A Timely Analysis of Legal Developments

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Colorado is the Latest and Ninth State to Enact Legislation Restricting the Use of Credit Reports for Employment Purposes

By Rod Fliegel, Philip Gordon, and Jennifer Mora

On April 19, 2013, Colorado Governor John W. Hickenlooper signed into law Senate Bill 13-018 (the "Employment Opportunity Act"), which will significantly restrict the ability of Colorado employers to use "consumer credit information" for hiring and other employment purposes unless use of the information is limited to the narrow category of positions set forth in the statute. With this law, Colorado becomes the ninth state to regulate the use of credit-related information for employment purposes, following laws enacted in California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont and Washington.[1] Colorado's law goes into effect July 1, 2013.

The nationwide trend towards banning employers' use of credit history is expected to continue at both the state and federal level.[2] Similar legislation has been introduced in several states, including Florida, New Jersey, New York and Pennsylvania. The Equal Employment Opportunity Commission (EEOC) continues to actively investigate the use of credit reports by some employers. Although the EEOC was expected to issue updated enforcement guidance regarding the use of credit reports for employment purposes more than one year ago, the EEOC has not yet issued this guidance.[3] Employers who use credit reports for employment purposes in these nine states therefore should review and, if appropriate, modify their policies for compliance. Multi-state employers should note that the nine "credit privacy" laws vary materially in their details, making it difficult to implement a uniform, enterprise-wide policy on the use of credit information for employment purposes. All employers should continue to stay abreast of additional developments in these evolving and related areas of employment law.

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1 See Littler ASAPs *Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes* (Jun. 18, 2012); *California Joins States Restricting Use of Credit Reports for Employment Purposes* (Oct. 10, 2011); *Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut* (Jul. 22, 2011); *New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions* (Aug. 24, 2010); *Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History* (Apr. 20, 2011); and *New Oregon Law Prohibits Credit Checks* (Apr. 2, 2010).

2 Federal legislation was recently introduced in the House of Representatives that would amend the Fair Credit Reporting Act to prohibit employers from considering, among other things, credit reports when making hiring or other employment decisions. H.R. 645 "Equal Employment For All Act."

3 The EEOC did release its updated guidance concerning the use of arrest and conviction records. See Littler ASAP *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers* (Apr. 30, 2012).

The New Law's Requirements

Senate Bill No. 13-018 prohibits private sector employers with four or more employees from using "consumer credit information" for employment purposes, which is defined broadly to include "evaluating a person for employment, hiring, promotion, demotion, reassignment, adjustment in compensation level, or retention as an employee." "Consumer credit information" means written or oral information bearing on an applicant or employee's "creditworthiness, credit standing, credit capacity, or credit history," or an individual's credit score. However, the term does not include the "address, name, or date of birth of an employee associated with a social security number."

The law identifies two classes of employers that are permitted to use consumer credit information for employment purposes for relatively broad categories of employees. One category consists of any "bank or financial institution;" however, the new law does not define either term (as compared to the "credit privacy" laws in other states which do). The Colorado law also does not limit the categories of employees whose credit can be checked. The other category consists of employers who are "required by law" to procure consumer credit information. These employers may conduct a credit check for any category of employee whose credit must be checked under the applicable legal requirement.

All other employers can only review consumer credit information for two specific types of positions. The law refers to the first type of position as "executive or management personnel or officers or employees who constitute professional staff to executive and management personnel." This language derives from Colorado's statute which generally voids restrictive covenants but establishes an exception for "executive or management personnel." One challenge for employers seeking to apply the Equal Opportunity Act is that the case law construing the phrase "executive or management personnel" is relatively thin, and Colorado's legislature has not defined the phrase. To date, Colorado courts have defined the phrase to include employees who are "in charge" of a business, those "at the heart of the business," and "those few executives at the highest echelons of a company" as well as those who "direct, control and supervise" other employees.[4] While the most recent Colorado appellate court decision to address the issue held that the last category includes an employee who supervised 50 employees, the degree of supervisory authority necessary to be considered "management personnel" for purposes of the Equal Opportunity Act remains unclear.

However, the new Colorado law itself suggests that only relatively high ranking "executive or management personnel" may be subject to a credit check. Even as to these personnel, the new law permits a credit check only if the position involves one or more of the following: (a) setting the direction or control of a business, division, unit or an agency of a business; (b) a fiduciary responsibility to the employer; (c) access to customers, the personal or financial information of a customer, employee or the employer (other than information customarily provided in a retail transaction); or (d) the authority to issue payments, collect debts or enter into contracts.

The law refers to the second type of position as one that "[i]nvolves contracts with defense, intelligence, national security or space agencies of the federal government." Colorado's legislature has given some leeway to the state's relatively robust presence of defense contractors and allowed these employers to conduct credit checks for these positions.

Employers who conduct credit checks on executive or management personnel or on employees involved in fulfilling the specified types of government contracts must meet two additional requirements before conducting a credit check. First, the employer must have a bona fide purpose for requesting or using information in the credit report that is substantially related to the applicant or employee's current or potential job. Second, the employer must provide a written disclosure to the individual.

If an employer determines that it can use an applicant or employee's consumer credit information for employment purposes, the new law allows the employer to inquire further and to give the individual an opportunity to explain any "unusual or mitigating circumstances where the consumer credit information may not reflect money management skills but is rather attributable to some other factor, including layoff, error in the credit information, act of identity theft, medical expense, military separation, death, divorce, or desperation in the employee's family, student debt, or a lack of credit history."

Adverse Action Notice

Any employer that obtains and uses consumer credit information and takes an adverse employment action against an applicant or employee based in whole or in part on that information must disclose this fact to the individual, along with the specific information upon which the employer relied in reaching an adverse decision. This disclosure must be made in writing or in the "same medium in which the application was made."

4 *DISH Network Corp. v. Altomari*, 224 P.3d 362, 366 (Colo. App. (2009).

Remedies

The statute allows an applicant or employee to file a complaint with the Colorado Division of Labor, which will investigate, conduct a hearing and issue findings. The Division of Labor has the authority to award to the aggrieved individual civil penalties in an amount not to exceed $2,500. The statute does not create a private right of action.

Open Questions

The new Colorado law raises important questions, including the following:

- If an employer determines that it can require an applicant or employee to consent to use of a credit report as a condition of employment, the new law states that the employer must "disclose" in writing the bona fide purpose for the employer's consent requirement. However, the law does not identify what information an employer must include in the written disclosure and when the employer must provide the disclosure to the applicant or employee (*i.e.*, before or after the employer obtains the credit report).
- The new law is unclear as to the timing of the written notification explaining to an applicant or employee what consumer credit information the employer relied upon in making an adverse decision. The federal Fair Credit Reporting Act (FCRA) typically requires employers that take adverse action against applicants or employees based in whole or in part on information contained in a "consumer report" (*e.g.*, a credit report) to provide separate pre-adverse action and adverse action notices. It is uncertain whether a Colorado employer that takes adverse action based in part on the consumer credit information is in compliance with the new law if it provides the applicant or employee with the reason for the adverse decision in the pre-adverse action notice or later, when the final adverse decision is made and the adverse action notice has been provided to the individual.
- The new law allows, but does not require, an employer to provide an applicant or employee with the opportunity to explain or provide mitigating information about his or her consumer credit information. However, the new law does not state how long an employer should give an applicant or employee to provide this information. The law is also silent regarding what, if anything, an employer must do with the information the applicant or employee provides to the employer.

Next Steps for Employers

Before July 1, 2013, all employers operating in Colorado that use credit reports or other credit information for employment purposes should evaluate whether they can continue to do so under the new law and, if so, which exemption provisions, if any, they can invoke to justify the screening. Multi-state employers also should evaluate compliance with the laws in the eight other states that regulate the use of credit history information by employers. All employers should continue to monitor efforts in Congress to regulate the use of credit history information and advisory guidance from, and litigation initiated by, the EEOC.

Employers also should evaluate the sufficiency of the paperwork they use in conjunction with their screening procedures (*e.g.*, consent forms and adverse action notices) and modify the paperwork as needed to incorporate the disclosures mandated by the new Colorado law. Likewise, employers must follow the requirements of the FCRA, including the FCRA's provisions requiring advance consent for the background or credit check and providing appropriate notices when any adverse employment decision is made based, in whole or in part, on the information disclosed in a background report.[5]

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5 See Littler Report, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers* (Dec. 12, 2011).