

May 30, 2013

Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes

By Rod M. Fliegel, Bruce Young and Jennifer L. Mora

On May 25, 2013, Nevada Governor Brian Sandoval signed a new law making Nevada the third state in the last 12 months to enact legislation restricting use by employers of credit reports and other credit history information for hiring and other employment-related purposes. Nevada's new law, which goes into effect October 1, 2013, follows closely on the heels of similar legislation enacted by Colorado in April 2013,¹ and adds Nevada to the handful of other states that have similar laws: California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont, and Washington.

This trend is expected to continue at both the state and federal level. In fact, Florida, New Jersey, New York, and Pennsylvania are currently considering similar legislation, and federal legislation has been introduced to prohibit employers from using credit information.² Meanwhile, 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 a year ago, it has, to date, failed to do so.

The New Law's Requirements

Nevada Senate Bill 127 amends Chapter 613 ("Employment Practices") of the Nevada Revised Statutes to restrict the ability of employers to use an employee or prospective employee's "consumer credit report" or any "consumer credit information" for employment purposes. Employers may not:

- directly or indirectly, require, request, suggest, or cause any employee or prospective employee to submit a consumer credit report or other credit information as a condition of employment; or
- use, accept, refer to, or inquire about a consumer credit report or other credit information.

1 See 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 (April 26, 2013).

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. "Equal Employment For All Act" (H.R. 645).

Employers may not discharge, discipline, discriminate against in any manner, deny employment or promotion to, or threaten to take any such action against any employee or prospective employee:

- who refuses, declines, or fails to submit a consumer credit report or other credit information;
- on the basis of the results of a consumer credit report or other credit information;
- who has filed any complaint, instituted or caused to be instituted any legal proceeding, or has testified or may testify in any legal proceeding instituted pursuant to the new law; or
- who has exercised his or her rights, or has exercised on behalf of another person the rights afforded to him or her under the new law.

The statute includes a variety of exceptions that permit employers to request or consider a credit report or other credit information to evaluate an employee or prospective employee for employment, promotion, reassignment, or retention if:

- the employer is required or authorized, under state or federal law, to use a consumer credit report or other credit information for that purpose; or
- the employer reasonably believes that the employee or prospective employee has engaged in specific activity that may constitute a violation of state or federal law.

Employers may also request or consider a credit report or other credit information for the purposes described above if the information sought is “reasonably related to the position for which the employee or prospective employee is being evaluated.” The new law states that the credit report or other credit information shall be deemed reasonably related to an evaluation of the position sought if the new duties of the position involve:

- the care, custody, and handling of, or responsibility for, money, financial accounts, corporate credit or debit cards, or other assets;
- access to trade secrets or other proprietary or confidential information;
- managerial or supervisory responsibility;
- the direct exercise of law enforcement authority as an employee of a state or local law enforcement agency;
- the care, custody and handling of, or responsibility for, the personal information of another person;
- access to the personal financial information of another person;
- employment with a financial institution chartered under state or federal law, including a subsidiary or affiliate of such a financial institution; or
- employment with a licensed gaming establishment (as defined by Nevada state law).

Remedies

The new law provides for both a public and a private right of action. Specifically, aggrieved employees and prospective employees may file a private lawsuit against employers that violate the new law. Courts are authorized to award a successful plaintiff the following remedies:

- employment, reinstatement, or promotion to the position at issue;
- lost wages and benefits;
- attorney’s fees and costs; and
- any other equitable relief the court deems appropriate.

On the public enforcement side, the Nevada law grants the Labor Commissioner the authority to impose penalties in an amount up to \$9,000 per violation against employers that violate the law. The Labor Commissioner may also initiate a lawsuit against the employer to obtain equitable relief including employment, reinstatement, and promotion for the aggrieved employee.

The new law includes a generous three-year statute of limitations.

Next Steps for Employers

Before October 1, 2013, Nevada employers or those that hire from Nevada who use credit reports or other credit information for employment purposes should evaluate whether they can continue to do so under the new law and identify exception provisions (if any) they can invoke to justify the screening. Multi-state employers should evaluate compliance with the laws in Nevada and the nine other states that regulate the use of credit history information by employers. Employers that use credit reports for employment purposes in these 10 states should therefore review and, if appropriate, modify their policies and practices for compliance. Multi-state employers should note that these laws differ 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 monitor efforts in Congress to regulate the use of credit history information, as well as advisory guidance from, and litigation initiated by, the EEOC in this area.

Employers should also evaluate the sufficiency of the paperwork they use with their screening procedures (e.g., consent forms and adverse action notices). Likewise, employers must follow the requirements of the Fair Credit Reporting Act, including obtaining 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.³

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3 See Rod Fliegel and Jennifer Mora, [The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers](#), Littler Report (Dec. 12, 2011).