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Beware of the Newly Enacted Illinois Employee Credit Privacy Act

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Illinois recently enacted the Employee Credit Privacy Act (the "IECPA" or the "Act"). The Act will prohibit most Illinois employers from basing employment decisions or benefits on an applicant's or employee's personal credit information, unless either the employer or the individual comes within any of several broad exceptions. Because the IECPA will not go in to effect until January 1, 2011, now is the time for Illinois employers to determine the law's application to them and to ensure that they will be in compliance come New Year's Day.

Restrictions on the Usage of Credit History and Credit Reports

The core provision of the IECPA is a prohibition on taking employment actions "because of the individual's credit history or credit report." Specifically, under Section 10(a)(1) of the IECPA, an employer "shall not":

> Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment because of the individual's credit history or credit report.[1]

Additionally, the IECPA makes it a violation for an employer to "inquire about an applicant's or an employee's credit history"[2] or to "[o]rder or obtain an applicant's or employee's credit report from a consumer reporting agency."[3] The IECPA broadly defines "credit history" as "an individual's past borrowing and repaying behavior, including paying bills on time and managing debt and other financial obligations," and it defines "credit report" as "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing, credit capacity, or credit history."[4]

The IECPA'S Broad Exceptions

The IECPA applies to all Illinois employers, regardless of size, but it does have a number of broad exceptions.[5]

First, it exempts entities engaged in banking, insurance, and debt collection, as well as state law enforcement agencies and state and local governmental agencies.[6]

Second, the IECPA does not prohibit an employer from making an employment decision based on credit history or a credit report "if a satisfactory credit history is an established bona fide occupational requirement of a particular position."[7] For a satisfactory credit history to be a "bona fide occupational requirement," at least one of the following circumstances must be present:

- Bonding or other security covering the employee is required under state or federal law;[8]

- The duties of the position include unsupervised access to cash or marketable assets of more than $2,500.00[9] or signatory power over business assets of $100 or more per transaction;[10]

- The position is managerial and "involves" setting the direction or control of the business;[11]

- The position "involves" access to personal, confidential, financial, or state or national security information, or trade secrets;[12]

- The position meets criteria in administrative rules, if any, promulgated by the US or Illinois Department of Labor[13] which establish credit history as a bona fide occupational requirement;[14] or

- State or federal law requires or exempts the employee's or applicant's credit history.[15]

Thus, even if an entity is covered by the IECPA, if the position applied for or held by the applicant or employee fits within one of the foregoing exceptions, the employer is not subject to the Act with respect to the position.[16]

The breadth of these exceptions is further enhanced by the broad definitions of some of the terms used. For example, the Act exempts positions that "involve" access to "personal or confidential information, financial information, [or] trade secrets[.]"[17] "Personal or confidential information" as defined in the IECPA "means sensitive information that a customer or client of the employing organization gives explicit authorization for the organization to obtain, process, and keep; that the employer entrusts only to managers and a select few employees; or that is stored in secure repositories not accessible by the public or low-level employees."[18] This exemption would apply to most positions involving access to customer account information, especially financial or other sensitive information, as well as most human resources or executive/leadership positions, which presumably have access to sensitive information available only to "a select few employees."

Similarly broad definitions for the terms "trade secrets" and "financial information" operate to exempt most positions with access to tax or profit and loss reports or any sensitive information regarding a company's overall strategy or business plans.[19]

Individual Liability

The IECPA includes individuals within the statutory definition of an "employer."[20] Thus, the IECPA could potentially provide for individual liability for those individuals acting on behalf of a company.

Specifically, section 5 of the IECPA defines the term "employer" for purposes of the law as "an individual or entity that permits one or more individuals to work or that accepts applications for employment or is an agent of an employer."[21] A court construing this language may have little difficulty including individuals within the class of "employers" who could be liable for violations of the IECPA.

Viewed through the lens of the statutory prohibitions, it appears likely that only high-level individuals – those making hiring decisions, or involved in setting the terms and conditions of employment – could potentially be personally liable for a decision taken because of an applicant's or employee's credit history or credit report.[22] However, this remains to be seen as the statute is enforced and construed by courts.

The IECPA's Anti-Retaliation Provision

As with most other contemporary employment statutes, the IECPA contains an anti-retaliation provision. It provides as follows: "A **person** shall not retaliate or discriminate against a person because the person has done or was about to do any of the following: (1) File a complaint under this Act. (2) Testify, assist, or participate in an investigation, proceeding or action concerning a violation of this Act. (3) Oppose a violation of this Act."[23]

The term "person" is not defined in the statute. Indeed, the only other place that the word appears is in the remedies section, which sets forth the remedies available for persons injured by violations of the statute.[24] Hence, under a literal reading of the IECPA, one could argue that individuals are barred from engaging in retaliation, but employing entities are not.[25] As a practical matter, under the doctrine of *respondeat superior* (under which employers are held liable for the actions of their employees acting within the scope of their employment), this may prove to be a distinction without a difference, but it, too, is a future issue for the courts.

The IECPA's Non-Waiver Provision

Like certain other Illinois and federal employment statutes,[26] the IECPA contains a "non-waiver" provision. It states that:

> An employer shall not require an applicant or employee to waive any right under this Act. An agreement by an applicant or employee to waive any right under this Act is invalid and unenforceable.[27]

As a result of this provision, potential claims under the IECPA will not be extinguished by boiler-plate language in a general release.

Additionally, the non-waiver provision means that employees cannot be required to arbitrate IECPA claims.

Conclusion

Generally speaking, if an employer has a legitimate need to inquire into an applicant's or employee's credit history, or to order a credit report, such employer or position likely will fit within one of the numerous statutory exemptions of the IECPA. Nevertheless, now is the time for Illinois employers to review the IECPA and ensure that they are in compliance.

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1 IECPA, Section 10(a)(1). This provision may expand the protections afforded bankrupt individuals in the federal bankruptcy code, which make it unlawful for an employer to terminate an employee solely because that employee filed bankruptcy. *See* 11 U.S.C. § 525(b)("[n]o private employer may terminate the employment of, or discriminate with respect to employment against, an individual who is or has been a debtor under this title … **solely because** such debtor or bankrupt … is or has been a debtor under this title[.]")(emphasis added); and *Laracuente v. Chase Manhattan Bank*, 891 F.2d 17, 21 (1st Cir. 1989)("plaintiff's claim is defeated by a showing that his bankruptcy status was not the *sole reason* for his termination.").

2 IECPA, Section 10(a)(2). The broad scope of the defined term "credit history" raises a variety of potential issues, and could lead to claims that innocuous conduct such as asking how a co-worker is paying for a new car or

weathering the mortgage crisis and economic downturn is unlawful.

3 IECPA, Section 10(a)(3).

4 IECPA, Section 5.

5 IECPA, Section 5 (defining "employer" as meaning "an individual or entity that permits one or more individuals to work or that accepts applications for employment or is an agent of an employer.").

6 IECPA, Section 5.

7 IECPA, Section 10(b).

8 IECPA, Section 10(b)(1).

9 IECPA, Section 10(b)(2).

10 IECPA, Section 10(b)(3).

11 IECPA, Section 10(b)(4).

12 IECPA, Section 10(b)(5).

13 However, the IECPA itself provides no authority to the IDOL to promulgate any such rules.

14 IECPA, Section 10(b)(6).

15 IECPA, Section 10(b)(7).

16 In addition, the Act expressly protects the right of Illinois employers to conduct "a thorough background investigation" without information on credit history. IECPA, Section 30.

17 IECPA, Section 10(b)(5).

18 IECPA, Section 5.

19 IECPA, Section 5.

20 IECPA, Section 5. In addition, the remedies section of the IECPA does not limit who can be a defendant in an IECPA claim. IECPA, Section 25(a).

21 IECPA, Section 5.

22 This is so because generally only those with hiring or supervisory authority can "[f]ail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition or privilege of employment[.]" IECPA, Section 10(a)(1).

23 IECPA, Section 15 (emphasis added).

24 IECPA, Section 25(a)("A person who is injured by a violation of this Act may bring a civil action…"); and IECPA Section 25(b)("The court shall award costs and reasonable attorney's fees to a person who prevails as a plaintiff…").

25 There is no indication in the definition of "employer" or elsewhere in the Act that "person" as used in this section is meant to include the term "employer," and a common sense reading leads to the opposite result. While "person" can easily be read to include individuals – human beings – it would not, in the absence of an express intention to do so, include companies or other legal entities. IECPA, Section 15. This is especially so when "employer" is a specifically defined term under the Act, IECPA, Section 5, and other statutory prohibitions use the defined term. *See* IECPA, Section 10(a)("an **employer** shall not do any of the following:"); and Section 20 ("An **employer** shall not require…")(emphasis added).

26 For example, the Illinois Sales Representative Act, 820 ILCS 120/2.

27 IECPA, Section 20.