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Jill Pedigo Hall, Esq.

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EEOC Continues Increased Scrutiny of Applicant Credit Checks

By Jill Pedigo Hall, Esq.

Economic recovery seems to be a reality, and so, with guarded optimism, employers are starting to hire again. Because of the job loss that occurred during the economic downturn, employers are faced with large pools of candidates for each job, which presents a significant screening challenge to employers. To meet the challenge, employers need to use every legal tool at their disposal - including a credit check - to find the most qualified candidate. At the same time, increasing state and federal efforts seek to limit or prohibit the use of credit checks for screening purposes.

While most employers who use credit checks do so on a limited basis and generally only screen executive level positions or jobs involving financial transactions and confidential information, state and federal lawmakers have expressed concern that the use of credit histories as an employment screening tool disparately impacts minority racial groups because those groups are more likely to have developed credit problems due to the recession. Other concerns regularly expressed are that a poor credit history indicates primarily past financial distress due to objective causes, not employment-related traits; that a credit record is a notoriously error-laden measure; and that there is no correlation between credit record and job performance. [Testimony of Adam T. Klein, EEOC Commission Meeting \(May 17, 2007\)](#).

As a result of these concerns, there has been a proliferation of state legislation attempting to restrict or prohibit the use of credit histories in employment screening. According to [statistics kept by the National Conference of State Legislatures](#), while only four states - Hawaii, Illinois, Oregon and Washington - currently have an

express restriction or prohibition on employers using credit histories in hiring, nearly half the states have legislation pending to address the issue. For example, Florida's Senate Bill 1562, introduced March 3, 2011, would make it an "improper employment practice" for an employer to use a job applicant's personal credit history in a hiring decision unless the information "is shown to be directly related to the position sought by the applicant." No matter the relevance of the credit report data to the position sought, it "may not be the determining factor in whether the applicant is ultimately hired to the position." Similarly, Michigan's House Bill 4363, introduced March 2, 2011, would prohibit using credit history to "refuse to hire or to recruit an individual for employment" unless it is pertinent to "an established bona fide occupational requirement of the particular position or employment classification" sought.

Meanwhile, at the federal level, the EEOC has also sharpened its focus in recent years on employer credit checks because it believes inquiries into an applicant's credit history - including car ownership, rental or ownership of a house, length of residence at an address, charge accounts, etc. - tends to impact more adversely on minorities and females. The EEOC has demonstrated heightened concentration on this issue through a number of steps over the past year. In a [March 9, 2010, informal opinion letter](#), the EEOC stated that a credit check could cause an unlawful disproportionate impact on a protected group, and unless the employer "could establish that the practice was needed for it to operate safely or efficiently," it would be considered to have an unlawful adverse impact. Then, [in October 2010](#), the EEOC held a public meeting - always an indication that enforcement action is imminent - on the use of credit checks in employment screening.

The culmination of this examination by the EEOC in 2010 was the filing of *EEOC v. Kaplan Higher Education Corp.*, Civil Action No. 10-cv-02882, in the U.S. District Court for the Northern District of Ohio on December 22, 2010. In the case, the EEOC alleges Kaplan - a nationwide provider of postsecondary education - engaged in a pattern or practice of race discrimination when it relied upon credit check results in excluding what it considers a disproportionate number of black job applicants. The EEOC challenges Kaplan's position that the "background checks are job-related and a necessity for [Kaplan] to ensure that staff handling financial matters, including financial aid, are properly screened." The *Kaplan* suit signals the start of EEOC enforcement action over use of credit histories for employment screening.

Congress has also flagged the issue. In January 2011, the ["Equal Employment for All Act"](#) (H.R. 321) was introduced in the House. The bill seeks to amend the Fair Credit Reporting Act to "prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions, "effectively making applicant credit history a protected category.

Despite the aggressive state and federal posture against use of credit history in employment screening, not all use of credit checks will be circumscribed; rather, credit checks should be used only in conjunction with careful, job-related considerations. For example,

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the federal government itself uses credit checks to screen for certain jobs such as those related to government security and intelligence. Additionally, credit checks are often required by state agencies, bonding agencies, or their customers. Law enforcement uses credit checks to screen for candidates who might be susceptible to bribes. Some of these uses consider whether bad credit and financial status might influence an employee to compromise security or duty.

The lesson from this is that if an employer uses credit checks in employment screening, just as with any other screening device, the employer will have to be able to show it is a valid predictor of job performance or directly related to job duties. Moreover, the results of a credit check alone should not be used as a *per se* disqualification. This is especially so where many individuals suffered financial hardship in the recession, lessening whatever value a credit check may have as a determinant of trustworthiness or reliability. While a credit check may be warranted if the job at issue involves cash handling, exposure to sensitive company or customer data, trade secrets, or other confidential information, the growing governmental scrutiny regarding its use counsels caution and suggests a credit check should not be relied on as the sole determinant for selection.

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