

## In This Issue:

June 2010

The Oregon Bureau of Labor and Industries (BOLI) has issued final rules to effectuate Oregon's Job Applicant Fairness Act. The Act, effective July 1, 2010, prohibits employment discrimination on the basis of information contained in an applicant's or an employee's credit history. Significantly, BOLI's final rules define the "substantially job-related" exception to the law's credit check ban.

## Oregon's Job Applicant Fairness Act Update - BOLI Issues Final Rules

By Howard Rubin and Janice Kim

The Oregon Bureau of Labor and Industries (BOLI) issued final rules to implement restrictions on an employer's use of information contained in an applicant's or an employee's credit history. BOLI's final rules effectuate Oregon's new law, "The Job Applicant Fairness Act," which will go into effect July 1, 2010. See "New Oregon Law Prohibits Credit Checks," April 2010 ASAP available at: [www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1484&asapType=Northwest](http://www.littler.com/PressPublications/Lists/ASAPs/DispAsaps.aspx?id=1484&asapType=Northwest).

Under the law, employers are prohibited from obtaining or using an applicant's or an employee's credit history for the purposes of employment decisions with only limited exceptions for certain employers, including federally insured banks and credit unions, businesses required by law to consider employee credit history, and police and other public employers hiring for law enforcement and airport security. Additionally, the law includes an exception when the individual's credit history is "substantially job-related." While that exception is not defined in the statute, it is defined in BOLI's final rules.

### What Does "Substantially Job-Related" Mean?

Under BOLI's new rules, "substantially job-related" must be determined "with respect to the position for which the individual is being considered or holds."<sup>1</sup> An applicant's or an employee's credit history information is "substantially job-related" if an "essential function of the position at issue requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit."<sup>2</sup> In turn, the regulations provide that "[f]inancial information customarily provided in a retail transaction includes information related to the exchange of cash, checks, and credit or debit card numbers." In addition, an employer may obtain or use credit history information if "the position at issue is one for which an employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond." In order to rely upon the "substantially job-related" exception, an employer must provide an applicant or employee with

written notice detailing the reasons for the use of credit history information, and the employer bears the burden of proving that it made such a disclosure.

### What Employers Should Do

An employer should update its employee handbook to state that it does not discriminate on the basis of information in an applicant’s or an employee’s credit history. If a third party service is used to perform background checks, the employer should instruct the service in writing not to obtain or use credit histories except when specifically instructed to do so and to comply fully with Oregon’s Job Applicant Fairness Act. When relying on the “substantially job-related” exception, an employer must prepare a disclosure form customized to each situation and should keep a copy of each disclosure form.

.....  
Howard Rubin is the Office Managing Shareholder of, and Janice Kim is an Associate in, Littler Mendelson’s Portland office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Rubin at hrubin@littler.com, or Ms. Kim at jkim@littler.com.

---

<sup>1</sup> OR. ADMIN. R. 839-005-0080(1).

<sup>2</sup> OR. ADMIN. R. 839-005-0080(2)(a).