Better Double Check Your Use Of Credit Checks

Insights
3.01.11

(Retail Industry Update, No. 1, March 2011)

Colorado, Maryland and Pennsylvania are the latest to join a growing number of states that have taken steps to limit an employer's ability to perform credit checks on its employees. So far, only four states have actually enacted laws limiting use of credit checks for employment purposes. But approximately 10 others have introduced similar legislation aimed at prohibiting employers from using information contained in an employee's credit history to deny employment, or basing employment decisions (such as transfers, reassignments, promotions or terminations) on such information. Additionally, at least two states already prohibit the use of credit checks for non-financial jobs.

EEOC Renews Interest In Disparate Impact Theory

The current push by states to limit credit checks for employment purposes comes on the heels of the Equal Employment Opportunity Commission's (EEOC) focus on the possibility that using credit histories in the employment context could have a disparate impact on protected groups, such as African-Americans, Hispanics, women, and those with disabilities.

Last October, the Commission held an informal review to scrutinize use of credit checks in the hiring and promotion process. During the public meeting, the Commission heard comments from several stakeholders, including the National Consumer Law Center, National Council of Negro Women, Society for Human Resource Management (SHRM) and U.S. Chamber of Commerce. A mere two months later, a more aggressive EEOC filed suit against Kaplan Higher Education Corporation claiming that Kaplan "engaged in a pattern and practice of unlawful discrimination by refusing to hire a class of black job applicants nationwide."

Similar lawsuits have also been filed by individuals who claim that they have been discriminated against on the basis of race or national origin because of a prospective employer's use of credit checks. Specifically, in November 2010, an applicant who was not offered a job sued the University of

Miami claiming that the university unlawfully rejected job applicants because of their credit histories.

The plaintiff, who filed suit on behalf of herself and other applicants who were rejected, relied heavily on statistics to indicate that African-Americans and Hispanics had lower credit scores, and claimed that the university's use of an applicant's credit history was not essential to determining whether the applicant was qualified for the job.

Be Careful About Who Gets Checked . . .

This is not to say that you cannot – or should not – use credit checks in making employment decisions. Title VII permits an employer to use credit checks and other screening tools if they are job-related and consistent with business necessity. Thus, you may use checks, but exercise caution because doing so can result in increased scrutiny by the EEOC or a possible violation of a newly-enacted state law.

The best way to minimize risks associated with using credit checks for employment purposes is to review the requirements of a particular job and determine whether a credit check is really necessary for that position. Historically, employers have conducted credit checks for positions with financial responsibility, including access to company funds or other large amounts of cash or with access to confidential financial information. Courts have generally affirmed such credit checks.

For this reason, credit checks are most commonly used in the banking, finance and retail industries. Similar to other background screening processes, such as criminal history reports – which the EEOC previously took issue with – employers can argue that a credit report presents them with a snapshot that indicates whether an employee is productive, reliable, responsible and trustworthy.

. . . and Why

In light of the EEOC's recent focus on credit checks in employment, if you use a candidate's credit history to make employment decisions make sure that this is only being done when the nature of the job requires it. Here are some tips to keep in mind:

- Ensure that guidelines are in place detailing when to use credit checks. Generally speaking, you should not be using credit checks for every position you are filling.
- Determine whether the particular position for which you are hiring is a position involving the handling of money or whether the person will have access to customers' financial information (e.g., is it a cashier position at the front register, or is it a credit department position reviewing customer financing applications?).
- Determine whether it is necessary to run a candidate's credit history before making an offer. Generally, you should not use credit checks as a screening mechanism prior to interviewing a candidate.
- If negative information appears on the applicant's credit history, ask about the information before removing them from the candidate pool. There may be an explanation, such as identity theft, for

removing them from the candidate pool. There may be an explanation, such as identity theft, for the negative information.

If you do find it necessary to use credit checks, use them consistently. In other words, do not run credit checks only on certain candidates. That's exactly what the EEOC and the new state laws are trying to prohibit.