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Colorado Ninth State to Prohibit Credit Checks for Employment Purposes

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On April 19, 2013, Colorado's governor signed S.B. 18 to prohibit employers from considering an applicant's or employee's credit history in employment decisions. California, Maryland, Connecticut, Hawaii, Illinois, Washington, Oregon and Vermont, as well as at least one locality, the City of Chicago, also have similar laws. Moreover, the U.S. Congress and several more state legislatures are considering comparable legislation. To assist employers in understanding the new Colorado law, this alert discusses its coverage, prohibitions, exceptions, and remedies.

Coverage

The coverage of the new Colorado law is expansive. By amending Title 8 of the Colorado Revised Statutes, the new Colorado law defines "employer" to mean every person, association of persons, firm, and private corporation (including any public service corporation, manager, personal representative, assignee, trustee, and receiver) who has four or more persons regularly engaged in the same business or employment in service under any contract of hire, expressed or implied. The term includes a prospective employer, but excludes any state or local law enforcement agency.

"Employee" means every person permitted, required, or directed by any employer to engage in any employment for direct or indirect gain or profit. The term also includes an applicant for employment.

The new Colorado law defines "consumer credit information" as a written, oral, or other communication of information bearing on a consumer's creditworthiness, credit standing, credit capacity, or credit history. Moreover, the term encompasses a credit score (defined as an attempted numerical quantification of a person's creditworthiness or credit history), but not the address, name, or date of birth of an applicant or employee associated with a Social Security number.

Prohibitions & Exceptions

The new Colorado law prohibits an employer from using consumer credit information for employment purposes[1] unless the information is "substantially related to the employee's current or potential job." Moreover, an employer or employer's agent, representative, or designee may not require an applicant or employee to consent to a request for a credit report containing information about his or her credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers as a condition of employment unless:

- the employer is a bank or financial institution;
- the report is required by law; or
- the report is "substantially related to the employee's current or potential job" and the employer has a bona fide purpose for making the request, which is disclosed in writing to the applicant or employee.

Under the new Colorado law, "substantially related to the employee's current or potential job" means that the position:

- constitutes executive or management personnel (or officers or employees who constitute professional staff to executive and management personnel), and involves one or more of the following:
    - setting the direction or control of a business, division, unit, or an agency of a business;
    - a fiduciary responsibility to the employer;
    - access to customers', employees', or the employer's personal or financial information other than information customarily provided in a retail transaction; or
    - the authority to issue payments, collect debts, or enter into contracts; or

- involves contracts with defense, intelligence, national security, or space agencies of the federal government.

When consumer credit information is "substantially related to the employee's current or potential job," an employer may afford the applicant or employee the opportunity to explain any unusual or mitigating circumstances where the consumer credit information may not reflect money management skills but is attributable to some other factor, including a layoff, error in the credit information, act of identity theft, medical expense, military separation, death, divorce, or separation in the applicant's or employee's family, student debt, or a lack of credit history.

If an employer relies, in whole or in part, on consumer credit information to take adverse action against the applicant or employee, the employer is to disclose that fact, and the particular information upon which the employer relies, to the applicant or employee. The employer is to make the disclosure to an employee in writing or to an applicant using the same medium as that of the application. Employers should note that these obligations are in addition to the employer's disclosure and notice requirements under the federal Fair Credit Reporting Act (FCRA). Moreover, nothing in the new Colorado law imposes any liability on a person, including a consumer reporting agency, for providing an employer with consumer credit information.

Remedies

The new law empowers the Director of the Colorado Division of Labor in the Department of Labor and Employment to enforce its provisions. An aggrieved person may file a complaint with the Division, which is to promptly investigate the allegations and issue findings within thirty days after a hearing. The Division may award civil penalties not to exceed two thousand five hundred dollars to the prevailing party.

Takeaway

The new Colorado law continues a growing legislative trend across the country to limit employer consideration of credit history in hiring and personnel decisions. In addition to the mounting number of such laws and proposals, the Equal Employment Opportunity Commission (EEOC) is considering issuing guidance on the use of credit checks to screen applicants and employees, taking the position that such checks may violate Title VII of the Civil Rights Act of 1964 if performed in a discriminatory manner, or if they have a disparate impact on a protected class and are not otherwise job-related and consistent with business necessity.

The new Colorado law takes effect July 1, 2013, and applies to acts occurring on or after said date. If you have any questions or concerns regarding these new laws or related developments, please contact your Proskauer lawyer or any co-chair of the Employment Law Counseling & Training Group.

Employment Law Counseling Group Co-Chairs
Katharine H. Parker, Partner
Leslie E. Silverman, Partner
Allan H. Weitzman, Partner
Fredric C. Leffler, Senior Counsel
Marc A. Mandelman, Senior Counsel

Authors of this alert: Katharine H. Parker & Daniel L. Saperstein

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[1] Under the new Colorado law, "employment purposes" means evaluating a person for employment, hiring, promotion, demotion, reassignment, adjustment in compensation level, or retention as an employee.