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Colorado Restricts Employers' Use of Credit Reports

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Employers using credit reports to evaluate applicants and employees take note: Colorado recently enacted the "Employment Opportunity Act" limiting the use of credit reports in employment decisions. In passing this law, Colorado joins eight other states--California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont and Washington--in restricting employers from obtaining and/or using credit history information when evaluating applicants and employees. The new Colorado law exempts certain job positions from the prohibition on the use of credit reports, but the exceptions are very fact specific. Employers need to analyze the job responsibilities of the position at issue in order to determine if they may use credit information under this new law.

Prohibition on the Use of Consumer Credit Information for Employment Purposes

Effective July 1, 2013, section 8-2-126 of the Colorado Revised Statutes provides that an employer shall not use consumer credit information for employment purposes unless the credit information is substantially related to the employee's current or potential job. This means that Colorado employers are prohibited from using credit information in the employment context except in those limited situations where credit or financial responsibility is substantially related to the job. The type of information prohibited under this law includes any written, oral or other communication of information that bears on a consumer's creditworthiness, credit standing, credit capacity or credit history. This includes a credit score, but does not include the name, address or date of birth of an employee associated with a social security number.

"Substantially Related" Analysis Looks to Job Responsibilities

When determining whether a particular position falls within the exception where credit information is "substantially related to the employee's current or potential job," employers may not rely on an informal, best-guess determination. Instead, employers must carefully analyze whether the job in question meets the parameters detailed in the new law.

Under Colorado's law, "substantially related to the employee's current or potential job" is defined to apply to positions that:

1. Constitute executive or management personnel or officers or employees who constitute professional staff to executive and management personnel, *and* 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', employees', or the employer's personal or financial information (other than information ordinarily provided in a retail transaction); or
 - d. The authority to issue payments, collect debts or enter into contracts; OR
2. Involves contracts with defense, intelligence, national security or space agencies of the federal government.

Consider this example: you are hiring a human resource specialist who will administer employee benefits within your company. May you obtain and use a credit report on applicants for this position? Assuming this position does not involve federal defense, intelligence, national security or space agency contracts, you first must determine if this position is an executive or management position, or alternatively, if this position is considered professional staff to an executive or manager. In our example, the employee benefits specialist position may or may not be an executive or management position at your company. If not, the position may be considered professional staff to an executive or manager if the position reports to an HR Director, Vice President or other similar high level manager or officer. If we assume this position meets this threshold determination, you next must analyze if the position involves one or more of the four areas of responsibilities where credit information will be deemed substantially related. Because an employee benefits specialist is likely to have access to employees' personal and perhaps financial information, it appears to fall within the third area of responsibility where credit information will be deemed substantially related to the job, but the answer is certainly not clear-cut.

Requesting Employee Consent to Obtain a Credit Report

In addition to the prohibition on the use of credit information for employment purposes, the new Colorado law prohibits employers or their agents from requiring an employee to consent to a request for a credit report that contains information about the employee's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers as a condition of employment unless:

1. The employer is a bank or financial institution;
2. The report is required by law; or
3. The report is substantially related to the employee's current or potential job *and* the employer has a bona fide purpose for requesting or using information in the credit report and is disclosed in writing to the employee.

The written disclosure requirement here is a new procedural step with which most employers meeting this exception will not be familiar. Employers meeting these criteria now need to provide applicants/employees with a notice of their business purpose for

requesting credit information.

Employee May Be Allowed to Explain Circumstances Affecting Credit

In those cases when an employer is permitted to use credit information because it is substantially related to the job, an employer may ask the employee to explain any unusual or mitigating circumstances that affected their credit history. For example, if the credit report shows delinquent payments, the employer may inquire further allowing the employee to explain circumstances that may have caused the delinquencies, such as an act of identity theft, medical expense, a layoff, or a death, divorce or separation.

Adverse Action Disclosure Required

If the employer relies on any part of the credit information to take adverse action regarding the employee or applicant, the employer must disclose that fact and the particular information relied upon to the employee. This disclosure must be made to the employee in writing but can be made to an applicant via the same medium in which the application was made (e.g., if the application was submitted electronically, this disclosure may be sent electronically).

FCRA Obligations Still Apply

Employers who are permitted to obtain and use credit reports under the Colorado law must also comply with the requirements of the Fair Credit Reporting Act (FCRA) in order to obtain a credit report from a consumer reporting agency. These additional FCRA duties include:

1. Providing a clear and conspicuous written disclosure to the applicant/employee before the report is obtained, in a document that consists solely of the disclosure, that a consumer report may be obtained;
2. Getting written authorization from the applicant/employee before obtaining the report;
3. Certifying to the consumer reporting agency that the above steps have been followed, that the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation, and that, if any adverse action is to be taken based on the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer;
4. Before taking an adverse action, providing a copy of the report and a summary of FCRA consumer rights to the applicant/employee; and
5. After an adverse action is taken, sending an adverse action notice to the employee/applicant containing certain FCRA-required statements.

Credit Check Compliance

Colorado employers need to review and update their background check policies as they relate to conducting credit checks on applicants and

existing employees. In addition to FCRA obligations, employers wishing to use credit reports have additional restrictions and duties under state law.

Employers now must analyze whether each position for which they wish to obtain credit reports meets the "substantially related to the employee's current or potential job" criteria. If the position meets that criteria and the employer wishes to obtain a credit report on an applicant or existing employee, the employer first must provide a written disclosure to the applicant/employee describing the bona fide purpose of obtaining the credit information. If the credit report reveals questionable or negative information, the employer may (but is not required to) ask the applicant/employee to explain any unusual circumstances that may have led to the unfavorable credit information. If the employer rejects the applicant/employee for the position based in any way on the credit report, the employer must provide the required FCRA adverse action notices as well as a written explanation of the particular information in the report that led to the employer's decision.

Multi-state employers face unique challenges when obtaining and using credit reports for employment purposes as they must comply with various state laws that now restrict such use. Given the intricacies of complying with the FCRA and applicable state laws, employers are wise to consult with their counsel to review and update their credit check policies.

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