A Timely Analysis of Legal Developments

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June 18, 2012

Vermont Becomes the Eighth State to Restrict the Use of Credit Reports for Employment Purposes

By Rod Fliegel and Jennifer Mora

On May 17, 2012, Vermont Governor Peter Shumlin signed Vermont Act No. 154 (S. 95), which prohibits employers, subject to certain exceptions, from *using* or *inquiring* into an applicant or employee's credit report or "credit history" for employment purposes. Relying on a variety of statistics regarding the purported reason that families "go into debt" and the alleged increased use of credit reports for employment purposes, the legislature stated that the new law was necessary because "information contained in a credit report has no correlation to job performance" and "credit reports do not provide meaningful insight into a candidate's character, responsibility, or prospective job performance."

Effective July 1, 2012, Vermont is the eighth state to regulate the use of credit-related information for employment purposes, following on the heels of laws enacted in California, Connecticut, Hawaii, Illinois, Maryland, Oregon and Washington.[1] Vermont's efforts at regulating the use of credit reports for employment purposes, however, have resulted in requirements that exceed those in other state laws, including even California. For example, although the new Vermont law will exempt certain employers from most obligations, it still prohibits exempt employers from using an applicant or employee's credit history as the "sole factor" in employment decisions. In addition, Vermont employers who take advantage of an exemption and also take adverse action against an applicant or employee based in part on his credit history must return the report to the individual or destroy it altogether. Neither the federal Fair Credit Reporting Act (FCRA) nor any of the seven other similar state laws imposes such a requirement on employers.[2]

This trend is likely to continue, as several other states and the federal government are considering comparable legislation. In fact, the Equal Employment Opportunity Commission (EEOC) is actively investigating use of credit reports by employers and presently is litigating disparate impact lawsuits against employers in federal court in Maryland and Ohio. In addition, although the EEOC was expected to issue updated enforcement guidance regarding the use of credit reports for

1 See Littler ASAPs *California Joins States Restricting Use of Credit Reports for Employment Purposes* (Oct. 2011); *Use of Credit Reports by Employers Will Soon Be Restricted in Connecticut* (July 2011); *New Illinois Law Puts Credit Reports and Credit History Off Limits for Most Employers and Most Positions* (Aug. 2010); *Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History* (Apr. 2011); and *New Oregon Law Prohibits Credit Checks* (Apr. 2010).

2 See Littler ASAP *New FTC Regulations On Proper Destruction of "Consumer Information": Steps Employers Need to Take to Comply* (May 2005).

employment purposes in April 2012, the EEOC has not yet done so. Employers who use credit reports for employment purposes in any of these eight states therefore should review and, if appropriate, modify their policies for compliance. All employers should continue to stay abreast of additional developments in this dynamic area of employment law.

The New Law's Requirements

Vermont Act No. 154 prohibits employers with one or more employees from refusing to hire, terminating or otherwise discriminating against individuals with respect to "employment, compensation, or a term, condition, or privilege of employment because of the individual's credit report or credit history." It also prohibits employers from inquiring about an applicant or employee's credit report or credit history. "Credit history" means any information obtained from a third party that reflects or pertains to an applicant or employee's "borrowing or repaying behavior" or "financial condition or ability to meet financial obligations," even if that information is not contained in a "credit report."

Employers are exempt from both restrictions if one or more of the following conditions are met:

1. The information is required by state or federal law or regulation.
2. The position of employment involves access to "confidential financial information," which means sensitive financial information of commercial value that a customer or client of the employer gives explicit authorization for the employer to obtain, process and store and that the employer entrusts only to managers or employees as a necessary function of their job duties.
3. The employer is a financial institution or a credit union as defined under applicable state law.
4. The applicant or employee will or does work as a law enforcement officer, emergency medical personnel or a firefighter (as those positions are defined in state law).
5. The position will require the applicant or employee to have a financial fiduciary responsibility to the employer or a client of the employer, including the authority to issue payments, collect debts, transfer money or enter into contracts.
6. The employer can demonstrate that the information is a valid and reliable predictor of employee performance in the specific position of employment.
7. The position of employment involves access to an employer's payroll information.

Use, Consent and Disclosure

Even if an employer is exempt from the general requirement that employers not use credit reports or credit history for employment purposes, the new law curiously states that those employers that do fit within an exemption nevertheless "may not use an employee's or applicant's credit report or history as the *sole factor*" in employment-related decisions.

Moreover, if an employer that qualifies for an exemption seeks to obtain or act on an applicant or employee's credit report or history that contains information about the individual's credit score, credit account balances, payment history, savings or checking account balances or savings or checking account numbers, the employer is subject to specific consent and disclosure requirements. First, the employer must obtain the applicant or employee's written consent *each time* the employer seeks to obtain the credit information. In other words, Vermont employers that use credit reports or credit history for employment purposes will not be able to rely on a blanket authorization (commonly known as "Evergreen" consent) to obtain subsequent reports during the individual's employment if the credit report or history will contain any of this specific information.

In addition, an employer that qualifies for an exemption must disclose in advance in writing to the applicant or employee the reason that the employer is accessing the credit report or history.

Costs and Confidentiality

Those employers that qualify for an exemption may not require applicants or employees to pay the costs associated with obtaining the credit report or history. In addition, employers that obtain credit reports or credit history based on one or more of the exemptions must maintain the

credit information in a confidential manner. Applicants and employees also have the right to contest the accuracy of information contained in their credit report or history, although it is unclear what this means and whether this right is any greater than the rights afforded by the FCRA.

Adverse Action Notice

If an employer that obtains and uses a credit report or history based on one of the enumerated exemptions takes an adverse employment action against an individual based in part on the credit report or history, the employer must provide to the applicant or employee written notification of the reason for the adverse decision. In circumstances where the exempt employer terminates an incumbent employee or refuses to hire an applicant based in part on his credit report or history, the employer must either provide the report to the applicant or employee or destroy the credit report "in a secure manner that ensures the confidentiality of the information in the report."

Remedies

Vermont Act No. 154 will add a new section to Vermont's Fair Employment Practices statute (Vt. Stat. Ann. tit. 21, §§ 495 *et seq.*). That statute allows an applicant or employee to bring an action against an employer seeking compensatory and punitive damages, as well as equitable relief, reinstatement and attorneys' fees and costs. Vermont's Fair Employment Practices statute also grants the attorney general the authority to enforce the statutory provisions and seek civil penalties.

Open Questions

The new law raises important questions. For instance:

- The new law is unclear as to the timing of the written notification explaining to an applicant or employee the reason that an employer is taking adverse action based in part on information contained in the credit report or history. For instance, the FCRA typically requires employers that take adverse action against applicants or employees based in whole or in part on information contained in a "consumer report" (*e.g.*, a credit report) to provide *separate* pre-adverse action and adverse action notices. It is uncertain whether a Vermont employer that takes adverse action based in part on the credit report or history is in compliance with state law if it provides the individual with the reason for the adverse decision in the pre-adverse action notice or later, when the final adverse decision is made and the adverse action notice has been provided to the individual.
- The new Vermont law allows applicants and employees to contest the accuracy of information contained in their credit report, but leaves many procedural questions unanswered. For example, the law does not state whether applicants or employees have the right to or should submit a dispute directly to the employer or to the background screening company that furnished the credit report, or both. The law also does not state what an employer or background screening company must do, if anything, upon receipt of a dispute from an applicant or employee. The FCRA allows individuals to submit disputes directly to the background screening company, which must conduct an investigation into the completeness or accuracy of the information within 30 days of receiving the individual's dispute. It is unclear whether an employer is in compliance with the new Vermont law if the background screening company complies with the FCRA's reinvestigation requirements upon receipt of a dispute.

Action Steps for Employers

Before July 1, 2012, all employers operating in Vermont that use credit reports for employment purposes should evaluate whether they can continue to do so under the new law and, if so, which exemption provisions, if any, they can invoke to justify the screening. Multi-state employers also should evaluate compliance with the laws in the seven other states that regulate the use of credit history information by employers. All employers also should continue to monitor efforts in Congress to regulate the use of credit history information and advisory guidance from, and litigation initiated by, the EEOC.

Employers also should evaluate the sufficiency of the paperwork they use in conjunction with their screening procedures (*e.g.*, consent forms and adverse action notices) and modify the paperwork as needed to incorporate the disclosures mandated by the new Vermont law. Employers that use background screening companies to obtain credit reports for employment purposes also should ensure that disputes about credit

reports are promptly investigated in compliance with the new law and the FCRA. Due to a recent and significant spike in class action litigation under the FCRA, employers also are advised to evaluate their compliance with that federal law.[3]

Summary of Vermont's Credit Report Law

Duties/Restrictions under New Law	Employers or Positions Not Covered by an Exemption	Employers or Positions Covered by an Exemption
Prohibited from failing or refusing to hire or recruit, discharging or otherwise discriminating against a candidate in the terms and conditions of employment because of his or her credit report or credit history	Yes	No. Exempt employers/positions may use credit reports, subject to conditions (below)
Prohibited from using an employee's or applicant's credit report or history as the sole factor in employment-based decisions	N/A	Yes
Obtain consent each time a credit report is used for employment purposes	N/A	Yes
Provide advance written notice of the reason for use of a credit report	N/A	Yes
Provide written notification of the reason for any adverse action based in part on the credit report	N/A	Yes
Maintain credit reports in confidence	N/A	Yes
Return to the candidate or destroy credit report if adverse action is taken	N/A	Yes

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3 See Littler ASAP *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers* (Dec. 2011).