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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 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.

Increased Scrutiny and Legislation

We noticed at the beginning of 2010, with the Equal Employment Opportunity Commissions (EEOC) release of its charge statistics for fiscal year 2009, an increase in the number of employment related claims. As the year progressed, that trend has become a standard, and the ongoing increase in discrimination charge filings accompanied with an increase in EEOC enforcement would suggest that employers should consider broadening their efforts to maintain a discrimination-free workplace.

In December of 2010, the EEOC announced a lawsuit against a nationwide provider of post-secondary education, charging that the company has engaged in a pattern or practice of unlawful discrimination by refusing to hire a class of black job applicants. According to the EEOC press release, the company has "...rejected job applicants based on their credit history. This practice has an unlawful discriminatory impact because of race and is neither job-related nor justified by business necessity, the EEOC charged in its lawsuit. As a result of these practices, the company has violated Title VII of the Civil Rights Act of 1964, according to the lawsuit (Civil Action No. 1:10-cv-02882) filed by the EEOC's Cleveland Field Office in U.S. District Court for the Northern District of Ohio. It is a violation of Title VII to use hiring practices that have a discriminatory impact because of race and that are not job-related and justified by business necessity."

In July of this year, H.R. 3149 was introduced in the U.S. House of Representatives, to amend the Fair Credit Reporting Act. Known as the "Equal Employment for All Act," it sought to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions. This bill was referred to and stayed in committee; however passage of laws in Oregon, Illinois, and other states seem likely to drive interest in this sort of legislation at the federal level in the coming year. In addition, the Equal Employment Opportunity Commission's recent interest in the use of credit checks in employment decisions could also drive increased interest in this sort of federal legislation.

In addition, there are currently four states that have legislation in place that restrict an employer's use of a credit report in the employment decision: Illinois, Oregon, Hawaii, 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:

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.

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:
 1. The position requires access to financial information not customarily provided in a retail transaction that is not a loan or extension of credit, or
 2. The employer is required to obtain credit history as a condition of obtaining insurance or a surety or fidelity bond.

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 bone 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." 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."

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) or phone (877-483-7138) to request changes to our service packages.