

## In This Issue:

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Illinois recently enacted a new state law, the Employee Credit Privacy Act, that will prohibit covered employers from using an individual's credit history or credit report in decision-making (including hiring and recruiting). Illinois employers need to determine prior to January 1, 2011 whether the new law applies to them and whether any specific jobs may be excluded from the ban on using credit information.

## New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions

By Philip L. Gordon and Jeffrey Kauffman

On August 10, Illinois enacted a new state law called the "Employee Credit Privacy Act" that will take effect January 1, 2011. This new Illinois law will prohibit *covered* employers from using an individual's credit history or credit report in decision-making (including hiring or recruiting) as to *covered jobs*, positions and areas of responsibility. Any prudent employer with employees in Illinois should: (1) evaluate whether it is exempt from the new Employee Credit Privacy Act; and (2) if not exempt, identify which jobs and positions within its organization are and are not covered by the Act's prohibitions.

### What Does the Employee Credit Privacy Act Prohibit?

The Act generally prohibits employers from making any employment decision (e.g., to hire or recruit, discharge, or modify compensation) based upon an individual's credit report or credit history. The Act also prohibits employers from *obtaining* a credit report regarding an applicant or employee, and from *asking* an applicant or employee about the individual's credit history. The term *credit report* is generally defined as any credit information provided by a consumer reporting agency (e.g., a background check vendor). *Credit history* is defined broadly as "an individual's past borrowing and repaying behavior, including paying bills on time and managing debt and other financial obligations." The Act also prohibits retaliation or discrimination because a person "has . . . or was about to . . ." file a complaint under the Act, assist or participate in an investigation or other action concerning a violation, or oppose a violation of the Act.

### Which Employers Are Covered

The law broadly defines the term *employer* as "an individual or entity" that "permits one or more individuals to work" or "accepts applications for employment." Also covered is any "agent of an employer." The law then expressly excludes five

business categories from the term “employer.” Thus, all employing entities in Illinois, and their agents, will be covered *unless* expressly excluded. The exclusions are:

- Any bank or financial holding company, bank, savings bank, savings and loan association, credit union, trust company, or any subsidiary or affiliate of same;
- Any authorized insurance or surety business, and those who act on behalf of a company engaged in the insurance or surety business;
- Any state law enforcement or investigative units, such as the executive inspector general, state police, and departments of corrections, juvenile justice, and natural resources;
- Any state or local government agency that requires use of an employee or applicant credit history or credit report; and
- Any entity defined as a “debt collector” by federal or state statute.

## What Positions Are Excluded from Coverage

For those employers not excluded altogether, there are exceptions in the Act for several types of positions. The statute defines the “position exclusion” in a convoluted manner. Specifically, covered employers are not “prevented” from “an inquiry” or “an employment action” that would be prohibited, when “satisfactory credit history” is an “established bona fide occupational requirement of a particular position or a particular group of an employer’s employees.” Establishing that the position or group has that “bona fide occupational requirement” requires the employer to show that “at least one” of the seven following circumstances is present:

- The employer is required by law to obtain bonding or other security for the individual in the position;
- Unsupervised access to cash or marketable assets valued over \$2,500;
- Signatory power over business assets of \$100 or more per transaction;
- Managerial positions that involve setting the direction or control of the business;
- The job involves access to personal or confidential information, financial information, trade secrets, or state or national security information;
- The position meets criteria under any state or federal regulations that are designed to establish when credit history can be a bona fide occupational qualification; and/or
- The individual’s credit history is required by or exempt under federal or state law.

These criteria seem broad enough to cover senior executives, in-house attorneys, human resources professionals, most finance department and information technology employees, and managers with money-handling responsibilities at or above the levels specified. In other words, such positions should clearly involve one or more of the factors necessary to show a bona fide occupational requirement for having a satisfactory credit history. The outcome for other positions is less clear. The application of the Act’s criteria in close cases may raise interpretation issues that courts will need to decide if suit is filed alleging a violation of the Act.

## What Are the Remedies for Violations?

Persons injured by a violation of the Act can sue in state circuit court for injunctive relief and/or damages, plus costs and reasonable attorneys’ fees if they prevail.

## What This Means for Employers in Illinois

Illinois is now the fourth state — following Hawaii, Oregon, and Washington — to enact restrictions on the use of credit history in employment decisions. Nearly one dozen other states have similar legislation pending. Because these laws and bills establish varying standards for the permissible use of credit history in employment decisions, Illinois employers with multi-state operations will need to follow and track this incipient legislative trend and, as more such laws are enacted, may be required to vary their use of credit history in employment decisions on a state-by-state basis. With respect to the new Employee Credit Report Act in Illinois, each employer will need to conduct an analysis to determine whether it is covered by the Act and, if so, the categories of its Illinois workforce for whom a “satisfactory credit history” exists as a “bona fide occupational qualification” as demonstrated by the presence of one or more of the criteria specified in the statute. Covered employers lawfully may only obtain and consider credit history and credit report information as to those positions.

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