

California Employers' Use of Credit Reports for Employment Purposes (CA AB 22)

Employers or prospective employers located in or doing business in California need to be aware of a new law that will change the way they conduct employment screening background checks in the state. The new law, California Assembly Bill 22 (CA AB 22), imposes restrictions on the use of credit reports for both current employees and prospective job applicants. CA AB 22 amends Section 1785.20.5 of the California Civil Code and adds Chapter 3.6 (commencing with Section 1024.5) to Part 2 of Division 2 of the California Labor Code, relating to employment.

Current Use Requirements:

Prior to January 1, 2012, California employers may generally obtain a consumer credit report on an applicant/employee with appropriate prior written notice to the applicant/employee (*i.e.*, stating that a credit report will be obtained and used, identifying the source of the report and providing the individual with an opportunity to request a free copy of the report). If the individual requests a copy of the report, the employer must request that a copy be provided to the applicant/employee when the employer requests its copy from the credit reporting agency. The free report must be provided to the applicant/employee at the same time as the employer. If the employer makes an adverse employment decision based on information from the credit report, the employer must inform the applicant/employee the decision was based, in whole or in part, on that information and provide the contact information of the credit agency from which the report was obtained.

New Restrictions:

Effective January 1, 2012, CA AB 22 prohibits California employers from obtaining and using a consumer credit report for employment purposes unless:

(I) the employer is a financial institution subject to the Gramm Leach Bliley Act privacy protections (15 U.S.C. §§6801-6809) (and state and federal statutes or regulations implementing these sections if the person or business is subject to compliance oversight by a state or federal regulatory agency with respect to those laws); or

(II) the position of the person for whom the report is sought is one of the following 8 positions:

1. a "managerial position" (*i.e.*, an employee covered by the California executive wage and hour exemption).
2. a position in the state Department of Justice.
3. a sworn peace officer or other law enforcement position.
4. a position for which the information contained in the report is required by law to be disclosed or obtained.
5. a position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information of any one person:
 - (a) Bank or credit card account information.
 - (b) Social security number.
 - (c) Date of birth.
6. a position in which the person is, or would be, any of the following:
 - (a) A named signatory on the bank or credit card account of the employer.
 - (b) Authorized to transfer money on behalf of the employer.
 - (c) Authorized to enter into financial contracts on behalf of the employer.
7. a position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that (i) derives independent economic value, actual or

potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information, and (ii) is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information.

8. a position that involves regular access to cash totaling ten thousand dollars (\$10,000.00) or more of the employer, a customer, or client, during the workday.

Note, however, that CA AB 22 only applies to “consumer credit reports” and does not restrict a California employer’s ability to use other “non-credit related” background checks (e.g., a criminal background check) or reports that verify income or employment, as long as that report does not include credit-related information, such as a person’s credit history, credit score or credit record. CA AB 22 also does not apply to “investigative consumer reports” which employers may obtain in performing criminal history or other background checks. Of course, California employers must still follow California’s existing notice and authorization requirements when obtaining “investigative consumer reports.”

Notice Requirements:

CA AB 22 also imposes new notice requirements for California employers. If the employer is permitted under CA AB 22 to use a consumer credit report for a particular individual, the employer must first notify the individual in writing (prior to requesting the report) of the specific reason that the employer is allowed to use the report (e.g., the individual is applying for a managerial position). Technically, this new disclosure requirement may not apply if the employer is an exempt financial institution. However, it is recommended that if an employer is using the financial institution exemption, the employer should provide advance written notice to the individual of this permissible use for the report.

California employers permitted under CA AB 22 to use a consumer credit report for a particular individual, must also continue to comply with current use and federal and state fair credit reporting act notice requirements (e.g., providing proper advance written authorization and disclosure of the report, the opportunity to receive a free copy of the report and providing the proper written notices when adverse action will be taken based on the report).

Next Steps:

In light of CA AB 22, a California employer will need to evaluate whether: (a) it is an exempt financial institution; or (b) the groups of California applicants and employees for whom it wishes to access and use consumer credit reports meet any of the exemptions.

Effective January 1, 2012, California employers must use an updated employment authorization and disclosure form (for the consumer credit report) that notifies the individuals of the specific reason the credit report may be permissibly used (e.g., the individual is applying for a managerial position).

Also, effective January 1, 2012, California employers who use third-party criminal background reports or DMV reports (and other investigative consumer reports under California law other than consumer credit reports) are also required under a separate law (2010 Cal SB 909) to disclose the Internet website address for the third-party reporting agency performing the report where the individual may find information about the agency’s privacy practices, including whether the individual’s personal information will be sent outside of the U.S. or its territories. If the reporting agency has no website, the notice must contain a phone number that the individual may call to find out more about the agency’s privacy practices.

Violations:

Effective January 1, 2012, California employers must cease accessing consumer credit reports on individuals who do not meet any of the exemptions set forth in CA AB 22. Section 1024.5 does not specify an independent remedy for violations of CA AB 22, so it can be posited that the penalties available under the Private Attorney General Act would apply. The remedies under the Consumer Credit Reporting Agencies Act (“CCRAA”) include damages, attorneys’ fees and costs.