



September 13, 2010

Labor & Employment

Alert



Potential New Credit Traps for Employers

BY **KIMBERLY D. BARTMAN**
AND **DAVID C. BURTON**

Under the Fair Credit Reporting Act (FCRA), employers are permitted to use consumer reports in making employment decisions so long as they follow the proper notice, authorization, and disclosure requirements set forth in the FCRA. 15 U.S.C. §§ 1681 *et seq.* On July 9, 2009, in response to concerns that employers are using consumer reports to make adverse employment decisions for positions where the job responsibilities are unrelated to an individual's money management skills, Representatives Steve Cohen (D-TN) and Luis Guitérrez (D-IL) introduced H.R. 3149, the "Equal Employment for All Act," which would amend the FCRA to prevent employers from using consumer reports and credit checks in making employment decisions unless the position involves FDIC clearance, national security, or significant financial responsibilities.



Kimberly D. Bartman



David C. Burton

include information about the individual's credit, and may also include information on the individual's character and personal characteristics in certain situations. An employer can use the report in making an adverse employment decision if it first provides the employee or applicant with a "pre-adverse action disclosure," which contains a copy of the consumer report and a copy of a Federal Trade Commission publication entitled, "A Summary of Your Rights Under the Fair Credit Reporting Act." If the consumer report was a factor in the adverse employment decision, the employer is then required to give the affected individual an "adverse action notice," which includes the contact information for the CRA, a statement that the CRA did not make the employment decision, and notice that the individual has the right to dispute the completeness or accuracy of the consumer report.

Sponsors of the Equal Employment for All Act believe that in the current economic climate, employers' use of consumer reports has created a "vicious cycle of debt," where individuals with poor credit ratings are unable to obtain the jobs they need to improve their credit. A recent Society for Human Resources Management survey found that 60 percent of employers run credit checks on at least some job applicants, which is an increase from the 42 percent of employers who did so during a robust economy back in 2006. According to the sponsors, this evidence suggests that, in a time when more Americans are struggling to meet their debt obligations, employers increasingly are screening out candidates on the basis of their credit reports. In addition, the Equal Employment

Labor & Employment Team

David C. Burton
Chair, Labor & Employment
757.473.5354
dburton@williamsmullen.com

Igor M. Babichenko

D. Earl Baggett

William P. Barrett

Kimberly D. Bartman

Beth Hirsch Berman

Jonathan R. Bumgarner

M. Eve G. Campbell

Edward M. Eakin, III

Alden J. Eldredge

Heath H. Galloway

Sean M. Gibbons

Lynn F. Jacob

Kendra J. Jarrell

Joshua M. Krasner

Linda S. Laibstain

Michael C. Lord

James V. Meath

Douglas M. Nabhan

Adele M. Neiburg

Sara B. Rafal

J. Nelson Wilkinson

Ashley W. Winsky

continued from page 1

Opportunity Commission (“EEOC”) has found that, because certain racial and ethnic groups tend to have more credit problems, employers’ use of consumer reports to make adverse employment decisions has a disparate adverse impact on these racial and ethnic groups.

If passed, the proposed amendment would prevent employers from obtaining and using consumer reports for employment purposes, except in a narrowly-defined category of jobs involving FDIC clearance, national security, and certain jobs with significant financial responsibilities. In the limited circumstances where employers are permitted to use a consumer report, they must continue to follow the notice, authorization, and disclosure requirements outlined above.

Even if the bill does not pass, given the EEOC’s findings of racial and ethnic disparities in credit checks, employers’ use of consumer reports to make employment decisions could lead to a rise in adverse impact discrimination claims. Employers should review their current consumer report policies to make sure that they are using an applicant’s or employee’s credit information for legitimate job-related reasons. For example, it would generally not be relevant for an employer to require a credit check on an applicant for a janitor position. On the other hand, courts have held that employers are justified in running a credit report for a bank teller candidate.

For more information about this topic, please contact the authors or any member of the Williams Mullen Labor & Employment Team.

