

LEGAL
SMARTSAre the Risks of Performing Credit Checks on
Job Applicants Worth the Potential Reward?

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In this increasingly competitive marketplace, potential employers are constantly searching for the best talent available. Companies looking to ensure that they are able to secure the best talent might consider the use of credit checks in the applicant screening process. Those employers that use credit checks to screen job applicants point out that employers have a fiduciary responsibility to protect their assets and those of their clients, customers and members. On the other hand, critics maintain that there is no proof that someone with a bad credit record will be a bad employee. Critics also question the accuracy of credit reports.

Under existing Federal law, an employer's ability to rely upon credit information of prospective and current employees is limited. With reference to both private employers and the government, the U.S. Bankruptcy Code prohibits employers from denying employment to a person who is or has been bankrupted or a debtor in bankruptcy, as well as a person that has been associated with a bankruptcy.

The denial of employment based solely on credit status is not per se illegal. However, Title VII specifically prohibits an employer from considering credit information in connection with a person's employment if it causes a "disparate impact" on his or her protected class and is not job related and consistent with business necessity. The possibility that the use of credit checks will act to have a disparate impact on certain protected classes of job applicants is the biggest threat facing employers that use credit checks in their screening process.

The Federal Consumer Credit Protection Act also prohibits employers from discharging an employee because his earnings have been subject

to garnishment for any one indebtedness. Many states have a similar prohibition with reference to garnishments.

Under the Fair Credit Reporting Act, employers may make hiring and/or retention decisions based on information contained in an applicant or an employee's consumer credit report provided that applicable legal requirements are followed, unless restricted by state law. Before obtaining an investigative consumer report, the FCRA requires that specific notice requirements be given to the applicant or employee that a consumer investigative report has been or will be requested for employment related purposes. Advance authorization is also required before accessing an applicant's credit report.

In addition to limitations imposed by federal law, seven states currently restrict or prohibit an employer's use of credit reports. In 2010, the EEOC weighed in on this matter. In 2011, similar legislation was proposed in more than 20 other states and the District of Columbia. Legislation was presented in Congress.

What should employers do to avoid allegations of bias in the employment process based on the use of credit reports? One immediate thing that employers can do to limit potential liability is to use credit checks for applicants applying for a narrow range of jobs, including those positions that involve financial responsibility. As is the case with other types of pre-employment tests, employers should conduct credit checks uniformly and without regard to protected category. With these checks in mind, employers should be able to objectively weigh the potential reward of conducting credit checks on applicants with the potential risks associated with this type of screening process. **AT**