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Using Credit Reports in Employment Decision-Making

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**Relationship Between Credit
Reports and Job Performance
Under Fire**

Many employers routinely obtain credit reports on prospective or current employees and use these reports in making decisions whether to hire an applicant, or promote or terminate a current employee. Since 2008, the United States has experienced one of the highest all-time rates of mass layoffs and job losses. A secondary effect of this recent recession and gradual recovery is a marked increase in the number of individuals re-entering the job market.

Because employers can now be more selective and, in many instances, are attracting highly motivated and credentialed candidates, the hiring process has become an employer's market. As a result, the use of credit reports often plays an important role in an employer's selection of candidates, and who does, or does not, obtain a coveted position.

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Recently, the use of credit reports in making employment decisions has received heightened scrutiny by the federal government and various states for several reasons. In 2010, the Equal Employment Opportunity Commission (EEOC), concerned with the potential discriminatory impact of using credit checks in employment decisions, held public meetings exploring the use of credit reports as a screening tool in the hiring process. Several experts expressed concern over the use of credit reports as a method of screening applicants.

Those opposed to using credit reports in employment decisions argue that this practice discriminates against certain protected groups, such as minorities, women and individuals with disabilities, inasmuch as those groups of individuals are more likely to have a checkered credit history compared to their white, male, non-disabled counterparts. Moreover, details regarding an individual's life circumstances, such as a recent divorce, piling medical bills and other unrelated life circumstances, which may explain a low credit rating, are not available in a brief report on the

individual's credit history. Opponents of credit checks also argue that, in many cases, an individual's credit history or financial status is neither job-related nor a business necessity. Plus, a job applicant whose credit has been hurt by an economic recession (or other circumstance such as divorce or illness) is placed in an impossible "Catch-22" situation, where the credit report makes it even more difficult to obtain a job in order to repair his damaged credit.

In light of these concerns, the EEOC recently filed a lawsuit against Kaplan Higher Education, Inc., claiming that the test preparation company "has engaged in an ongoing, nationwide pattern or practice of race discrimination against black job applicants and incumbents in violation of Title VII," based upon its use of credit history information as a selection criterion for hiring and discharge. The EEOC alleges that this has "a significant disparate impact on black job applicants and incumbents, is not job-related and consistent with business necessity and [that] there are appropriate, less-discriminatory alternative selection procedures."

The Fair Credit Reporting Act

In addition to concerns over the potential disparate impact resulting from the use of credit reports in employment decision making under Title VII of the Civil Rights Act, this practice also implicates the Fair Credit Reporting Act (FCRA), which regulates how employers can obtain and use credit reports.

Under the FCRA, a consumer reporting agency may only provide an employer

with an applicant or employee's credit history with the individual's prior, written consent. If an employer intends to take an adverse action against the employee based upon the contents of a credit report, it must provide the applicant or employee with a pre-adverse action disclosure notice that allows the individual to review the information contained in the report. The federal law also requires that, after taking adverse employment action, the employer must provide the applicant or employee with the contact information for the consumer reporting agency that provided the employer with the credit report in order to allow the applicant or employee an opportunity to challenge or contest the contents of the report.

However, recent proposed federal legislation seeks to amend the FCRA to prohibit the use of "consumer reports" against prospective and current employees for the purposes of making adverse employment decisions. This prohibition would stand regardless of whether the applicant or employee consents to the employer obtaining such a report. The proposed legislation contains an exception to this prohibition where the position requires national security or FDIC clearance, or where the position is with a state or local agency that requires the use of a consumer report, or is a supervisory, managerial, executive or professional position with a financial institution.

State Efforts To Prohibit the Use of Credit Reports in Employment

Congress is not the only legislative body concerned with the impact of using credit reports in employment decisions. An increasing number of states have enacted, or are proposing the enactment of, laws that would limit an employer's ability

to use credit reports in making employment decisions. Hawaii, Illinois, Oregon and Washington have all enacted laws strictly curtailing the use of an applicant's or employee's credit history in making employment decisions.

New Jersey is one of several states currently considering legislation prohibiting an employer's use of credit reports in the employment decision-making process. If enacted, S1791 would amend the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et. seq. (LAD), and expand the definition of an unlawful employment practice. This proposed legislation would make it an unlawful employment practice for an employer or employment agency to: (i) take adverse employment action against an individual based upon his or her credit history or financial status; (ii) express to an applicant any limitation, specification or discrimination against the individual based upon such individual's credit history or financial status; or (iii) make inquiries into an applicant's credit history or financial status.

Like its proposed federal counterpart, New Jersey's proposed legislation provides an exception to the prohibition of using credit history to evaluate a prospective or current employee. The proposed amendment only permits an employer to consider an employee or applicant's credit history if a "good credit history or a good financial status" is a "bona fide occupational requirement." Such a requirement might exist for a position that: (i) is a managerial position that involves setting the direction or control of the business; (ii) involves access to customers', employees' or employers' personal or financial information, other than information customarily provided in a retail transaction; (iii) involves a fiduciary responsibility to the employer, including but not limited to, the authority to issue payments, transfer

money or enter into contracts; or (iv) provides an expense account.

Impact on Employers

In light of the EEOC's heightened scrutiny of the legality of the use of credit reports, and pending legislation to prohibit their use in most situations, attorneys counseling employers should assess how and why the employers obtain credit reports for their applicants and/or employees. If an employer intends to obtain credit information, it should review the requirements of each position and determine if a credit report is actually necessary for the specific position. Not all positions will require credit checks. If a credit check is deemed necessary for a position, an employer should be able to articulate a reason why obtaining credit information is job-related and consistent with business necessity, and that there are no alternative procedures to obtain the necessary information that poses a lesser risk for discrimination.

In addition, if an employer intends to take adverse action against an applicant or employee based upon results of a credit report, it must ensure that it complies with the FCRA and provide the individual with a pre-adverse action disclosure notice to allow the individual to review the information contained in the report. The employer must also provide the applicant or employee with the contact information for the consumer reporting agency that provided the credit report in order to allow the applicant or employee an opportunity to challenge or contest the contents of the report.

In sum, while the use of credit reports can in certain circumstances be a helpful and necessary tool for employers, they should proceed with caution when using such reports and ensure that they are in full compliance with all applicable laws. ■