Insight

IN-DEPTH DISCUSSION

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Philadelphia Becomes the First Jurisdiction in 2016 to Restrict Employers from Using Credit Information in Employment Decisions

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On June 7, 2016, Philadelphia Mayor Jim Kenney signed a bill to make it unlawful, with limited exceptions, for employers to procure or use an applicant's or employee's credit history for employment purposes. Philadelphia joins the growing list of jurisdictions that have enacted similar laws: California, Chicago, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, New York City, Oregon, Vermont, and Washington.[1] The Philadelphia legislation goes into effect July 7, 2016.

Given that other jurisdictions are considering comparable legislation, it is likely this trend will continue. Employers that use credit reports for employment purposes in any of these jurisdictions should therefore review, and, if appropriate, modify, their policies to ensure that they comply with the law in all of the jurisdictions in which they operate. All employers should continue to stay abreast of additional developments in this rapidly evolving area of employment law.

What the Ordinance Will Require

Philadelphia Bill No. 160072 will amend the Philadelphia "Fair Practices Ordinance: Protections Against Unlawful Discrimination" to make it an unlawful discriminatory practice for an employer generally to procure or use an applicant's or employee's "credit information" for employment purposes, which means making decisions in connection with any

1 *See, e.g.,* Jennifer Mora, David Warner and Rod Fliegel, *New York City Council Passes the First Citywide Bill Restricting Employers from Using Credit Information in Employment Decisions*, Littler Insight (Apr. 21, 2015); Rod Fliegel and Jennifer Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, Littler ASAP (Oct. 10, 2011); Rod Fliegel, Philip Gordon, and Jennifer Mora, *Colorado is the Latest and Ninth State to Enact Legislation Restricting the Use of Credit Reports for Employment Purposes*, Littler ASAP (Apr. 26, 2013); Rod M. Fliegel, Bruce Young and Jennifer L. Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (May 30, 2013); Rod Fliegel and Jennifer Mora, *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes*, Littler ASAP (Jun. 18, 2012); Philip Gordon, *New Maryland Statute Further Complicates Patchwork of "Credit Privacy" Laws*, Littler ASAP (May 11, 2011).

individual's hire, discharge, tenure, promotion, discipline or consideration of any other term, condition or privilege of employment. The bill defines "credit information"" as "[a]ny written, oral, or other communication of information regarding a person's debt; credit worthiness, standing, capacity, score or history; payment history; charged-off debts; bank account balances or other information; or bankruptcies, judgments, liens, or items under collection." Thus, the ordinance prohibits employers from considering such information when making employment decisions.

The ordinance contains several exceptions to this general prohibition. To begin with, the prohibition does not apply to financial institutions, law enforcement agencies, or the City of Philadelphia when it is collecting taxes or other debts owed the city. The prohibition also does not apply to any employer that is required by state or federal law to obtain credit information.

In addition to exempting these employers from the ordinance's prohibition on using credit information for employment purposes, the ordinance carves out five different types of jobs from the blanket prohibition, but it creates special rules when credit information is used:

a. jobs requiring the employee to be bonded under city, state, or federal law;

b. jobs that are supervisory or managerial in nature and involve setting the direction or policies of a business or a division, unit or similar part of a business;

c. jobs involving significant financial responsibility to the employer, including the authority to make payments, transfer money, collect debts, or enter into contracts, but excluding jobs that involve handling retail transactions;

d. jobs requiring access to financial information pertaining to customers, other employees, or the employer, other than information customarily provided in a retail transaction; and

e. jobs requiring access to confidential or proprietary information that derives substantial value from secrecy.

Employers that take an adverse action against an individual (*e.g.*, rejecting an applicant or terminating an employee) who is applying for, or working in, any of the five job categories listed above based in whole or in part on the individual's credit information must notify the individual in writing of the reason the employer considered the individual's credit information, and the specific credit information on which the employer relied. The employer must also provide the individual an opportunity to explain the circumstances surrounding the information at issue before taking adverse action.

Coverage and Remedies

Because this ordinance will become a new part of the Philadelphia Fair Practices Ordinance, it will apply to any organization that employs one or more employees in Philadelphia. The ordinance will provide aggrieved persons with the right to file a complaint with the Philadelphia Commission on Human Relations or, after timely exhausting administrative remedies, to pursue a private right of action to recover the full panoply of damages available under the Fair Practices Ordinance, which includes compensatory damages, attorney's fees and punitive damages.

Next Steps for Employers

The ordinance will become effective July 7, 2016. Employers in Philadelphia that use credit reports or other credit information for employment purposes should consult with an experienced employment attorney to determine whether this ordinance may prohibit them from continuing to do so. Multi-state employers also

may want to revisit their practices to help ensure that they comply with both this ordinance and the laws of the other jurisdictions that now regulate employers' use of credit information.

All employers should continue to monitor efforts in Congress and at the state and local level to regulate the use of credit history information, as well as advisory guidance from, and litigation initiated by, the EEOC in this area. In addition, employers may want to evaluate the sufficiency of the paperwork they use with their screening procedures (e.g., disclosure and authorization forms and pre- and final adverse action notices), and otherwise confirm they are following the requirements of the federal Fair Credit Reporting Act and its state and local counterparts. These requirements include obtaining advance, written consent for credit checks and providing specific notices before and when an adverse employment decision is based, in whole or in part, on information concerning an individual's credit history.[2]

2 See Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).