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March 17, 2011 An ALM Website

Avoid Credit History Pitfalls When Making Employment Decisions

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Special to Law.com
March 17, 2011

In a recent decision, the 3rd U.S. Circuit Court of Appeals held that the Bankruptcy Code's anti-discrimination provisions applicable to private employers do not apply to hiring decisions. See *Rea v. Federated Investors*, No. 10-1440, 2010 WL 5094250 (3d Cir. Dec. 15, 2010). Finding that the language of the statute is plain and that Congress chose to prohibit discrimination in hiring in the anti-discrimination section of the Bankruptcy Code applicable to public employers but not in the section applicable to private employers, the court held that Federated Investors did not violate 11 U.S.C. §525(b) when it refused to hire the plaintiff because he had previously declared bankruptcy. While this decision indicates that private employers may avoid liability under the Bankruptcy Code when making hiring decisions on the basis of an applicant's bankruptcy filing, such employers will face liability under the Bankruptcy Code's anti-discrimination provisions if they terminate an employee or otherwise discriminate against an employee on the basis of his bankruptcy filing. *Id.*

However, employers may run afoul of various state and federal statutes when making employment decisions, including hiring decisions, based on employees' and applicants' credit histories. The Equal Employment Opportunity Commission contends that an employer violates Title VII of the Civil Rights Act of 1964 if it makes employment decisions on the basis of individuals' credit histories, as doing so has an adverse impact on various minority groups according to the EEOC. In 2009, the EEOC filed a lawsuit against a Dallas-based convention and corporate events planning company, alleging that the company unlawfully discriminated against black, Hispanic and male applicants in violation of Title VII by using credit histories and certain types of criminal background information when making hiring decisions. See *EEOC v. Freeman*, No. 8:09-cv-02573-RWT (S.D. Md., complaint filed Sept. 30, 2009). In October 2010, the EEOC held a public meeting to explore the practice of employers considering applicant and employee credit reports in making employment decisions, and the potential discriminatory impact of such practice. While employers faced with Title VII discriminatory impact lawsuits can defend the challenged practice by showing that the practice is job-related and consistent with business necessity, disparate impact plaintiffs can still prevail if they show that an alternate practice exists that achieves the same purpose without creating the discriminatory impact.

In addition, an employer's use of credit history information when making employment decisions may violate various state anti-discrimination laws, as many such laws offer protections equal to or greater than those provided under Title VII. Moreover, certain state laws outright prohibit employers from accessing and using credit history information when making employment decisions. For example, Oregon law prohibits most employers from obtaining or using information contained in an applicant or employee's credit history when making employment decisions, including hiring decisions. See O.R.S. §1. Oregon's law does not apply to certain employers, such as federally insured banks and credit unions, and its prohibitions do not extend to the use of credit history information when such information is substantially job-related and the employer's use is disclosed in writing to the employee or applicant. *Id.* Similarly, Illinois law prohibits most employers from making employment decisions, including hiring decisions, on the basis of an applicant or employee's credit history or credit report. See 820 ILCS §70/10. These prohibitions do not apply to some employers, such as certain banks and government agencies, and Illinois employers may use such credit history information when a satisfactory credit history is an established bona fide occupational requirement for a particular position. *Id.*

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Employers may also run afoul of the federal Fair Credit Reporting Act if they use a third-party consumer reporting agency to conduct background checks, which typically include credit history information, and an adverse employment decision is made based on such information, unless the employer complies with the FCRA's strict notice, authorization and disclosure requirements prior to taking adverse employment action based on such information. See 15 U.S.C. §1681 *et. seq.* Some states have laws which contain similar or more stringent protections. See, *e.g.*, Cal. Civil Code §1786 et seq. Additionally, in July 2009 the "Equal Employment for All" Act was introduced into Congress, proposing to amend the FCRA to prohibit the use of consumer credit checks to evaluate job candidates. See H.R. 3149. Although this bill was never put up for a vote before the session ended, Rep. Steve Cohen reintroduced the bill on Jan. 19, 2011.

In light of these developments, employers should carefully examine any practices which entail obtaining or using credit related information in making employment decisions. Only those practices which comply with applicable federal and state laws should be continued, and such information should only be used for decisions where the employer can articulate a job-related rationale consistent with business necessity for consulting credit information, such as the position provides access to finances or to sensitive financial information about the company, its customers, or its employees.

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