

*The proceeding is not legal advice, either expressed or implied and is provided for educational purposes only. We recommend you seek the advice of your corporate legal counsel for all aspects of employment law.*

### **The Use of Credit Information in the Employment Decision**

Employers use credit information in employment decisions for various reasons. Some use credit information to verify that an applicant is responsible and reliable. Others are concerned about someone who cannot manage their money, are living beyond their means, or whose monthly debt payments are too high for the salary involved. Many employers limit the consideration of credit information to management and executive positions, or to positions that have access to cash, assets, a company credit card, or confidential information.

As an industry best practice, employers should approach the use of credit information in the hiring decision with caution, and have policies and procedures in place to ensure that the use of credit information is both relevant and fair. An employer should first determine if there is a sound business reason to obtain credit information. Unless the information is directly job related, its use could be considered discriminatory. Unnecessary credit reports can discourage applicants from applying, and running credit reports on all applicants, regardless of the position, can have the effect of discriminating against certain protected classes. Employers should be aware that there is the potential for errors in credit reports. A debt may be reported incorrectly, or an applicant could be the victim of identity theft. Negative information on a credit report may not be a valid predictor of job performance. On the other hand, hiring a person that handles money or company assets, makes fiduciary decisions or has access to other people's private data without running a credit reports could result in allegations of negligent hiring.

There are currently ten states that have legislation in place that restrict an employer's use of a credit report in the employment decision: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont and Washington. In all cases, there are exceptions within these laws to allow their use in certain circumstances and for certain positions (the exceptions are generally based on a "bona fide occupational requirement" or "substantial job-relatedness").

Here is a summary of the exceptions in these states:

#### California

California became the seventh state to limit the use of credit reports for employment purposes in October of 2011.

(California, cont.)

The law restricts employers and prospective employers, except financial institutions subject to 15 US Code §§6801-6809 (the Gramm Leach Bliley Act), from obtaining a consumer credit report unless the position sought is/involves:

1. Within the California state Department of Justice,
2. Managerial (defined as persons who manage the company or a department of the company, have the authority to make hiring/retention decisions, manage two or more persons, are exempt employees, and earn more than two times the state's current minimum wage), Law enforcement/peace officer,
3. Required legally to obtain such a report,
4. Regular access to (but excluding positions for routine credit card application processing):
  - o Bank or credit card information,
  - o Social security numbers, and
  - o Dates of birth
5. Job responsibilities where the person would be:
  - o a named signatory on bank or credit card accounts,
  - o authorized to transfer money on behalf of the employer
  - o authorized to enter into financial contracts on behalf of the employer
6. Access to confidential or proprietary information (description provided in bill)
7. Regular access to \$10,000 or more in cash

If a position falls into one of the exception categories above, the employer must provide the applicant/employee with written notice of the exception category which permits the processing of a consumer credit report.

### Colorado

In Colorado, the Employment Opportunity Act significantly restricts Colorado employers from using "consumer credit information" to make hiring and other employment decisions except for some narrow statutory exceptions. The Act went into effect in July of 2013. Private sector employers with four or more employees are generally prohibited from using "consumer credit information" to make employment decisions. "Consumer credit information" means written or oral information bearing on an applicant or employee's "creditworthiness, credit standing, credit capacity, or credit history," or an individual's credit score.

Only two classes of employers are permitted to use consumer credit information for employment purposes for relatively broad categories of employee: banks or financial institutions or employers who are "required by law" to procure consumer credit information.

(Colorado, cont.)

Other employers may only review consumer credit information to make employment decisions for two specific types of positions:

1. executive or management personnel; or
2. officers or employees who constitute professional staff to executive and management personnel" or one that "[i]nvolves contracts with defense, intelligence, national security or space agencies of the federal government."

An employer who conducts credit checks for potential or actual employees in either category must have a bona fide reason for asking for the information, and that reason must be "substantially related" to the applicant or employee's current or potential job.

If the employer does use credit information for an employment purpose, the employer can give the employee an opportunity to explain any "unusual or mitigating circumstances where the consumer credit information may not reflect money management skills but is rather attributable to some other factor, including layoff, error in the credit information, act of identity theft, medical expense, military separation, death, divorce, or desperation in the employee's family, student debt, or a lack of credit history."

### Connecticut

Connecticut law generally prohibits employers from using credit reports in making employment decisions regarding existing employees or applicants. The law applies to all employers in Connecticut that have at least one employee.

Employers may not require an employee or prospective employee to consent to a credit report, subject to the following exceptions:

1. The employer is a financial institution, as defined under the law;
2. The report is required by law;
3. The employer reasonably believes the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment; or
4. Such report is substantially related to the employee's current or potential job or the employer has a bona fide purpose for requesting or using information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant.

(Connecticut, cont.)

A report is "substantially related to the employee's current or potential job" and allowable if the position:

1. Is a managerial position that involves setting the direction or control of a business, division, unit or an agency of a business;
2. Involves access to customers', employees' or the employer's personal or financial information, other than information customarily provided in a retail transaction;
3. Involves a fiduciary responsibility to the employer, as defined under the law;
4. Provides an expense account or corporate debit or credit card;
5. Provides access to certain confidential or proprietary business information, as defined under the law; or
6. Involves access to the employer's nonfinancial assets valued at \$2,005 or more, including, but not limited to, museum and library collections and to prescription drugs and other pharmaceuticals.

### Hawaii

In Hawaii, an employer may not refuse to hire or employ, bar or discharge from employment, or otherwise discriminate against any individuals in the terms, conditions and privileges of employment of any individual because of his or her credit history or credit report, unless:

1. Such information directly relates to a bona fide occupational qualification (defined in the statute), under which such an employment action is reasonably necessary to the normal operation of a particular business or enterprise and has a substantial relationship to the functions and responsibilities of prospective or continued employment,
2. The employer is expressly permitted or required to inquire into an individual's credit history for employment purposes pursuant to state or federal law,
3. The inquiry/consideration involves a "managerial" or "supervisory" employee, or
4. The employer is a financial institution in which deposits are insured by a federal agency having jurisdiction over the financial institution.

Regardless, inquiry or consideration into an applicant's credit history or credit score may take place only after the prospective employee has received a conditional offer of employment, which may be withdrawn if the information in the credit history or credit report is directly related to a bona fide occupational qualification. A managerial employee is defined as "an individual who formulates and effectuates management policies by expressing and making operative the decisions of the individual's employer."

(Hawaii, cont.)

A supervisory employee is defined as "an individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibility to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires use of independent judgment."

### Illinois

In Illinois, the new law is effective January 1, 2011, and specifically, employers may not:

1. Fail or refuse to hire applicants or otherwise discriminate against individuals, including negatively impacting employment or compensation based on the individual's credit history or report,
2. Inquire about an applicant's or employee's credit history, or
3. Obtain an applicant or employee's credit report from a consumer reporting agency.

Retaliation against any person who files a complaint, participates in an investigation or proceeding, or opposes a violation of the Act is specifically prohibited. The law further prohibits employers from requiring applicants or employees to waive any of their rights under the law, and any such waiver would be invalid and unenforceable. Individuals who have been injured due to an employer's violation of this law are specifically permitted to bring suit in civil court and, if successful, may be entitled to injunctive relief, damages and costs, including attorney's fees.

A satisfactory credit history is not a bona fide occupational requirement unless at least one of the following circumstances is present:

1. State or federal law requires bonding or other security covering an individual holding the position.
2. The duties of the position include custody of or unsupervised access to cash or marketable assets valued at \$2,500 or more.
3. The duties of the position include signatory power over business assets of \$100 or more per transaction.
4. The position is a managerial position which involves setting the direction or control of the business.
5. The position involves access to personal or confidential information, financial information, trade secrets, or State or national security information.
6. The position meets criteria in administrative rules, if any, that the U.S. Department of Labor or the Illinois Department of Labor has promulgated to establish the circumstances in which a credit history is a bona fide occupational requirement.
7. The employee's or applicant's credit history is otherwise required by or exempt under federal or State law.

### Maryland

Maryland enacted legislation (the Job Applicant Fairness Act) that places restrictions on employers that use Credit Reports in the employment decision. Effective October 1, 2011 the legislation bars employers

from using credit reports in the employment decision, with some exceptions. The exceptions allowed are for those positions where there is a "bona fide purpose that is substantially job related." This exception generally applies to positions involving money-handling and other confidential job duties. For instance, employers may request or use credit information for employees in managerial positions that control or direct part of the business, employees who are provided expense accounts or corporate credit cards, and employees who have access to confidential business information. Notably, where an employer chooses to request or use credit information for a bona fide purpose, it must disclose its intent to do so in writing to the employee or applicant.

### Oregon

In Oregon, an employer is prohibited from using credit histories in employment decisions, with four exceptions:

1. Federally insured banks and credit unions,
2. Employers required by state or federal law to use credit history for employment purposes,
3. Certain public safety officers,
4. When credit information is "substantially job-related" and the employer has disclosed to the applicant/employee the reason(s) for obtaining credit history.

The Oregon Bureau of Labor and Industries released rules defining what constitutes "substantially job-related". The rules clarify that employers should not order credit reports solely on the basis that job duties include the exchange of cash, checks and credit or debit card numbers. Financial information customarily involved in a retail transaction includes "exchanges of cash, checks and credit or debit card numbers." Specifically the rules state:

1. Employers must evaluate whether credit history information is substantially job-related based on the position for which the individual is applying or holds
2. Credit history is substantially job-related if:
  - (i) The position requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit, or
  - (ii) The employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.

### Vermont

Vermont became the eighth state to restrict the use of credit information in the employment process. The law was effective July 1, 2012 and goes even further in its restrictions than other states in that employers are not only prohibited from considering credit reports and credit information, they may not even inquire about an applicant or employee's credit history. In general, the Act prohibits employers from inquiring into an applicant or employee's credit report or credit history and prohibits employers from discriminating against or making any employment decisions (e.g. hire, fire, alter the compensation or any other term or condition of employment) against an individual based on his or her credit report or credit history. In the Act, credit history is defined to include any credit information obtained from any third party, not only information contained in a credit report.

There are a number of exceptions provided for in the Act, but generally an employer may only obtain and use credit history information in the employment context if they meet one or more of the following criteria:

- The information is required by state or federal law or regulation;
- The position:
  - involves access to "confidential financial information," defined as sensitive financial information of commercial value that consumers or clients explicitly authorize the employer to have and which the employer only entrusts to certain employees; or
  - requires a financial fiduciary responsibility to the employer or its clients, including authority to issue payments, collect debts, transfer money, or enter into contracts; or
  - involves access to employer's payroll information; or
  - is that of a law enforcement officer, emergency medical personnel or a firefighter.
- The employer is a financial institution or credit union; or
- The employer can demonstrate that the information is "valid and reliable predictor of employee performance in a specific position of employment."

However, an employer should be aware that even if they meet one of the exception criteria define in the act they are still prohibited from using the credit report or credit history information as the sole factor in making the employment decision. Similar to the federal Fair Credit Reporting Act, employers are required to get the applicant or employee's consent as well as disclose to the applicant or employee the purpose of the request. Also similar to the federal FCRA if an employer intends to take an adverse employment action based partly on the contents of the credit report, it must notify the affected individual in writing of its reasons for doing so and allow an opportunity for the applicant or employee to contest the accuracy of the credit report or credit history.

### Washington

In Washington consumer reports addressing the consumer's creditworthiness, credit standing, or credit capacity may not be procured for employment purposes unless:

1. That information is substantially job related and the employer's reasons for the use of such information are disclosed to the consumer in writing, or
2. It is otherwise required by law.

### What Employers Should Do

Given the convergence of both scrutiny and legislative activity at the federal level and legislation and pending legislation at the state level, employers should take steps to ensure compliance with these laws. Employers who use credit history as part of a background check or other hiring processes should take stock of their policies in light of the shifting tide against use of such information. First, employers should analyze their existing job positions to determine which positions fall within the law's exceptions and, thus, may permissibly involve consideration of an applicant's or employee's credit history. Second, employers should review their existing job positions to determine whether consideration of credit falls within the guidelines published by the EEOC. Third, employers should review materials such as employment applications, background check consent forms, interview guides and the like to ensure that no questions about credit history are asked and no request for information concerning the individual's credit is made except in situations satisfying the EEOC guidelines and the state law's exceptions. A similar review should be conducted concerning post-hire employment materials, such as promotion interview guides, to ensure that prohibited questions are not asked and credit reports are not run, except as allowed by EEOC guidelines and state laws. Finally, employers should update all managers who play a role in making employment decisions concerning the EEOC guidelines and state law's requirements to ensure they know how to comply

### How Orange Tree Can Help

If you determine that using credit information in your background screening program is appropriate for your applicants or certain positions within your organization, Orange Tree Employment Screening can help you comply with EEOC guidelines and state laws by creating separate service packages for those positions where a credit service is appropriate and by removing credit services from your service packages where you deem it is not appropriate. Contact your Orange Tree Customer Care Consultant direct or by e-mail ([customercare@otes.com](mailto:customercare@otes.com)) or phone (877-483-7138) to request changes to your service packages.