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CONSIDERING A JOB APPLICANT'S PRIOR BANKRUPTCY FILING DURING THE HIRING PROCESS

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A recent decision from the United States Court of Appeals for the 11th Circuit affirms a private employer's right to deny employment to a job applicant on the basis of the applicant's previous bankruptcy filing. This particular holding only impacts private employers in Alabama, Florida and Georgia. However, the 11th Circuit now joins the 3rd and 5th Circuit Courts of Appeal in approving a private employer's right to consider this information in the hiring process. Accordingly, for now, private employers in the following states may safely consider bankruptcy filings when making hiring decisions: Alabama, Delaware, Florida, Georgia, Louisiana, Mississippi, New Jersey, Pennsylvania and Texas.

As written, the Bankruptcy Code applies to private employers differently than it does to public employers. While the Bankruptcy Code clearly prohibits government employers from refusing to hire an individual because that individual previously filed for bankruptcy, the Code does *not* contain language specifically prohibiting private employers from refusing to hire on that basis. Accordingly, the 11th Circuit held that the absence of such language means that a private employer does not violate federal law when refusing to hire on that basis. This holding is especially timely for private employers in light of the increase of personal bankruptcy filings during the "Great Recession." According to statistics from the American Bankruptcy Institute's website, personal bankruptcy filings have increased 5 straight years, with 2010 filings nearly tripling those from 2006.

In *Myers v. Toojay's Management Corporation, Docket No. 5:08-cv-00365-WTH-GRJ,* the 11th Circuit heard an appeal from Eric Myers, a Florida resident. In 2008, Myers had filed for bankruptcy in North Carolina before subsequently moving to Florida to seek a fresh start. Once in Florida, Myers applied for a managerial position at Toojay's Gourmet Deli and, as part of the application process, signed a

background check release which permitted Toojay's to conduct a "comprehensive review" of Myers' background, including a review of his "credit history and reports." According to Toojay's, Myers' hiring was contingent on the background check. Shortly thereafter, Toojay's notified Myers that he would not be hired because of the previous bankruptcy filing that appeared in his credit report. Myers then sued Toojay's, claiming that its refusal to hire because of his bankruptcy filing constituted a violation of the Bankruptcy Code. The 11th Circuit disagreed, essentially finding that if Congress had intended that private employers were to be prohibited from basing a hiring decision on this factor, as public employers were prohibited, it would have drafted the Bankruptcy Code to achieve that goal.

Although private employers in these states may engage in this practice, employers should ignore the temptation of distinguishing the different types of bankruptcy filings or of weighing the particular circumstances of an individual's filing when making hiring decisions. Such a practice is likely to lead to inconsistent results and undermine the very purpose for researching a job applicant's credit history in the first place. If an employer considers bankruptcy filings to be an important predictor for an applicant's suitability for a position, the better practice is to adopt a bright-line rule that prior bankruptcy filings automatically disqualify an applicant.