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*Published by Proskauer Rose, the "Employment Law Counseling & Training Tip of the Month" provides best practice tips to assist employers in meeting today's challenging workplace environment. Our Employment Law Counseling & Training Practice Group counsels employers with respect to the interplay of multiple federal, state, and local laws governing today's workplace, helping them avoid workplace problems, and improve employee satisfaction.*

## Tip of the Month

**Tip: Background Check "Crunch"—It's Not Just the EEOC—Two More States Restrict Use of Credit Checks in Employment**

Beginning October 1, 2011, new laws in Connecticut and Maryland will further limit employers' ability to use credit information when making personnel decisions. These states join Hawaii, Illinois, Oregon, and Washington as states that have enacted legislation specifically designed to curtail employers' use of credit reports. Similar legislation that would limit employers' use of credit information also is pending in 26 other states and the District of Columbia.

The growing concern over employers' use of credit information is not limited to the state level. Federal legislation, which would amend the Fair Credit Reporting Act ("FCRA") so as to restrict employers' use of credit information when making hiring or personnel decisions, currently is pending before Congress. Further, the Equal Employment Opportunity Commission ("EEOC") has stepped up its enforcement efforts as they relate to credit checks (and other screening devices).

Employers nationwide would be wise to take a second look at their background check policies in light of the recent trend to limit employers' use of credit information. After providing specific information on the new Connecticut and Maryland laws, and general information on activity at the federal level, this Tip of the Month summarizes general advice for employers using credit checks as part of their employment decision process.

## New State Laws

### Connecticut

Connecticut's new law<sup>1</sup> limits employers' ability to require that employees and/or applicants submit to a credit check as a condition of employment, with certain exceptions. These exceptions permit an employer to require a credit report as a condition of employment where:

- the employer is a financial institution;<sup>2</sup>
- the credit report is required by law;
- the employer reasonably believes the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment;

- where the information is "substantially related" to the job, or the employer has a bona fide purpose for requesting or using the information in the report that is substantially job-related and the information is disclosed in writing to the employee or applicant.

Connecticut law defines credit information to be "substantially related" to a current or potential job, if the position:

- is managerial and involves setting the direction or control of a business, division, unit, or agency of a business;
- involves access to the personal or financial information, other than information that is customarily provided in a retail transaction;
- involves a fiduciary responsibility to the employer, such as the authority to issue payments, collect debts, transfer money, or enter into contracts;
- provides an expense account or corporate debit/credit card;
- provides access to the confidential, proprietary, or trade secret information; or
- involves access to the employer's nonfinancial assets of \$2,005 or more.<sup>3</sup>

The law does not give employees and applicants a private right of action. Aggrieved individuals can file a complaint with the Connecticut Labor Commissioner. The Labor Commission will investigate all complaints and can impose a fine of \$300 for each credit check that violates the law.

### **Maryland**

Maryland's Job Applicant Fairness Act ("Jafa")<sup>4</sup> prohibits employers from using a credit report or credit history in making most employment decisions.<sup>5</sup>

Like Connecticut, Maryland's new law carves out a number of exceptions. Specifically, the following types of employers are excepted :

- required to inquire into credit information under federal or state law;
- a financial institution;<sup>6</sup>
- a credit union; and
- an entity registered as an investment advisor with the SEC.

The Jafa also permits employers to request or use an applicant's or an employee's credit history if the request is post-offer, for a reason not related to employment,<sup>7</sup> and is not otherwise prohibited by the Act.

In addition, an employer may request or use a credit history or report if the employer has a "bona fide" purpose that is "substantially job-related" and disclosed in writing. This exception applies to positions that:

- are managerial and involve setting the direction and control of a business, department, division, unit or agency of a business;
- allow access to certain personal information (does not include retail information);
- involve fiduciary responsibility to the employer (includes positions with authority to issue payment, collect debts; transfer money and enter into contracts);

- provide an expense account or corporate debit/credit card; and
- provide access to the confidential, proprietary, or trade secret information.

The new law does not give aggrieved individuals a private right of action. Instead, similar to Connecticut, aggrieved parties must file a complaint with the Maryland Commissioner of Labor and Industry, who will investigate and attempt to resolve the matter informally. The Commissioner may assess civil penalties of up to \$500 for an initial violation, and up to \$2,500 for repeat offenders.

## Activity at the Federal Level

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We believe that recent gridlock on Capitol Hill makes the enactment of similar federal legislation unlikely prior to the 2012 election. Nevertheless, employers should review their credit check policies in light of the EEOC's recent enforcement efforts related to credit checks. In 2010, EEOC Chair Jacqueline Berrien announced that eliminating discriminatory barriers to hiring is a top Agency priority and has since held a Commission meeting scrutinizing the use of credit checks as a hiring tool. The EEOC also has launched numerous systemic investigations that probe into discriminatory credit check practices, and, notably, has filed two separate lawsuits challenging each company's use of credit records during its hiring process. In both suits, the EEOC alleges that the employers' use of credit information resulted in the disproportionate exclusion of African-American and Hispanic candidates, and that the credit information was not job-related. Although the EEOC has yet to issue official guidance on employer use of credit information, the Agency's recent actions indicate that, if it does so, the EEOC is likely to take a narrow view of the reliability and lawfulness of credit reports as a predictor of job performance.

## Practical Tips for Compliant Credit Checks

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### Connecticut & Maryland Employers

- If you currently conduct employment-related credit checks in Connecticut or Maryland, you should review your current background and/or credit check practices and procedures to ensure compliance with these new laws.
- If you routinely conduct credit checks on applicants prior to hire, or on all employees, and your company is not a "financial institution," or otherwise required by law to conduct a credit check, the company should discontinue this blanket practice and start making decisions regarding credit checks on a position-by-position basis.
- Written Disclosure: When conducting credit checks pursuant to Connecticut's "substantially related" and/or Maryland's "bona fide purpose" exceptions, you must comply with the written disclosure requirement by providing a written explanation as to why you are conducting a credit check for a particular position.
  - To avoid a potential violation of the Fair Credit Reporting Act ("FCRA"), the written disclosure should be separate from the disclosure and authorization issued under FCRA.<sup>8</sup>
  - Remember that employers who intend to conduct credit checks as to existing employees pursuant to either state law exception are still

obligated to provide the written disclosure concurrent with the credit check. Even if an employee has provided a disclosure and authorization compliant with FCRA in the past, this does not eliminate the need for a new written disclosure under the new state requirements.

## General Advice for Employers Using Credit Checks

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- When it comes to employment selection, remember that one size rarely fits all. Employers who are able to articulate a rational reason as to how the credit check is useful in predicting job performance or relates to business functions are less likely to be subject to legal scrutiny. When in doubt, use the exceptions in the Maryland and Connecticut laws as guideposts for legitimate credit checks.
- Employers that make individualized decisions based on the position and the information in applicant and/or employee credit reports are less likely to be subject to EEOC systemic or class action lawsuit.
- Routinely monitor your company's policy and practices to ensure that it complies with the FCRA and any other applicable federal or state laws, and continue to monitor the evolving laws on the use of credit information.

*If you have any questions about your credit check policy, or other background check policies, please contact your Proskauer relationship attorney or any of the attorneys listed below.*

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<sup>1</sup> Public Act No. 11-223 was approved on July 13, 2011

<sup>2</sup> Connecticut law defines "financial institution" as "any entity or affiliate of a state bank and trust company, national banking association, state or federally chartered savings bank, state or federally chartered loan association, state or federally chartered credit union, insurance company, investment advisor, broker-dealer or an entity registered with the Securities and Exchange Commission."

<sup>3</sup> This particular exception may be interpreted narrowly as the new law lists "prescription drugs and other pharmaceuticals" and "museum and library collections" as examples of nonfinancial assets.

<sup>4</sup> Chapter 29 § 3-711 of the Annotated Code of Maryland, approved on April 12, 2011.

<sup>5</sup> The Maryland law prohibits the use of "credit information." It does not preclude employers from conducting criminal background checks or from performing employment-related background investigations that include use of a consumer report or investigative consumer report under the Fair Credit Reporting Act so long as they do not investigate credit information § 3-7111 (d)(6).

<sup>6</sup> Defined under § 3-711(a)(2), a financial institution that accepts deposits that are insured by a federal agency, or an affiliate or subsidiary of the financial institution.

<sup>7</sup> An employer may not use credit information for hiring, firing, or determining compensation or other terms and conditions of employment.

<sup>8</sup> 15 USC § 1681b(b)(2).

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The Proskauer Rose Employment Law Counseling and Training Practice Group is a multidisciplinary practice group throughout the national and international offices of the firm which advises and counsels clients in all facets of the employment relationship, including compliance with federal, state and local labor and employment laws; review and audit of employment practices, including wage-hour and independent contractor audits; advice on regulations; best practices to avoid workplace problems and improve employee satisfaction; management training; and litigation support to resolve existing disputes.

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