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Connecticut and Maryland to Restrict Employers' Use of Credit Checks

Both Connecticut and Maryland recently enacted laws that generally will prohibit employers from using a job applicant's or an employee's credit information in making employment decisions. The laws will go into effect on October 1, 2011.

Background

Hawaii, Illinois, Oregon and Washington currently limit employers' use of credit history in employment decisions. Legislation that would impose similar restrictions is pending in a number of states and also at the federal level.

BUCK COMMENT. *At the federal level, the Equal Employment for All Act ([H.R. 321](#)) proposes to amend the Fair Credit Reporting Act to prohibit a current or prospective employer from using a consumer report or an investigative consumer report for making employment decisions, with certain job-related exceptions.*

On April 12, 2011, Maryland Governor Martin O'Malley signed into law the Job Applicant Fairness Act ([H.B. 87](#)). On July 13, 2011, Connecticut Governor Dannel Malloy signed similar legislation ([S.B. 361](#)) into law. Both laws take effect on October 1, 2011.

The New Laws

The laws recently enacted in Connecticut and Maryland differ in their application but have many strikingly similar provisions. Although both public and private sector employers are expressly covered by the new Connecticut law, it appears that Maryland's law will not apply to governmental employers. Both laws generally exempt financial institutions, credit checks required by federal or state law for employment, and credit checks that are for a *bona fide* purpose that is substantially job-related. Key provisions of each state's law are discussed below.

Connecticut

The Connecticut law applies to all private sector employers with one or more employees, as well as to the state and its political subdivisions. It generally prohibits an employer or its agent from requiring an employee or job applicant to consent to a credit check as a condition of employment. Requiring a credit report that contains information about an employee's or prospective employee's credit score, credit balances, payment history,

savings or checking account balances or checking account numbers is expressly prohibited unless it falls within the following limited exceptions:

- The employer is a financial institution;
- The report is required by law;
- The employer reasonably believes that the employee has violated a law related to his or her employment; or
- The 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 job-related, provided it is disclosed in writing to the employee or job applicant.

For purposes of the new law, “substantially related” means information in the credit report that relates to a job that involves:

- A managerial position that sets the direction or control of a business, or a department, division, unit or agency of a business;
- Access to customers’, employees’ or the employer’s personal or financial information (other than information customarily provided in a retail transaction);
- A fiduciary responsibility to the employer (such as the authority to issue payments, transfer money or enter into contracts);
- Use of an expense account or corporate debit or credit card;
- Access to confidential or proprietary business information or trade secrets; or
- Access to the employer’s nonfinancial assets valued at \$2,500 or more, including to museum and library collections and to prescription drugs and other pharmaceuticals.

The law does not provide a private right of action for its violation. Rather, employees or prospective employees must file a complaint with the Labor Commissioner, who will investigate and, if appropriate, hold a hearing. An employer will be liable for a civil penalty of \$300 for each inquiry found to have violated the new law.

Maryland

The Maryland law generally prohibits employers from using a job applicant’s or an employee’s credit report or history for employment purposes, including making hiring and firing decisions, and determining compensation and other terms, conditions or privileges of employment. Although the law does not define which employers are subject to its provisions, Maryland’s Department of Legislative Services previously [advised](#) that the law does not apply to employers that are units of government.

Specifically exempted from the new law's coverage are:

- Financial institutions that accept federally insured deposits, their affiliates and subsidiaries;
- Credit union share guaranty corporations approved by the Maryland Commissioner of Financial regulations;
- Investment advisors or their affiliates registered with the Securities and Exchange Commission; and
- Entities required under federal or state law to inquire into an applicant's or employee's credit report or history for employment purposes.

BUCK COMMENT. *Unlike the Connecticut law, the Maryland law uses the term employer without specifying a minimum number of employees an employer must have to trigger coverage. Until further guidance is available, private sector employers with at least one employee in Maryland should assume the law will apply to them unless they meet one of the stated exceptions.*

The law also provides an exemption for employers that do not fall into the four categories above to request or use an applicant's or employee's credit report or credit history in two situations. An employer may request or use the credit report or history if the individual has received a job offer and the credit report or history will not be used for a prohibited purpose, or if the employer has a bona fide "substantially job-related" purpose for requesting or using the information. With respect to "substantially job-related" requests, the employer must disclose to the applicant or employee in writing its intent to request a credit check. Positions that qualify for the bona fide purpose exemption include those that involve:

- A managerial position that sets the direction or control of a business, or a department, division, unit or agency of a business;
- Access to customers', employees', or the employer's personal information (other than such information customarily provided in a retail transaction);
- A fiduciary responsibility to the employer, including the authority to issue payments, collect debts, transfer money, or enter into contracts;
- Use of an expense account or a corporate credit card; or
- Access to trade secret or other confidential business information.

Importantly, the law does not prohibit all employment-related background investigations. It specifies that an employer may perform an investigation that includes use of a consumer or investigative consumer report, as long as it is authorized under the federal Fair Credit Reporting Act (FCRA) and does not involve investigation of an applicant's or employee's credit information.

BUCK COMMENT. *The FCRA, which controls when consumer reporting agencies can provide credit history information, generally prohibits the employer's receipt of a credit report without the job applicant's or employee's written consent. Although FCRA-required employer notice and disclosure obligations apply to background checks made by a consumer reporting agency, they do not apply to an employer's background investigation. However, in light of the Equal Employment Opportunity Commission's recent focus on the potentially discriminatory impact of pre-employment credit and criminal background checks on minorities, employers may wish to review their current practices.*

Like Connecticut, Maryland does not provide a private right of action to an applicant or employee who believes his or her prospective or current employer has violated the Act. Instead, the applicant or employee must file a written complaint with the Commissioner of Labor and Industry. If the Commissioner is unable to resolve the matter informally, the Commissioner may assess a civil penalty of up to \$500 for a first violation and up to \$2,500 for a repeat violation.

Conclusion

The new laws, which generally prohibit the use of credit information for employment purposes, will affect most employers that operate in Connecticut or Maryland. Multi-state employers should also consider whether they are subject to, and are in compliance with, similar laws in other states. Employers should review their current hiring process along with existing employment policies and procedures to ensure that they will be in compliance when the new laws take effect.

Buck's consultants would be pleased to discuss the potential impact of applicable laws on your hiring process and current employment policies and practices.

This FYI is intended to provide general information. It does not offer legal advice or purport to treat all the issues surrounding any one topic.