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New California Law Restricts Use of Credit Reports by Employers

The federal Fair Credit Reporting Act (FRCA) and state Consumer Credit Reporting Agencies Act (CCRAA) already protect California job applicants. Under these laws, employers have to follow specific procedures designed to protect employees before requesting credit reports and if adverse action is taken based on a report. Faced with the current economic climate and concerns regarding the plight of the unemployed, on Monday, October 10, 2011, Governor Brown signed into law AB 22, which further curtails pre-employment investigative inquiries by prohibiting most employers and prospective employers from even obtaining an applicant's consumer credit report. With this law on the books, California joins the ranks of Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington which all restrict the use of credit checks in most employment decisions.

What Does AB 22 Do?

Though touted by supporters as necessary to protect workers whose credit scores have plummeted in the economic crisis and to remove barriers to employment, AB 22 significantly hamstrings employers' ability to gauge an applicant's overall credibility, verify employment history, and conduct due diligence to prevent theft.

Now that AB 22 is law, it amends Civil Code section 1785.20.5 and adds provisions to the Labor Code, beginning at section 1024.5. It limits employment credit checks to situations where, arguably, the applicant's credit history relates to the position in question. As discussed below, Labor Code section 1024.5 now sets forth the specific categories of jobs for which employers may still seek credit reports on applicants. If a position is not subject to a listed exception, California employers may not seek credit reports in their job search to fill such a position.

In addition to restricting the types of jobs for which employers may obtain credit reports, AB 22 requires employers to "identify the specific basis" for which the report will be used. In other words, if they seek a credit report, it appears that employers must indicate under which particular "exception" the applicant falls. As under existing laws, this notice must be in writing and must inform the applicant of the source of the report and contain a box that the applicant can check off to request a copy of the report. Likewise, the employer must advise the applicant of the adverse action if they deny employment "wholly or partially" because of information contained in the consumer credit report. It does not appear that AB 22 contains new penalties for violations of the law, but that the same penalties under the CCRAA will apply.

Who Is Exempt?

AB 22 carves out an exception for certain financial institutions, banks, loan brokers, etc. that are subject to the Gramm-Leach-Bliley Act and to FTC regulation. It also permits employers to seek credit reports in a few narrowly defined circumstances—if the job is in law enforcement or the State Department of Justice, if the position is one for which the information contained in the credit report is required by law to be disclosed or obtained, or if the position involves regular access to $10,000 or more in cash.

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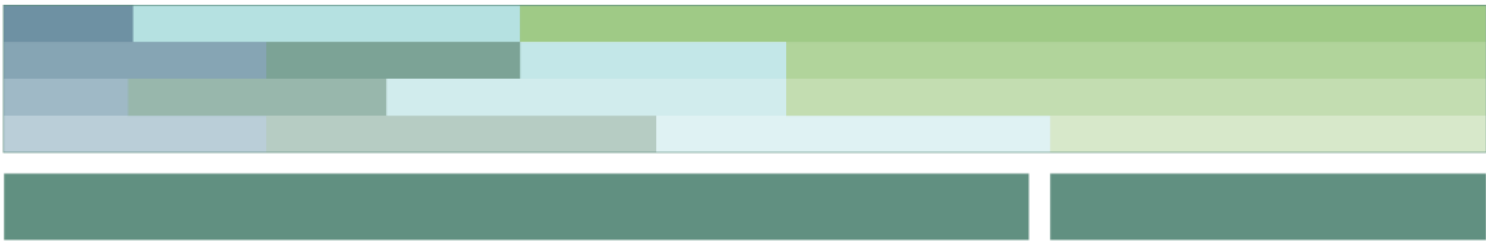

A few of the exceptions, however, are broader. Under AB 22, so long as they provide the "specific reason" for obtaining the report, employers can still seek credit reports for positions subject to the "executive" exemption under Wage Order 4 of the Industrial Welfare Commission. Employers may also continue to seek credit reports for positions that require "regular access to specified personal information [bank or credit card information, social security number, date of birth] for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment." The bill also contains an exception for positions in which the applicant would be a signatory on the employer's bank or credit account, or authorized to enter into financial contracts or transfer money on the employer's behalf. And finally, the bill contains a potentially wide exception for positions that "involve [] access to confidential or proprietary information" or trade secrets. Depending on how strictly these "exceptions" are construed, entire classes of other positions will likely also be exempt from the law.

What Should Employers Do?

In light of AB 22, employers should revisit their background check consent and disclosure policies and the positions for which they currently seek credit reports in the hiring process. Some employers, such as those in the financial industry, may be unaffected by AB 22, but others will need to review the "exceptions" to the law and determine whether they are still permitted to obtain credit reports. Fortunately, AB 22 contains a sort of safe harbor provision under which, if an employer can show they maintained "reasonable procedures to assure compliance" with Civil Code section 1785.20.5, they will not be held liable for violating the law. Employers should, therefore, redraft their policies and revamp their procedures as necessary to demonstrate this compliance.

For the full text of these new statutes, click here.