

In This Issue:

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The Governor of Maryland recently signed the Job Applicant Fairness Act, joining Hawaii, Washington, Oregon and Illinois that have also recently passed state laws regulating the use of credit history-related information by employers for employment purposes. The Maryland law restricts the use of credit reports and credit history information unless specified conditions are met.

Legislation Roundup: Maryland Law Restricts Use of Applicant's or Employee's Credit Report or Credit History

By Rod Fliegel, Steven Kaplan and Emily Tyler

On April 12, 2011, Maryland's Governor approved the Job Applicant Fairness Act,¹ the latest state law to regulate the use of credit history-related information by employers for employment purposes. The Act, which takes effect on October 1, 2011, applies to all employers with some exceptions outlined below. The new law restricts the use of credit reports and credit history information by covered employers unless certain specified conditions are satisfied. Civil penalties may be assessed by the Commissioner of Labor and Industry. Four other states have enacted similar laws: Hawaii, Washington, Oregon, and Illinois.

What Does the Job Applicant Fairness Act Prohibit?

Despite the reference to "job applicants" in the name of the Act, the new law extends protection to job applicants and employees. The Act generally prohibits covered employers from using an applicant's or employee's "credit report" or "credit history" – both undefined terms – when: (1) denying employment to an applicant; (2) discharging an employee; or (3) determining compensation or the terms, conditions, or privileges of employment. Covered employers who can satisfy the statutory conditions for using the restricted information must make appropriate informational disclosures to applicants and employees. Requests for restricted information concerning job applicants must be postponed until the applicant has received an offer of employment.

Which Employers Are Covered?

The Act does not define the term "employer," but expressly excludes four categories of businesses from coverage. The four exclusions are:

- Employers who are required to inquire into an applicant's or employee's credit report or credit history under federal law or any provision of state law for the purposes of employment.
- A financial institution that accepts deposits that are insured by a federal agency (including an affiliate of the financial institution).

- A credit union share guaranty corporation that is approved by the Maryland Commissioner of Financial Regulation.
- An entity (or its affiliate) that is registered as an investment advisor with the U.S. Securities and Exchange Commission.

Statutory Conditions

Covered employers are prohibited from using restricted information unless certain conditions are satisfied. The specific conditions vary depending on the employer's intended use of the restricted information.

The first set of conditions applies when the covered employer intends to request or use the restricted information for a purpose *other than* evaluating a job applicant for hire and determining the terms, conditions, or privileges of employment. A covered employer may request or use the restricted information so long as the applicant has received an offer of employment. (States such as Hawaii have similar laws that prohibit inquiries into an applicant's criminal past until the applicant has a conditional job offer.)

The second set of conditions applies when the covered employer intends to request or use the restricted information to evaluate a job applicant for hire, discharge an employee, or determine the terms, conditions, or privileges of employment. A covered employer may request or use the restricted information if the covered employer: (1) has a "bona fide purpose" for requesting or using the restricted information; and (2) discloses that bona fide purpose in writing to the applicant or employee. Further, the employer's bona fide purpose must be "substantially job-related." The positions for which an employer has a bona fide purpose that is substantially job-related for requesting or using the restricted information include:

- positions that are managerial and involve setting the direction or control of a business, department, division, unit, or agency of a business;
- positions that involve access to personal information, except for personal information customarily provided in a retail transaction;
- positions that involve fiduciary responsibility to the employer, including issuing payments, collecting debts, transferring money, or entering into contracts;
- positions that will be provided an expense account or a corporate credit card;
- positions with access to trade-secret or other confidential business information.

What Are the Remedies for Violations?

If an employer violates the Act, an employee or applicant may file a written complaint with the Maryland Commissioner of Labor and Industry. After receiving a complaint, the Commissioner must investigate the complaint. If, after an investigation, the Commissioner determines that the employer has willfully or negligently violated the Act, the Commissioner shall try to resolve the matter informally. Absent an informal resolution, the Commissioner may: (1) assess a civil penalty of up to \$500 for an initial violation of the Act, or \$2,500 for a repeat violation of the Act; and (2) send an order to pay the civil penalty to the applicant/employee and the employer.

What This Means for Employers

Employers in Maryland should evaluate whether they are subject to coverage by the Act. Covered employers should identify when and how and for which positions credit reports or credit history are requested and used, and should then assess whether the statutory conditions can be satisfied, including, but not limited to, the limitation on requesting or using restricted information to make employment decisions without a bona fide purpose. Employers with multi-state operations also should consider whether they are subject to similar regulations in Hawaii, Washington, Oregon, or Illinois, and, if so, whether their practices comport with all applicable laws. Employers also should continue to monitor overall developments in this area of the law because comparable bills are pending in a number of other states and in Congress.

Workplace Regulation Bills that Did Not Pass this Session of the General Assembly, But Will Likely Be Back for Consideration Next Year

- **Employment Standards and Conditions – Definition of Employer (SB 444/HB 693):** This bill would have changed the definition of “employer” under the Maryland Wage Payment and Collection Law and the Workplace Fraud Act to create individual liability for certain supervisors.
- **Maryland Wage & Hour Law – Prohibited Acts of Employers – Adverse Action (SB 551/HB 1130):** This bill would have prohibited employers from taking an adverse action against an employee who makes a complaint, brings an action, or testifies in an action under the Maryland Wage & Hour Law. This bill would have defined “protected activity” to include a complaint made to a union representative or employee’s attorney.
- **Abusive Work Environment – Employee Remedies (SB 600/HB 580):** This bill, essentially a workplace bullying law, would have brought countless of lawsuits against employers.
- **Religious Observance Accommodation (SB 750/HB 1002):** This bill would have required an employer to allow employees to use any type of accrued leave to observe a holy day in accordance with a sincerely held religious belief.
- **Administrative Leave – Parent-Teacher Conferences (SB 0969):** This bill would have authorized an employee to use paid administrative leave to attend a teacher-parent conference.
- **Employment Discrimination – Criminal Convictions (HB 907):** This bill would have prohibited an employer from refusing to hire, discharging, or otherwise discriminating against an applicant because of his or her criminal history not directly related to employment.

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¹ Governor Martin O’Malley signed two identical bills, House Bill 87 and Senate Bill 132, which constitute the Job Applicant Fairness Act.