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CALIFORNIA'S NEW LAW HIGHLIGHTS THE GROWING RESTRICTIONS ON EMPLOYERS' USE OF CREDIT REPORTS

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Attorneys in the Employment Litigation & Policy Practice represent corporate employers throughout the United States in all types of employment matters. To learn more about the SHB employment group and its members, see SHB.com.

As of January 1, 2012, California will join six other states in limiting employers' use of consumer-credit reports for hiring and personnel decisions. Assembly Bill 22, signed on October 10, 2011, by Governor Jerry Brown (D), amends California's Labor Code and Consumer Credit Reporting Agencies Act (CCRAA). In addition to imposing restrictions on the ability of employers to use credit reports, AB 22 also imposes notice and disclosure obligations on employers permitted to do so under the law's exceptions.

With 2012 quickly approaching, California employers and multi-state employers with locations in California should evaluate the extent to which they evaluate individuals' consumer-credit reports, whether they fit within any of the exceptions, and, if they do, the notice they provide to individuals. Retail and security-based employers, in particular, should carefully consider their policies on these issues.

Most Credit Report Uses Prohibited Under AB 22

AB 22's amendments to California's Labor Code are consistent with similar legislation in Connecticut, Hawaii, Illinois, Maryland, Oregon, and Washington. As in those states, AB 22 prohibits private and public sector employers generally from using a consumer-credit report for employment purposes. Certain exceptions exist, however, and they are based mainly on the nature of the position an employer is seeking to fill. Employers may use a consumer-credit report in making an employment decision if an individual is applying for or works in:

- a managerial position;
- a position for which the employer is required to consider credit-history information;
- a position (other than one involving the routine solicitation and processing of credit-card applications) involving regular access to bank or credit-card account information, social-security numbers, or dates of birth;
- a position where the individual is or will be a named signatory on an employer's bank or credit-card account, authorized to transfer money on behalf of an employer, or authorized to enter into financial contracts on behalf of the employer;

- a position that involves access to confidential or proprietary information, e.g., trade secrets;
- a position that affords regular access during a workday to cash belonging to an employer, client or customer and totaling $10,000 or more;
- a position with the California Department of Justice; or
- a sworn peace officer or law enforcement position.

One difference between AB 22 and similar laws in other states is that its exceptions are precise and limited compared to other states, which generally permit an employer to consider an individual's credit report if it is for a "bona-fide purpose" or "substantially job-related."

It is unclear how an aggrieved individual would assert a claim for violation of AB 22, but it likely would be through the California Private Attorneys' General Act of 2004, which requires an individual to provide notice to the California Workforce Development Agency before filing suit.

AB 22 also amends the CCRAA, which is modeled on the Fair Credit Reporting Act and addresses the notice obligations of entities that desire to request an individual's credit report. Before AB 22, the CCRAA generally required an entity or person seeking an individual's credit report to (1) obtain consent from the individual to order the report, (2) provide notice to the individual of the intended use of the report, and (3) provide notice to the individual if the report contains information that adversely affected the individual's employment opportunities.

Significant Sanctions Can Be Imposed for Violating AB 22's Notice Provisions

AB 22 adds another notice requirement. As of January 2012, employers permitted to consider an individual's credit report must notify the individual in writing and before obtaining a credit report of the basis under the Labor Code for requesting the report. In other words, employers must explain in writing to a prospective or current employee that a consumer-credit report is being sought because, for instance, the position is one where the individual will be or is a signatory on the employer's credit-card account. An employer that fails to provide this notice can be held liable for actual damages, attorney's fees, costs, and, in the case of willful violations, punitive damages.

The provisions of AB 22 and recent legislation in other states highlight the growing concern that employers' consideration of prospective employees' credit reports results in an unlawful discriminatory impact primarily because of race. Indeed, in the past year, the Equal Employment Opportunity Commission has filed high-profile lawsuits in federal court against Kaplan Higher Education Corp. and Freeman Cos. challenging their alleged consideration of candidates' credit histories. A relatively recent letter from the EEOC responding to an inquiry about federal legislation on employers' use of credit checks is also instructive. *See* http://www.eeoc.gov/eeoc/foia/letters/2010/titlevii-employer-creditck.html. It confirms the EEOC's belief that credit checks are often inaccurate measures of job performance and may disproportionately exclude protected groups of individuals.