Insight

IN-DEPTH DISCUSSION

FEBRUARY 16, 2017

District of Columbia Mayor Signs Law Restricting Employers from Using Credit Information in Employment Decisions

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On February 15, 2017, District of Columbia Mayor Muriel Bowser signed a bill prohibiting, with limited exceptions, employers' use of or obtaining a job applicant's or employee's credit information for employment purposes. D.C. joins the growing list of jurisdictions that have enacted similar laws: California, Chicago, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, New York City, Oregon, Philadelphia, Vermont, and Washington.[1]

This trend is likely to continue. Employers who use credit reports for employment purposes in any of these jurisdictions therefore should review, and, if appropriate, modify, their policies for compliance. All employers should continue to stay abreast of additional developments in this rapidly evolving area of employment law.

The New Law Broadly Prohibits Employer Consideration of Credit Information

The D.C. "Fair Credit in Employment Amendment Act" amends the Human Rights Act of 1977 to make it unlawful for an employer to "directly or indirectly require, request, suggest, or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information." "Credit information" is defined as "any written, oral, or other communication of information bearing on an employee's creditworthiness, credit standing, credit capacity, or credit history." "Inquire" is broadly defined to mean "any direct or indirect conduct intended to gather credit information using any method, including application forms, interviews, and credit history checks."

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1 *See, e.g.,* Jennifer Mora, Philip Gordon and William Simmons, *Philadelphia Becomes the First Jurisdiction in 2016 to Restrict Employers from Using Credit Information in Employment Decisions*, Littler Insight (Jun. 20, 2016); 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).

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The law provides very limited exceptions to the general prohibition, of which only a few apply to private-sector employers. Specifically, the prohibition does not apply:

- Where an employer is otherwise required by District law to require, request, suggest or cause any employee to submit credit information, or use, accept, refer to, or inquire into an employee's credit information;
- Where the individual is applying for certain police officer positions;
- To the Office of the Chief Financial Officer of the District;
- Where the individual will work in a position that requires possession of a security clearance under District law;
- To disclosures by District government employees of their credit information to the Board of Ethics and Government Accountability or the Office of the Inspector General, or to the use of such disclosures by those agencies;
- To financial institutions where the position will involve access to personal financial information; and
- Where an employer requests or receives credit information pursuant to a lawful subpoena, court order, or law enforcement investigation.

Remedies

The law is unclear as to whether an aggrieved applicant or employee may pursue a private right of action against a covered employer. An aggrieved applicant or employee who elects to file an administrative complaint with the Office of Human Rights will have his/her complaint investigated and, if the Commission on Human Rights ultimately finds that a covered employer violated the law, the Commission may impose the following fines:

- $1,000 for the first violation;
- $2,500 for the second violation; and
- $5,000 for each subsequent violation.

Next Steps for Employers

The law will take effect following a 30-day period of Congressional review as provided in the District of Columbia Home Rule Act and publication in the District of Columbia Register.

Employers in the District of Columbia that use credit reports or other credit information for employment purposes should consult with an experienced employment attorney to determine whether this law will prohibit them from continuing to do so. Multi-state employers should also review their practices to help ensure they comply with this bill and the laws of any other jurisdictions that in which they operate.

Employers should also monitor Congressional efforts to regulate the use of credit history information and advisory guidance from, and litigation by, the Equal Employment Opportunity Commission in this area. In addition, employers should evaluate their screening procedures (*e.g.,* disclosure and authorization forms and pre- and final adverse action notices) in order to confirm that they are following the requirements of the federal Fair Credit Reporting Act and its state and local counterparts. This includes 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).

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