A Timely Analysis of Legal Developments

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# California Joins States Restricting Use of Credit Reports for Employment Purposes

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On October 10, 2011, the Office of California Governor Jerry Brown announced that Governor Brown had signed AB 22, legislation that adds a new provision to the California Labor Code and amends the state's Consumer Credit Reporting Agencies Act (CCRAA)[1] to restrict the discretion that private and public sector employers have to use "consumer credit reports"[2] for hiring and personnel decisions. Together, the new laws, which take effect on January 1, 2012, limit when employers lawfully can use consumer credit reports and impose notice and disclosure obligations on employers who intend to do so.

AB 22 is similar to the laws in six other states: Hawaii, Washington, Oregon, Illinois, Maryland and Connecticut. Given that several other states and the federal government are considering comparable legislation, it is likely this trend will continue. In fact, the Equal Employment Opportunity Commission (EEOC) is actively investigating use of credit reports by employers and presently is litigating disparate impact lawsuits against employers in federal court in Maryland and Ohio. Employers who use credit reports for employment purposes in any of these seven states therefore should review, and, if appropriate, modify their policies for compliance, and all employers should continue to stay abreast of additional developments in this dynamic area of employment law.

## New Labor Code Section 1024.5

New Labor Code section 1024.5 limits when private and public sector employers, except for financial institutions, lawfully can use consumer credit reports in connection with hiring and personnel decisions. Specifically, employers are permitted to use consumer credit reports only if the individual is applying for or works (or will work) in the following positions:

- a managerial position (as the term elsewhere is defined by California law);
- a position in the State Department of Justice;
- a sworn peace officer or law enforcement position;
- a position for which the employer is required by law to consider credit history information;
- a position that affords regular access to bank or credit card account information, Social Security numbers, and dates of birth, provided, however, that the access to this information does not merely involve routine solicitation and processing of credit card applications in a retail establishment;


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- a position where the individual is or will be a named signatory on the bank or credit card account of the employer and/or authorized to transfer money or authorized to enter into financial contracts on the employer's behalf;
- a position that affords access to confidential or proprietary information; or
- a position that affords regular access during the workday to the employer's, a customer's or a client's cash totaling at least $10,000.

Labor Code section 1024.5 does not establish an independent remedy for violations of the statute. It would appear, however, that a remedy (civil penalty) may be provided by the California Private Attorneys General Act of 2004 (PAGA).[3] Claims for PAGA penalties, which are subject to a one-year statute of limitations, cannot be filed in court without first providing notice to the California Labor Workforce Development Agency (LWDA).

## Amended Civil Code Section 1785.20.5

The CCRAA, like its federal counterpart, the Fair Credit Reporting Act (FCRA),[4] is triggered when an employer orders a consumer credit report from a vendor (commonly known as "consumer reporting agencies") for employment purposes.[5] Both statutes generally require: (1) advance consent from the individual to order the credit report; (2) notice to the individual of the intended use of the report; and (3) notice to the individual if the report's contents negatively impact his or her employment opportunities (commonly known as "adverse action letters").

Section 1024.5, as amended by AB 22, imposes an additional notice obligation on employers that use consumer credit reports to screen job applicants and employees. Specifically, before ordering a consumer credit report concerning a job applicant or employee, the employer must notify the individual in writing of the basis under Labor Code section 1024.5 for permissibly using the consumer credit report (*e.g.*, because the individual is applying for or holds a managerial position, etc.).

Civil Code section 1785.31 provides a remedy for "negligent" and "willful" violations of the CCRAA. An individual who suffers damages as a result of the violation can recover actual damages, including attorney's fees and court costs, as well as punitive damages up to a maximum amount of $5,000 for willful violations.

## Action Steps for Employers

Before January 1, 2012, employers operating in California that use consumer credit reports for employment purposes should evaluate whether they are subject to Labor Code section 1024.5, and, if so, which provisions, if any, they can invoke to justify the screening. Multi-state employers also should evaluate compliance with the laws in the six other states that regulate the use of credit history information by employers: Hawaii, Washington, Oregon, Illinois, Maryland and Connecticut. All employers also should continue to monitor efforts in Congress to regulate the use of credit history information and advisory guidance from, and litigation initiated by, the EEOC.

Employers also should evaluate the sufficiency of the paperwork they use in conjunction with their screening procedures (e.g., consent forms) and modify the paperwork as needed to incorporate the notice mandated by Labor Code section 1024.5. Regarding consent forms, employers should be aware of a related and modest amendment to the CCRAA's companion statute, the Investigative Consumer Reporting Agencies Act. Effective January 1, 2012, employers that order background reports other than consumer credit reports (*e.g.*, criminal background reports, motor vehicle reports, etc.) must notify job applicants and employees of the Internet website address of the consumer reporting agency, or, if the agency has no Internet website address, the telephone number of the agency where the individual can find information about the agency's privacy practices.[6] Due to a recent and significant spike in class action litigation under the federal law, the FCRA, employers also are advised to evaluate their compliance with the FCRA.

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[1] Cal. Civ. Code § 1785 *et seq.*

[2] The CCRAA states in pertinent part: "'Consumer credit report' means any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for: . . . employment purposes . . . ." Cal. Civ. Code § 1785.3(c). AB 22 states that the term consumer credit report "does not include a report that (A) verifies income or employment, and (B) does not include credit-related information, such as credit history, credit score, or credit record."



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[3] Cal. Lab. Code § 2699 *et seq.*

[4] 15 U.S.C. § 1681 *et seq.*

[5] The companion statute to the CCRAA, the California Investigative Consumer Credit Reporting Agencies Act (ICRAA), regulates the use of information other than credit reports, including criminal background check reports. Cal. Civ. Code § 1786 *et seq.*

[6] Cal. Civ. Code § 1786.22



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