

Client Alert

LABOR, EMPLOYMENT AND BENEFITS PRACTICE GROUP | AUGUST 2011

WIGGIN AND DANA

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Use of Credit Reports Restricted in Hiring and Employment Decisions

Effective October 1, 2011, Connecticut employers may no longer require employees or prospective employees to give consent to requests for credit reports.

Public Act No. 11-223 expressly prohibits any employer with one or more employees, or such employer's agent, representative or designee, from requiring as a condition of employment that the employee or applicant consent to the employer obtaining a credit report that contains the individual's credit score, credit account balances, payment history, savings or checking account balances or account numbers. Broad though this Act seems, it does provide a number of exceptions. Specifically, an employer may obtain a credit report when:

- of the law related to the employee's employment; or
 - Such report is substantially related to the individual's current or potential job or the employer has a bona fide purpose for requesting or using the information in the credit report that is substantially job-related and is disclosed in writing to the individual.
- Fortunately for employers, the Act defines "substantially related to the employee's current or potential job" fairly broadly to allow many employers to continue using credit reports should they so choose. Information in a credit report is "substantially related" when the position:
- Is managerial, meaning it involves setting the direction or control of a business, division, unit or an agency of a business;
 - Involves access to customers', employees', or the employer's personal or financial information other than information customarily provided in a retail transaction;
 - Involves a fiduciary responsibility to the employer, including for example, the authority to issue payments, collect debts, transfer money or enter into contracts;
 - Provides an expense account or corporate debit or credit card;
 - Provides access to confidential or proprietary business information;
 - Provides access to information, including a formula, pattern, compilation, program, device, method, technique,
- It is a financial institution, meaning it is an entity or affiliate of:
 - a state bank and trust company,
 - national banking association,
 - state or federally chartered savings bank, savings and loan association, or credit union,
 - insurance company,
 - investment advisor,
 - broker-dealer, or
 - an entity registered with the Securities and Exchange Commission; or
 - Such report is required by law; or
 - The employer reasonably believes that the employee has engaged in specific activity that constitutes a violation

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process or trade secret, that (1) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from the disclosure of use of the information; and (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy; or

- Involves access to the employer's nonfinancial assets valued at \$2,005.00 or more, including but not limited to, museum and library collections and prescription drugs and other pharmaceuticals.

The Act does not provide a private right of action, but it does allow individuals claiming a violation of the Act to file a complaint with the State Labor Commissioner. Employers found to have violated the Act are subject to a civil penalty of \$300.00 per violation.

In preparation for the October 1, 2011 effective date of this Act, employers that obtain credit reports as part of their hiring process or for other employment-related decisions should evaluate and assess the business justifications for doing so. If none of the exceptions provided in the Act apply, that part of the process should be eliminated. Other steps that employers should take include:

- Identifying positions where the information contained in a credit report is “substantially related to the position” and reviewing those job descriptions to ensure a request for a credit report would be deemed reasonable under the defined parameters of the Act;
- Adopting and/or revising a personnel policy and a notice to applicants that describes the circumstances under which an employer may require consent to obtain a credit report;
- Educating all personnel involved in hiring and other employment-related decisions that utilize credit reports about these new legal requirements and restrictions.

Employers using credit reports in any employment-related decisions should also keep in mind that they must comply with the federal Fair Credit Reporting Act, which requires advance consent for a background check and notification when any adverse employment decision is made based, in whole or in part, on the information disclosed in a background report. And, on a related note, the U.S. Equal Employment Opportunity Commission has recently taken interest in, and is pursuing investigations regarding, whether routine pre-employment credit screening has a “disparate impact” on protected class members so as to result in unlawful discrimination under Title VII of the Civil Rights Act of 1964.

This publication is a summary of legal principles. Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.