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Management Alert

Nevada Becomes The Tenth State To Prohibit The Use Of Consumer Credit Reports Or Other Credit Information For Employment Purposes

Last month we reported to you how Colorado became the ninth state to prohibit employers from using credit information for employment purposes. Nevada has just become the tenth state.

Senator Parks introduced Nevada's Senate Bill 127 on February 18, 2013, which was intended to, among other things, "[p]rohibit[] employers from conditioning employment on a consumer credit report or other credit information." Nevada Governor Brian Sandoval signed the bill into law on May 25, 2013 and it goes into effect on October 1, 2013.

Prohibitions Under The New Law:

Chapter 613 of the Nevada Revised Statutes covers "Employment Practices," including various unlawful employment practices. Senate Bill 127, as enacted, amends Chapter 613 to add a new unlawful employment practice—employers conditioning employment on a consumer credit report or other credit information.

The new law adopts a very broad definition of employer to include private employers and "any person acting directly or indirectly in the interest of an employer in relation to an employee or prospective employee." With limited exceptions, this wide array of Nevada "employers" is now prohibited in their attempts to:

- Directly or indirectly, require, request, suggest or cause any employee or prospective employee to submit a consumer credit report or other credit information as a condition of employment;
- Use, accept, refer to or inquire concerning a consumer credit report or other credit information;
- Discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee: (a) who refuses, declines or fails to submit a consumer credit report or other credit information; or (b) on the basis of the results of a consumer credit report or other credit information; or
- Discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against any employee or prospective employee who has pursuant to the new law: (a) filed any complaint or instituted or caused to be instituted any legal proceeding; (b) testified or may testify in any legal proceeding instituted; or (c) exercised his or her rights, or has exercised on behalf of another person the rights afforded to him or her.

Exceptions Under The New Law:

When Senate Bill 127 was first introduced, it did not provide for any exceptions from its prohibitions. This meant, for example, that employees who handle large sums of money—such as bank and casino employees—could not be subjected to pre-employment credit checks under the state law. Both advocates and opponents of the bill debated this issue at a February 22, 2013 Senate Commerce, Labor and Energy Committee hearing. The opponents prevailed and the bill now provides for exceptions from the preceding prohibitions. Under these exceptions, an employer may request or consider a

consumer credit report or other credit information for the purpose of evaluating an employee or prospective employee for employment, promotion, reassignment or retention as an employee if:

- The employer is required or authorized, pursuant to state or federal law, to use a consumer credit report or other credit information for that purpose;
- The employer reasonably believes that the employee or prospective employee has engaged in specific activity which may constitute a violation of state or federal law; or
- The information contained in the consumer credit report or other credit information is "job related" or reasonably related to the position for which the employee or prospective employee is being evaluated for employment, promotion, reassignment or retention as an employee.

The "job relatedness" requirement from this final exception is met if the duties of the position involve: (a) responsibility for financial assets or employment with a financial institution; (b) access to confidential information; (c) managerial or supervisory responsibility; (d) direct exercise of law enforcement authority; (e) responsibility for or access to another person's financial information; and of course (because this is Nevada) (f) employment with a licensed gaming establishment.

Remedies Under The New Law:

Senate Bill 217, as enacted, allows for both a private and public right of recovery under a three-year statute of limitations.

Private Right. When an employer violates the new law, the civil remedies available to affected persons include; (a) employment if they were prospective employees or reinstatement or promotion if they already were employees; (b) payment of lost wages and benefits; and (c) the award of reasonable costs and attorneys' fees. The new law also presumably permits recovery through class actions because it allows an "action to recover" to be brought "[o]n behalf of other employees or prospective employees similarly situated."

Public Right. The new law also authorizes the Labor Commissioner to impose an administrative penalty against an employer (not to exceed $9,000 for each violation) and to bring a civil action against the employer. The administrative penalty is separate and apart from any civil action brought under the new law.

Recommendations For Employers:

Nevada joins California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont and Washington in enacting legislation to restrict employer's ability to use credit information for employment purposes. Several other states and the Equal Employment Opportunity Commission (EEOC) are also focused on this area and additional laws and guidance are expected this year. Given the Nevada law's high penalties for non-compliance (civil actions, $9,000 per incident administrative penalty, and possible class actions) and the national focus on the use of credit information for employment purposes—employers in Nevada that use credit reports or credit information for employment purposes are well advised to evaluate and reassess their practices and procedures in anticipation of the new law's October 1, 2013 effective date.

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