What Approaching Limitations on Use of Credit Reports Mean for Maryland Employers

April 22, 2011

Practices

Workplace Training

In a dramatic change for Maryland employers, the state's new Job Applicant Fairness Act will significantly limit their use of an individual's credit history report for hiring and making other employment-related decisions. No previous state restrictions existed on employers' obtaining and using this information. The Act was signed by the Governor on April 12 and will become effective on October 1, 2011.

The new law does not apply to employers that are financial institutions, state-approved credit unions, investment advisors registered with the Securities and Exchange Commission, and companies that are required by federal law to examine credit history data.

Prohibited Uses

Under the Act, an employer may not use an applicant's or an employee's credit report or credit history in determining whether:

1. to deny employment to the applicant;
2. to discharge the employee; or
3. to determine compensation or the terms, conditions or privileges of employment.

The Act does not define "credit report" or "credit history," although both are commonly understood to mean a statement of an individual's borrowing and payment history from various entities that report to credit bureaus. The Maryland Legislature has defined "credit history" in other sections of the state's code and regulations to mean "any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's creditworthiness, credit standing, or credit capacity." Md. Code Regs. 31.15.11.03(7) (a) (2010). Likewise, "credit report" has been defined as a "credit history obtained from a consumer reporting agency." Md. Code Regs. 31.15.11.03(8) (2010).

Exemptions

Exemptions exist under the Act where a prospective or current employee's credit report information is "substantially job-related." The law does not define "substantially job-related," but it recognizes certain jobs as exempt under the law. Exempt positions include:

1. managers and/or those who have the authority to set the direction or control of a business or a department, division, unit, or agency of a business;
2. those that involve access to personal information of a customer, employee, or employer (including an individual's first and last name, and his or her social security number, driver's license number, or financial account number); however, a position that involves access solely to personal information that is customarily provided in retail transactions is not exempt;
3. those that involve a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
4. those that are provided an expense account or a corporate debit/credit card; or
5. those that have access to trade secrets, proprietary or confidential business information.

An employer who uses a credit report under an exemption *must* disclose its use of the information in writing to the employee or applicant.

Remedies for a Violation

The Act permits an aggrieved employee or job applicant to file an administrative complaint with the Commissioner of Labor and Industry for an alleged violation. The standard for finding liability is whether the employer intentionally or negligently violated the law.

The Commissioner must resolve any dispute between the employer and employee informally; however, if it cannot be resolved, then the Commissioner may assess a fine against the employer of up to $500 for a first offense or up to $2,500 for any subsequent violation.

The employer may request a *de novo* administrative hearing at the Office of Administrative Hearings within 30 days of receipt of the violation. At a hearing, an employer may offer evidence to defend its use of the credit report or credit history. A failure to request a hearing within the time limits results in the penalty becoming a final order, which can be enforced by a state court.

While the Act does not provide an applicant or employee a right to file a private cause of action in court, this will not prevent litigation. Maryland permits an employee to file a claim, under certain circumstances, when an employer's action contravenes a clear mandate of public policy and there is no statutory remedy. Since the Act states Maryland public policy, any employee who is denied employment or terminated may file the equivalent of a wrongful termination or a failure-to-hire suit and seek compensatory and punitive damages.

Permitted Investigations

The Act does not prohibit an employer from performing employment-related background checks, such as of driving records, criminal history, and educational history, as long as it does not involve an investigation into an employee's or applicant's credit information.

Any employer who performs background checks on applicants or current employees must ensure they are not only abiding by the new state law, but also by the federal Fair Credit Reporting Act.

What Employers Should Do

1. Maryland employers should ensure their policies and procedures do not require the use of credit reports in a manner prohibited by the Act;
2. Employers should make sure that any use of a credit report meets at least one of the exemptions;
3. If use of a credit report is permitted, the relevant applicant or employee should be notified in writing of such; and
4. Employers should ensure compliance with the requirements of the federal Fair Credit Reporting Act.

Currently, 17 states are considering bills that limit the use of credit report data for employment screening. These include: California, Connecticut, Florida, Georgia, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, and Vermont.

If you have any questions regarding this provisions of the Act or its implications, please contact the Jackson Lewis attorneys with whom you regularly work or an attorney in the Firm's Baltimore office.