

# Management Alert



## Colorado Becomes Ninth State to Prohibit Use of Consumer Credit Information in Employment

Colorado recently became the ninth state to prohibit employers from using credit information for employment purposes. In the last few years, eight other states have also passed laws which, subject to few exceptions, regulate ban employers' ability to use credit information in making employment decisions. Colorado's law, called the "Employment Opportunity Act," Colo. Rev. St 8-2-126, was signed into law on April 19, 2013 and goes into effect on **July 1, 2013**.

### The Requirements of the Law

Colorado's law generally prohibits employers from using "consumer credit information" for employment purposes. This means that employers may not use any written or oral information bearing on a consumer's credit worthiness, credit standing, credit capacity or credit score in "evaluating a person for employment, hiring, promotion, demotion, reassignment, adjustment in compensation level, or retention as an employee."

The law applies to private sector employers with four or more employees and the term "employer" is defined expansively to include any "person, association of persons, firm or private corporation including manager, personal representative, assignee, trustee or receiver".

Two types of employers are generally exempt from the law's prohibitions: (1) banks or financial institutions; and (2) employers who are required by law to procure consumer credit information. These two classes of employers are permitted to obtain and use credit information for all their employees, regardless of specific positions or responsibilities and need only abide by the law's additional adverse action requirements (detailed below).

The vast majority of employers, however, are prohibited from requesting or using an applicant or employees' consumer credit information unless that information is "*substantially related to the employee's current or potential job.*" The statute defines the substantially related language to mean one of two types of positions:

1. A position that constitutes executive or management personnel (or officers or employees who constitute professional staff to executive and management personnel) and which involves one or more of the following:
  - sets the direction or control of a business, division, unit or an agency of the business;
  - owes a fiduciary responsibility to the employer;
  - has access to customers', employees' or the employer's financial information; or
  - has the authority to make payments, collect debts or enter into contracts.
2. A position that involves contracts with defense, intelligence, national security, or space agencies of the federal government.

Even for these positions where credit information is "substantially related to the employee's current or potential job", an employer must satisfy two additional requirements before it uses and applicant or employee's consumer credit information in making an employment decision. First, the employer must have a "bona fide purpose" for requesting or using the information in the credit report. Second, the employer must disclose its bona fide purpose to the applicant employee. Notably, the law is silent as to *when* this disclosure must be made and does not define the term "bona fide purpose."

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Also, when consumer credit information is “substantially related to the employee’s current or potential job” an employer may, but is not required to, afford the applicant or employee an opportunity to explain any unusual or mitigating circumstances (e.g. error, lay off, identity theft, medical expenses etc. ).

Unless, (1) an employer is a bank or financial institution; (2) the report is required by law; or (3) the report is substantially related to the employee’s current or potential job and meets the additional requirements detailed above; an employer may not require an employee to consent to a request for a credit report that contains information about the employee’s credit score, credit account balances, payment history, account balances and the like as a condition of employment.

## Adverse Action

The new CO law also expands requirements for employers wishing to take adverse action in whole or in part based on information in a credit report. Any employer that relies, in whole or in part, upon consumer credit information to take any adverse action against an applicant or employee, must make a written disclosure to the employee or applicant explaining that it has relied on credit information to make an adverse action and *noting the specific information which the employers relied*. This is different from and more burdensome than the federal Fair Credit Reporting Act’s (FCRA) requirements. 15 U.S.C. Sec. 1681 et. seq. The term “adverse action” is defined broadly to include denial of employment, demotion, reassignment, a decrease in compensation, denial of promotion, termination or any other decision for employment purposes that adversely affects an employee or applicant. The law provides that the disclosure must be made in writing or “using the same medium in which the application was made”. Although the law does not detail when the disclosures must be made, in order to comply with the FCRA as well, employers should consider doing so prior to making any employment decisions.

## Remedies

Although the law does not create a private cause of action, aggrieved individuals may file a complaint with the Colorado Division of Labor. The law empowers the Division of Labor in the Department of Labor and Employment to enforce its provisions by investigating alleged violation and issuing findings after a hearing. The Division may award civil penalties up to two thousand five hundred dollars (\$2,500) to a prevailing party.

## Recommendations for Employers

Colorado joins California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont and Washington in enacting legislation to restrict employer’s ability to use credit information in employment. Several other states have similar pending legislation. Additionally, the Equal Employment Opportunity Commission (EEOC) has signaled that it will step up its efforts to eliminate potential barriers of employment, including the use of credit information in employment. Given this quickly changing and increasingly regulated legal landscape, all employers should be aware of their policies in this respect and keep abreast of developments in this area of the law.

Employers in Colorado that use credit reports or information are well advised to evaluate and reassess their practices and procedures in anticipation of the law’s effective day of July 1, 2013. These employers should also review their background screening documents, including but not limited to disclosure and authorization forms and adverse action notices, to incorporate Colorado’s requirements.

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