Insights, News & Events

CONNECTICUT AND MARYLAND ACT TO RESTRICT EMPLOYERS' USE OF CREDIT REPORTS

Insights
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Two more states – Connecticut and Maryland – have joined Illinois, Oregon, Washington, and Hawaii, and several cities, in severely limiting employers' ability to use a job applicant's or current employee's credit history or credit-related information. This affects decisions in hiring or promotions, as well as in determining compensation or other terms, conditions, or privileges of employment. Gov. Dannel Malloy signed the Connecticut law on July 13, 2011. Gov. Martin O'Malley had signed that state's Job Applicant Fairness Act (JAFA) on April 12, 2011. Both laws take effect on October 1, 2011.

The Context
There are efforts to enact such restrictions at the federal level as well, but under current circumstances their prospects do not appear bright. Members of Congress have attempted to amend the Fair Credit Reporting Act through various bills, including the "Equal Employment For All Act." This proposed federal amendment would provide roughly the same protections to workers as will the Connecticut and Maryland laws.

Supporters claim these enactments help the economy by fixing one of the primary "Catch-22s" of the recession – unemployed individuals who have bad credit because they can't find jobs (or pay their debts), but who cannot secure jobs because of their bad credit. The ACLU has advocated enactment of such laws on the ground that credit checks destroy diversity in the workplace by disproportionally preventing women and minorities from obtaining and keeping jobs.

While the two new laws share many features, their coverage, exceptions and enforcement are sufficiently different to merit separate analysis.

CONNECTICUT

Coverage And Prohibitions

The law applies to all employers with one or more employees as well as the state government and its political subdivisions. Under its provisions, employers may not require an employee or prospective employee to consent to a credit report, with the following exceptions:

- the employer is a financial institution, as defined under the law;
- the report is required by law;
- the employer reasonably believes the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment; or
- the report is substantially related to the employee's current or potential job, or the employer has a bona fide purpose for using information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant.

The first three exceptions are fairly straightforward. The law contains a detailed definition of "financial institution." It is the fourth exception where most of the analysis will be required since it is the key one that would come into play in most situations involving prospective and current employees.

It clearly is not intended as a "catch-all" provision – the proverbial exception that swallows the rule – since the law provides specific and relatively narrow definitions of when a credit report might be "substantially related to the employee's current or potential job." This condition will be met, only if the position into which the employee would be hired:

- is a managerial position that involves setting the direction or control of a business, division, unit or an agency of a business;
- involves access to customers', employees' or the employer's personal or financial information, other than information customarily provided in a retail transaction;
- requires a fiduciary responsibility to the employer, such as the authority to issue payments, collect debts, transfer money or enter into contracts;
- allows an expense account or corporate debit or credit card;
- provides access to certain confidential or proprietary business information, as defined under the law; or

- permits access to the employer's nonfinancial assets valued at $2,500 or more, including, but not limited to, museum and library collections and to prescription drugs and other pharmaceuticals.

Points to note here are that the managerial exception is not further defined, but the descriptive language associated with it suggests it should not necessarily be viewed as broad authorization to run credit checks on all "managers." The aim of the language appears to be to restrict such checks to higher-level and more responsible executives.

Similarly, the "fiduciary responsibility" permission would seem to be intended to be more restrictive than permitting credit checks for applicants and employees who merely are likely to come into contact with an employer's cash or credit proceeds. It appears to be targeted at positions and individuals who have access to a business's financial accounts, such as those with check-signing authority for business accounts.

Enforcement And Penalties
As enacted, the law does not provide for individuals to use civil suits to enforce its provisions. The only avenue open to prospective or current employees who believe they have been improperly required to submit to a credit report is to file a complaint with the Connecticut Labor Commissioner. The Commissioner may investigate and issue a civil fine of $300 for each credit check that violates the law.

MARYLAND

Coverage And Prohibitions
Maryland's JAFA does not contain a definition of which employers are covered, and so it should be presumed, like Connecticut's law, to apply to all employers in the state. As of its effective date of October 1, 2011, an employer who is not subject to one of several specifically enumerated exemptions may not use a job applicant's or employee's "credit report" or "credit history" to determine whether to deny employment to the applicant, to discharge the employee, or to determine the terms, conditions, or privileges of employment, including compensation.

Employers who are carved out of the Act's prohibitions must provide a job applicant or employee whose credit report or credit history is requested, with relevant informational disclosures similar to those required by the federal Fair Credit Reporting Act.

JAFA explicitly carves out four categories of employers as exempt from its coverage:

- businesses required to inquire into an applicant's or an employee's credit report or credit history under state or federal law for the purpose of employment;

- financial institutions that accept deposits that are insured by a federal agency, or an affiliate or subsidiary of the financial institution;
- Credit Union Share Guaranty Corporations that are approved by the Maryland Commissioner of Financial Regulation; or
- entities (or affiliates of an entity) that are registered as investment advisors with the United States Securities and Exchange Commission.

There is also a general exception applicable to employers who do not fall within one of these four categories. They may request or use 1) an employee's credit report or history; or 2) the credit report or history of an applicant who has been offered employment – that is, the credit check must be *post*-offer – for any purpose not explicitly prohibited by the Act, or if the employer has a "bona fide purpose" for the information.

Under the law, a "bona fide purpose" means substantially job related. The law lists various examples of positions for which an employer would have a "bona fide purpose" to request or use information in a credit report or credit history. For instance, in a list that reads remarkably like the one in the Connecticut law, a "bona fide purpose" exists for positions involving:

- setting the direction or control of a business, department, division, unit, or agency, and that is managerial;
- access to personal information of a customer, employee, or employer (excluding personal information typically provided in a retail transaction);
- a fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
- an employee who is provided an expense account, corporate debit or credit card; or
- access to confidential business information or trade-secret information (*e.g.*, formulas, patterns compilations, programs, processes, that are not generally known or have independent economic value).

Also excluded from the Act's coverage are employment-related background investigations which are authorized under the Federal Fair Credit Reporting Act and do not involve investigations of an applicant's or employee's credit information.

Enforcement And Penalties

Maryland's law, like Connecticut's, is enforced only by a state enforcement agency: The Maryland Commissioner of Labor and Industry is to investigate claims of non-

compliance after receipt of a written complaint by an aggrieved applicant or employee. If the Commissioner cannot resolve the matter informally and finds merit to the complaint, the Commissioner may subject an employer to civil penalties of up to $500 for an initial violation, and up to of $2,500 for each subsequent violation.

JAFA does not specify how to quantify the number of violations nor whether an employer who continuously (and unlawfully) uses credit report and credit history information for a single applicant or employee would be liable for multiple violations. If an employer could be repeatedly penalized for such conduct, the potential liability could add up quickly and be quite costly. The Commissioner is empowered to use civil enforcement proceedings in Circuit Court against employers who do not pay the assessed civil penalties.

An employer may request an administrative hearing within 30 days of receipt of an order to pay a civil penalty. The hearing will be on a *de novo* basis, where the employer can present evidence that it should not be subject to the penalty.

Practical Strategies
Although neither state law goes into effect until October 1, 2011, both Connecticut and Maryland employers should begin to assess whether and how they are covered by the laws, and adjust their workplace policies accordingly. And employers in other states should also be aware that efforts could well be under way in their jurisdiction to enact similar legislation. No fewer than sixteen other states (*i.e.* California, Florida, Georgia, Indiana, Kentucky, Michigan, Missouri, Montana, Nebraska, New Jersey, New Mexico, New York, Ohio, Pennsylvania, Texas, and Vermont) are considering bills that will limit employers to some degree in using credit checks to hire or evaluate their employees.

Consider taking the proactive step of reviewing published job descriptions for positions that might fall within one of the exceptions in the two laws and inserting clarifying language to demonstrate that occupants of the position would qualify for one of the exceptions. For example, clarifying the scope of managerial authority, and the nature of any "fiduciary responsibility" associated with positions as to which an employer has typically imposed a credit check requirement could well improve the chance that a state agency would conclude that credit checks could be imposed.

If you have any questions about any of these judicial developments, please contact your Fisher Phillips relationship attorney.

This Legal Alert provides an overview of two specific state laws. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.