Will New York Join the Wave of States Passing Laws Restricting Employers' Use of Applicant and Employee Credit History?

Since October 26, 1970, the federal Fair Credit Reporting Act, 15 U.S.C. § 1681 *et seq*. ("FCRA"), has imposed restrictions and disclosure requirements on employers who seek to procure and use applicant and employee credit history and other information obtained from third-party background checks. In reaction to the recent economic downturn, a number of states have imposed further restrictions and prohibitions on employer use of applicant and employee credit history in the employment context. Proponents of these new restrictions argue that in the current economic climate, in which jobs have been lost and investments have tanked, many currently unemployed but otherwise qualified applicants now have low credit scores through no fault of their own. These applicants - particularly those who have lost their jobs as a result of the economy - should not, according to proponents of the new restrictions, be further penalized by having a poor credit rating impact their chances of obtaining employment.

Most recently, on October 10, 2011, California passed Assembly Bill No. 22 ("Bill 22"), amending California's Consumer Credit Reporting Agencies Act ("CCRAA"). Bill 22 outright bans California employers, with the exception of certain financial institutions, from requesting a consumer credit report for employment purposes beginning on January 1, 2012, unless one of eight narrow exceptions applies. And, even if one of the exceptions does apply, Bill 22 imposes additional disclosure requirements on the use of consumer credit reports above-and-beyond those already imposed by the FCRA. Several other states have passed similar laws, including Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington.

In line with this recent trend, three bills have been introduced in New York that would impact New York employers' ability to request and rely on applicant and employee credit history in making employment decisions.

- Assembly Bill 4052, introduced on February 1, 2011, would prohibit the use of a job applicant's or employee's personal credit history background check in the hiring or promotion process, unless such information directly relates to the position sought, and even then, the information obtained cannot be a determining factor in the decision-making process. If an employee or applicant consents to a credit history background check, he or she must sign a consent form that explicitly states the specific purpose, use and limitations on the use of the credit history background information as it pertains to the position sought. There have been no votes on this bill, but it has been referred to the committee on governmental operations.
- Assembly Bill 6672 (Senate Bill 1519), introduced on March 24, 2011, would prohibit or severely limit the ability of an employer to use a consumer credit report in making any decisions relating to hiring, promotions, discipline or terminations. An employer may request and use a consumer credit report only in two limited situations: (1) if the information is substantially related to the position, for instance if the position involves access to money, assets or confidential information; or (2) if the information is for a managerial position, a position in the office of court administration, a position with a law enforcement agency, or a position for which the information contained in such report is required to be disclosed or obtained by the employer. Before an employer may request or use a consumer credit report, the employee or prospective employee shall be given and sign an authorization of consent form that explicitly states the specific purpose, use and limitations of use of such report as it pertains to the position sought. There have been no votes on this bill, but it has been referred to the committee on consumer affairs and protection.
- Assembly Bill 8070 (Senate Bill 4905), introduced on May 27, 2011, known as the Credit Privacy in Employment Act, would prevent an employer from requesting or using information in the credit history of a job applicant or employee in connection with or as a criterion for employment decisions related to hiring, termination, promotion, demotion, discipline, compensation, or the terms, conditions or privileges of employment. An employer may use such information if required by state or federal law to use such credit history. If an employer requests a credit history for positions

in which such information can be collected, the employee or applicant must sign an authorization of consent form authorizing such use. As with the other three bills, there have been no votes on it to date, but it has been referred to the committee on consumer affairs and protection.

Despite recent initiatives to restrict employer use of applicant and employee credit history - or perhaps because of them - on July 20, 2011, Governor Cuomo signed into law Assembly Bill 8159 (originally Senate Bill 3987) ("Bill 8159"). This new law amends the New York Education Law to permit background checks, including criminal background and credit checks, of employees and prospective employees of the Higher Education Services Corporation ("HESC"). HESC is the State's student financial aid agency that manages more than 18 grant, scholarship and loan programs, and offers guidance to students, families and counselors. Although at first blush it may appear that this law runs against the tide of recent legislative initiatives on employee background checks, Bill 8159 actually encompasses the type of exception seen in the recent legislation. For example, California's Bill 22 contains an exception allowing the collection of consumer credit report information when the information contained in the report is required by law to be disclosed or obtained. Even the proposed legislation in New York contains exceptions allowing the use of credit information when that information has a direct relationship to the position sought or is required by law.

In the end, employers in New York and elsewhere should continue to monitor developments in this area to ensure that their practices are in line with the expanding patchwork of state laws on the issue.

This post was authored by Matt Lampe, Joseph Bernasky, and Emilie Hendee of Jones Day. The views and opinions expressed herein are those of the authors and do not necessarily reflect the views of Jones Day or the New York State Bar Association.

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Posted by Matt Lampe on October 28, 2011 1:00 PM | Permalink