Proskauer

Nevada Tenth State To Restrict Employer Use of Credit Checks

June 5, 2013

On May 23, 2013, Nevada's governor signed S.B. 127 to limit employer use of an applicant's or employee's credit history in hiring and personnel decisions.

California, Maryland, Connecticut, Hawaii, Illinois, Washington, Oregon, Vermont, and Colorado, as well as at least one locality, the City of Chicago, have similar laws. Furthermore, the U.S. Congress and a number of states and localities, including New York City, are considering comparable legislation.

To assist employers in understanding the new Nevada law, which takes effect on October 1, 2013, this alert discusses its coverage, prohibitions, exceptions, and remedies.

Coverage

The new Nevada law is expansive, defining "employer" as any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee.

Prohibitions

Unless otherwise permitted by the new Nevada law, it is unlawful for any employer in the state to:

- Directly or indirectly, require, request, suggest or cause any employee or prospective employee to submit a consumer credit report[1] or other credit information[2] as a condition of employment;
- Use, accept, refer to or inquire concerning a consumer credit report or other credit information;
- Discharge, discipline, discriminate against in any manner or deny employment or promotion to (or threaten to take any such action against) any employee or prospective employee on the basis of the results of a consumer credit report or other credit information, or who:

- Refuses, declines or fails to submit a consumer credit report or other credit information;
- Filed any complaint or instituted (or caused to be instituted) any legal proceeding pursuant to the new Nevada law;
- Testified or may testify in any legal proceeding instituted pursuant to the new Nevada law; or
- Exercised his or her rights, or has exercised on behalf of another person the rights afforded to him or her pursuant to the new Nevada law.

Exceptions

Notwithstanding the general prohibition on credit checks, an employer may request or consider a consumer credit report or other credit information for the purpose of evaluating an employee or prospective employee for employment, promotion, reassignment or retention as an employee (hereinafter, "an accepted purpose") if:

- The employer is required or authorized, pursuant to state or federal law, to use a consumer credit report or other credit information for an accepted purpose;
- 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; or
- The information contained in the consumer credit report or other credit information is reasonably related to the position for which the employee or prospective employee is being evaluated for an accepted purpose.

As for the final exception, the new Nevada law defines "reasonably related" to mean, where the 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 statute).

Remedies

The law provides for a private right of action by employees and prospective employees, pursuant to which a plaintiff may obtain legal or equitable relief, including employment of a prospective employee, reinstatement or promotion of an employee, and the payment of lost wages and benefits. The statute also permits the court to award attorneys' fees and costs to the prevailing party. Moreover, the statute allows for class claims. There is a three-year statute of limitations applicable to claims under the new law.

In addition to private enforcement actions, Nevada's Labor Commissioner also may bring a civil action to obtain remedies similar to those afforded to private claimants, as well as assess an administrative penalty of up to $9,000 for each violation.

Takeaway

The new Nevada law continues a growing trend of laws aimed at restricting the use of credit history in hiring and personnel decisions. In addition to these legislative efforts, the Equal Employment Opportunity Commission (EEOC) has weighed in, opining that credit 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 EEOC is considering issuing guidance to further elaborate its position.

* * *

If you have any questions or concerns regarding the new Nevada law or related developments, please contact your Proskauer lawyer or any co-Chair of the Employment Law Counseling & Training Group.

[1] The new Nevada law defines "consumer credit report" as any written, oral or other communication of information by a consumer reporting agency bearing on creditworthiness, credit standing or credit capacity.

[2] "Credit information" means any information related to credit and derived from or found on a consumer credit report. The term does not include information not related to credit, regardless of whether it is contained in a consumer credit report.

Authors of this alert: Katharine H. Parker, Daniel L. Saperstein and Kelly Anne Targett.