

# LABOR AND EMPLOYMENT LAW UPDATE



## NEW STATE LAWS PROTECT APPLICANTS WITH POOR CREDIT HISTORY OR CRIMINAL RECORDS!

According to reports by the Society for Human Resources Management, (a) 60% of U.S. employers run credit checks on applicants for employment; and (b) more than 80% of U.S. employers conduct criminal background checks on applicants. The concerns which prompt such inquiries are generally legitimate and include safety, security, loyalty, integrity and avoidance of negligent hiring suits.

A backlash is brewing, however, against background checks and hiring decisions based upon credit history and criminal conviction records. Governor Quinn of Illinois recently said: "A job seeker's ability to earn a decent living should not depend on how well they are weathering the greatest economic recession since the 1930's." One of the stated goals of President Obama's crime and law enforcement agenda is to break down employment barriers for people who have a prior criminal record, but who have stayed clean of further involvement with the criminal justice system.

In 2010 alone, three states were added to the list of states with laws regulating background checks by employers. Although these laws do not affect existing federal or state laws which require background checks, they do substantially narrow the circumstances under which an employer can legally obtain or use background information regarding an applicant for employment.

**FEDERAL LAW:** For now, the federal law protecting applicants remains unchanged.

**FAIR CREDIT REPORTING ACT ("FCRA"):** This Act mandates certain procedures which employers must follow in obtaining and using credit reports from outside agencies, but does not prohibit employers from using such reports in employment decisions.

**DISCRIMINATION LAWS:** Under certain circumstances, hiring standards which disqualify applicants based upon credit history or criminal record can have a disproportionate impact on protected minorities.

**BANKRUPTCY CODE:** There is a split of authority as to whether the prohibition of discrimination against employees who file for bankruptcy extends to applicants for employment.

**CREDIT HISTORY OR REPORT:** On August 11, 2010, Illinois became the fourth state to pass a law protecting applicants with poor credit histories:

**ILLINOIS:** Effective January 1, 2011, except under limited circumstances, an employer may not (a) inquire about an applicant's credit history or obtain a copy of his credit report, or (b) use an applicant's credit history in hiring.

**HAWAII:** Except under limited circumstances, an employer may not refuse to hire an applicant because of his credit history or credit report. Even if permitted, an employer may inquire about credit history only after extending a conditional offer of employment.

**OREGON:** Under a new law passed on March 29, 2010, an employer may not obtain or use for employment purposes information in the credit history of an applicant. Exceptions include the circumstance where the information is "substantially job related."

**WASHINGTON:** An employer may not procure a credit report for employment purposes unless the information is "substantially job related."

**CRIMINAL CONVICTION RECORDS:** On August 6, 2010, Massachusetts became the sixth state to pass a law protecting job applicants with criminal conviction records:

**MASSACHUSETTS:** Effective November 4, 2010, an employer cannot inquire on an "initial written application form" about an applicant's "criminal offender record information" which includes information about criminal charges, arrests, and incarceration. An employer may access and use the Commonwealth's Criminal Offender Record Information database which has purged older conviction data.

**HAWAII:** Employers may inquire about criminal records only after they have extended a conditional offer of employment. An employer may consider a conviction in a hiring decision only if it (a) occurred within the past ten years, and (b) is rationally related to the employment.

**KANSAS:** An employer may not be liable for a decision to employ based upon a person's criminal history "provided the information that led to the employment ... decision reasonably bears upon the ... applicant's or employee's trustworthiness, or the safety or well-being of the employer's employees or customers."

**NEW YORK:** Employers with 10 or more employees may not deny employment to an applicant because of his conviction record unless (a) there is a direct relationship between the offense and the job sought, or (b) hiring would create an unreasonable risk to property or to public or individual safety.

**PENNSYLVANIA:** Criminal conviction records may be considered by an employer in a hiring decision "only to the extent to which they relate to the applicant's suitability for employment in the position for which he has applied."

**WISCONSIN:** An employer may only refuse to hire a qualified applicant because of a criminal conviction for an offense that is substantially related to the circumstances of a particular job.

**KEEP AN EYE ON:** Currently before Congress is H.R. 3149, a bill which would amend the FCRA to bar the use of consumer credit checks against prospective and current employees for the purpose of making adverse employment decisions.

According to the National Conference of State Legislatures, as of July 2010, bills addressing the use of credit history in employment are pending in 15 states and the District of Columbia. There are no pending bills addressing criminal background checks.

## QUESTIONS

Questions regarding background checks of prospective employees can be directed to Robert G. Chadwick, Jr. at Campbell & Chadwick, P.C.

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