on behalf of employer, credit reports for such applicants will be allowed under AB 22.

An exemption also exists for persons who will have access to confidential or proprietary information. However, caution must be used if this exemption is to be utilized. Employers often claim that many, if not most, employees have access to company confidential or proprietary information. Non-disclosure agreements are frequently signed by all employees to prevent disclosure of company trade secrets and confidential information. Seeking credit reports based on this exemption should only be used for those prospective employees that will regularly have access to private company financial and business data or formulae, rather than persons who might have access to confidential information only occasionally or if such access is not part of the person's regular job duties. Otherwise, employers may risk exposure to liability for violations of the CCRA.

Finally, employers may obtain credit reports of applicants if their positions involve regular access to cash of the employer, customer or client totaling $10,000 or more during the work day. In other words, credit reports may still be obtained when, as in this circumstance, they have a direct bearing on whether an employer should employ a person with a history of financial troubles.

Most employers do not try to keep track of the general or technical requirements of the FCRA or CCRA and, instead, use established credit reporting agencies to perform background and credit checks. Many of these agencies can be found on or solicit business over the Internet. Many are reputable and knowledgeable about California law, but many are not. If your company is already using a credit reporting agency, it would be prudent to communicate with the agency to document that it is knowledgeable of the upcoming changes to California law. The CCRA provides a variety of remedies to consumers for violation of its provisions, including actual damages, court costs, lost wages, attorneys' fees and, when applicable, pain and suffering for negligent violation of the CCRA. If the violation is determined to be willful, a consumer will also be entitled to punitive damages of up to $5,000 for each violation. Injunctive relief is also available to injured consumers.

Remember, however, AB 22 does *not* affect employer's rights to do criminal background searches, if otherwise allowed by FCRA and CCRA.

In summary, the past practices and regulations relating to obtaining credit reports in California have changed in significant ways. Current employer practices must be modified to comply with the changes in the law. Communicate now with your existing credit reporting agency, and your legal counsel, to make sure your business complies with the new credit report restrictions imposed by AB 22.

It is best to be safe rather than sorry.