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ACT NOW ADVISORY

EEOC Plans to Target Employer Use of Credit Information in Hiring and Other Employment Decisions

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By Peter M. Panken, Susan Gross Sholinsky, and Steven M. Swirsky

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The Equal Employment Opportunity Commission ("EEOC") has announced an increased emphasis on pursuing cases involving "systemic discrimination," seeking to challenge practices that it sees as having detrimental implications on a large scale. Generally, the EEOC aims to address issues about which it will be able not only to have a substantial impact on discriminatory employment practices, but also to pursue monetary damages and other relief for classes of persons who have been harmed by such discrimination. In this regard, on October 20, 2010, the EEOC held a public meeting at which it explored the impact of the use of credit checks and information as a screening method in hiring and other employment decisions.

At this meeting, EEOC Chair Jacqueline A. Berrien, a former NAACP official, observed that statistically, as groups, women and minorities typically have poorer credit histories than their white male counterparts. Chair Berrien noted that, for this reason, reliance on credit history in employment decisions can have a disparate impact on members of those groups. She also pointed out that, in cases where reliance on credit checks has a disparate impact on members of protected classes of applicants, and such cases come before the EEOC, an inquiry will be triggered into whether good credit is a bona fide requirement for the positions in question.

Accordingly, we anticipate that in 2011 and beyond, the EEOC will seek to challenge the use of credit history as a hiring criteria, especially when significant numbers of applicants are rejected based, at least in part, on their credit histories, and there is no clear and direct correlation between credit history and the requirements of the position. Therefore, employers that examine or consider credit history in their selection processes, without specific business justifications for doing so, could face claims and exposure. In this regard, employers should also be aware that the federal Bankruptcy Code *prohibits* employers from taking adverse employment actions based *solely* on the fact that an employee or applicant has filed for bankruptcy.

This is not to say that credit history may no longer be considered in any employment decisions, as a poor credit history may, indeed, lead to legitimate concern about an applicant's qualification or suitability for a particular position. For example, an applicant with a poor credit history may not be an appropriate candidate if there is an opportunity for defalcation or theft is tempting (*e.g.,* a cashier, delivery person, baggage handler,

corporate controller, an accounts payable employee, etc.). Further, selecting such an applicant for a job that requires him or her to have unsupervised access to the property of others – whether in hotel rooms, offices, clients' homes, or to pharmaceutical supply areas in hospitals and pharmacies – may present a real risk for the potential employer. In these situations, credit history may be a legitimate factor to consider before hiring. Notwithstanding the relevance of this information for some positions, the question will remain whether a poor credit history is an acceptable decision-making factor. These decisions and assessments will need to be examined and made on a case-by-case basis in light of the facts and circumstances surrounding the particular positions. Across-the-board policies and practices may no longer be suitable.

An assessment also requires an examination of whether there are any further restrictions under state or municipal law applicable to particular positions and/or facilities. For example, Illinois is one of a number of states that has recently addressed this credit history issue through legislation. Effective January 1, 2011, employers in Illinois will generally be prohibited from using credit information in connection with hiring and other employment decisions. While broad exceptions to entities engaged in banking, insurance, and debt collection, as well as state law enforcement agencies and state and local government agencies, will exist, it is clear that employers in that state will not be able to consider credit history in many decisions when they currently may do so. Also, the law 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. Examples of positions with "bona fide occupational requirements" include those that require the employee to have access to cash (over a minimum threshold amount) or private information. For more detail regarding the Illinois law, please see the article "Beware of the Newly Enacted Illinois Employee Credit Privacy Act."

Legislation has also been introduced on the federal level. The Equal Employment for All Act, which was introduced in the U.S. House of Representatives in July 2009, would amend the Fair Credit Reporting Act to prohibit a current or prospective employer from using information about a person's creditworthiness, credit standing, or credit capacity in employment decisions, unless the position in question (1) requires a national security or Federal Deposit Insurance Corporation ("FDIC") clearance; (2) is with a state or local government agency that otherwise requires use of a consumer report; or (3) is a supervisory, managerial, professional, or executive position at a financial institution. To date, the bill has 56 cosponsors; last month, hearings on the bill were held by the Subcommittee on Financial Institutions and Consumer Credit.

Action Items

The provisions of the Illinois statute and the proposed federal law offer employers guidance as to what might be considered a legitimate business reason that would justify the use of credit information in connection with hiring or some other employment decision. In any event, employers should take the following actions:

- Review the use of credit checks in the hiring process (and, of course, ensure compliance with the Fair Credit Reporting Act, including obtaining written consent to perform a background check, and, if an adverse action will be taken, providing both a notice of intent to take adverse action and a notice of adverse action, both of which must be sent along with a copy of the credit report and a "Summary of Your Rights" document available from the Federal Trade Commission).

- Consider which positions require credit information, and the reasons that such information is relevant; explore whether there are other ways to achieve the same purposes, which may have less of a disparate impact.

- Consider eliminating that credit-check step in the hiring process when its relevance is questionable or the information is clearly unnecessary.

- With counsel, to safeguard the attorney-client privilege, review the employer's hiring history to explore whether rejecting applicants with poor credit histories has had a disproportionate impact on minority and/or female candidates, and whether other criteria that do not impact such groups disproportionately can be used.

- Train recruiters and hiring decision makers to specify the reasons why the hired individual was superior to the rejected applicant, without referring to poor credit.

- Specify that experience in performing the essential functions of the job, the length of service at the former employment, a good reason for changing jobs, education, creating a positive impression during the interview when appropriate, and other similar reasons, are positive indicia of permissible hiring criteria that do not implicate credit ratings.

- Consider limiting the negative indicia to a history of frequently changing jobs, having been discharged before, any unexplained gaps in employment, a lack of necessary skills, creating a bad impression in the interview, and similar reasons.

- Ensure that the selected applicants were the "best qualified."

These steps are particularly important because the EEOC may well expand the scope of an investigation of a single charge by an employee or applicant, if it believes a systematic pattern of discrimination may exist. If it senses that such a pattern may exist, the EEOC may require production of all company files related to the hiring process. Indeed, the EEOC has publicly announced its policy of pursuing systemic discrimination with vigor in the coming years.

In addition, employers should be cognizant of the fact that, where the EEOC goes, the Office of Federal Contract Compliance Programs ("OFCCP") is seldom far behind (and often ahead, when it comes to enforcing the affirmative action requirements applicable to federal contractors and subcontractors). The OFCCP, like the EEOC, has recently received additional funds to increase its enforcement efforts.

For more information about this Advisory, please contact:

Peter M. Panken	**Susan Gross Sholinsky**	**Steven M. Swirsky**
New York	New York	New York
212/351-4840	212/351-4789	212/351-4640
ppanken@ebglaw.com	sgross@ebglaw.com	sswirsky@ebglaw.com

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