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Employment Law Forum

Pre-employment Screening –
Limitations on Credit Checks

Background:

Privacy and civil rights advocates have argued for many years that the use of credit reports as a part of the pre-employment screening process is unfairly eliminating qualified individuals in the hiring process. The use of credit reports to determine new hires has become a much larger issue since the recession, where the foreclosure crisis and double-digit unemployment have eroded the credit status of millions of individuals. The recently released national unemployment rate of 8.2% for June does not reflect the double-digit rates that continue for people of color throughout the United States.

In 1971 the United States Supreme Court established the need for each component of the employment selection process to be job related. The *Griggs v. Duke Power Company,* (401 U.S. 424, [1971]), decision held that an employment test with a substantial adverse impact was presumptively discriminatory. Use of such a test could only be permitted if justified by business necessity which in turn could be established through a determination as to whether the test was job related. Once adverse impact was established, the employer bore the burden of showing whether the test was job related.

Recognizing the disparate impact caused through the selection process, pre-hiring procedures including the application, job description, qualification standards, written, oral, physical, performance, background investigation, hiring interview, pre-employment physical examination, psychological, and related tests were required to be job related and consistent with business necessity. There is little question that an inquiry into a candidate's credit history is an extension of the employment process and must be job related accordingly.

Legislation Restricting the Use of Credit History

During the first six months of 2012 there have been 39 bills in 20 states introduced or are pending relating to the use of credit information in employment. During 2011 lawmakers in 25 states introduced legislation restricting the use of credit histories for most jobs. Considering the high unemployment rate, difficult economic times, and the corresponding negative impact of low credit scores, using credit history as part of the employment process has become subject to increased scrutiny on a nationwide basis.

Exceptions are often provided for jobs where there is a direct relationship between a credit check and the position. These often include persons with access to personal and confidential protected information, persons that must be bonded or have signing authority for transactions of varying amounts, individuals with unsupervised access to cash or other assets, certain financial and related managers, and sworn peace officers.

The total number of states that presently limit employers' use of credit information in the employment screening process is seven. These include California, Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington. There are exceptions in each of the states with respect to certain types of jobs. Some states limit the time period for reviewing credit information. California, for example, for jobs where screening is allowed, the information sought and obtained cannot be over seven years old with a few exceptions, such as bankruptcy within the last ten years.

The Equal Employment Opportunity Commission (EEOC) is investigating the use of credit reports by employers. In 2011 EEOC was litigating a disparate impact lawsuit against Kapland Higher Education Corporation in federal court in Ohio. EEOC contends that Kaplan violated Title VII of the Civil Rights Act of 1964 by rejecting black applicants nationwide based on their credit histories, without showing that the practice was job-related and justified by business necessity (*EEOC v. Kaplan Higher Education Corporation,* No. 1:10 CV 2882, N.D. Ohio, E.D. [2011]).

Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) is a federal law that regulates the collection, dissemination, and use of consumer information, including consumer credit information. Consumer reporting agencies (CRAs) are entities that collect and disseminate information about consumers to be used for credit evaluation and certain other purposes including employment. Employers that use third parties (CRAs) to perform background checks are subject to the provisions of the FCRA. Many states have similar laws under fair employment practice laws.

The FCRA provides consumers several rights with respect to inquiries about their credit history and the use of such information. If the employer intends not to hire someone based upon information in the credit report, then the applicant must first receive a copy of the report and statement of rights. Additionally, the applicant has a right to review the credit report and dispute any information believed to be inaccurate or incomplete. In most cases a CRA may not report negative information that is more than seven years old, or bankruptcies that are more than 10 years old.

A credit report typically contains four types of information. First, it gives identifying information such as name, social security number, and past addresses. Second, it shows how persons pay their debts, such as by credit cards and personal loans, and the amount of their payments for vehicles, student loans, and mortgage payments. It also shows how much credit a person has been given, how much they currently owe, and whether debts have been paid late or sent to a collection agency. Third, it will indicate who has requested a credit report. Finally, it will report public records such as court judgments, liens, and bankruptcies. Negative infor-

mation will remain on a report for seven years, and after 10 years bankruptcies may not be included in a consumer report.

Bankruptcy Discrimination

Bankruptcies are a matter of public record and may appear on an individual's credit report for not more than 10 years. The Federal Bankruptcy Act prohibits employers from discriminating against applicants because they have filed for bankruptcy.

The United States Court of Appeals for the Third Circuit in a 2010 decision ruled that applicants for employment in the private sector can consider an applicant's bankruptcy under United States bankruptcy laws when making an employment decision (*Rea v. Federated Investors,* No. 10-1440, 2010 WL 5094250 [3rd Cir. 2010]). The Third Circuit covers the states of Delaware, New Jersey, and New York and was litigated on the basis that the actions were discriminatory under bankruptcy law. The Fifth Circuit Court of Appeals on March 4, 2011, covering the states of Texas, Louisiana, and Mississippi, also ruled that private employers may discriminate against job applicants based on a bankruptcy (*Shanni Burnett v. Stewart Title, Inc.,* No. 10-20250, 2011 WL 754152 [5th Cir. 2011]).

The recent circuit court decisions do not preclude an individual from filing a bankruptcy discrimination claim under Title VII of the Civil Rights Act by showing that the use of bankruptcy creates a disparate impact on the basis of race, color, religion, sex, national origin, or other protected category. Title VII prohibits not only intentional discrimination, but also practices that have the effect of discriminating.

Conclusion

Consistent with the *Griggs* decision, the pre-employment screening process must be job related and consistent with business necessity. Bankruptcy may be a valid factor in the hiring process for a limited number of jobs involving financial and other positions where there is a direct relationship between the position and an individual's bankruptcy. If credit history is used during the hiring process, employers must comply with the provisions of the FCRA, ascertain that the need to obtain credit information is job related, and when bankruptcies are reported, give consideration to whether the debt(s) resulting in a bankruptcy filing are an abnormality after reviewing the individual's credit history (e.g., major medical expense v. credit card, car payments, etc.).

Employers must be sensitive to job related issues addressing discrimination and disparate impact or otherwise be exposed to compensatory and punitive damages under Title VII and other EEOC enforced laws. Hiring authorities are advised to always consult counsel when considering individuals with sensitive backgrounds and employment histories.