

## Using Consumer Reports in Employment Decisions

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### **As seen on Employment Law360.**

In July 2009, H.R. 3149, entitled the "Equal Employment for All Act", was presented to Congress in an effort to amend portions of the Fair Credit Reporting Act (FCRA) to bar employers from using consumer reports and credit checks in making employment decisions. This bill represents an abrupt and somewhat controversial change to employers' current practice of using these reports to assess current or prospective employees' money management skills, personal background and responsibility.

#### Current FCRA Regulation of Employers' Use of Consumer Reports

Employers are currently permitted to use consumer reports in making employment decisions, as long as they follow certain notice, authorization and disclosure requirements. The FCRA governs the use of consumer reports from Credit Reporting Agencies (CRA) for making adverse employment decisions, including hiring decisions, promotions, transfers and terminations. Consumer reports can include a broad range of information, including not only credit information, but also in some situations information on consumers' character, personal characteristics, general reputation and even interviews from family and friends.

Employers may only obtain consumer reports for current or prospective employees if they first notify the individual in writing and obtain written authorization from the individual to contact a CRA to obtain a consumer report. If the employer uses the report in making an adverse employment decision, it must first provide the individual with a "pre-adverse action disclosure" containing a copy of the consumer report and a copy of a Federal Trade Commission publication entitled "A Summary of Your Rights Under the Fair Credit Reporting Act." After the employer makes the adverse employment decision, if the consumer report influenced the decision in any way, the employer must provide the individual with an oral, written or electronic "adverse action notice" giving the contact information for the CRA, a statement that the CRA did not make the employment decision and cannot comment on the reasons for the decision, and that the individual has the right to dispute the accuracy or completeness of the report.

#### Proposed Amendments to the FCRA Under H.R. 3149, the Equal Employment for All Act

The general purpose of H.R. 3149 is clearly set forth in its preamble: to "prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions." In a May 12, 2010 committee hearing on this topic, Chairman Luis Gutierrez of the House Financial Services Subcommittee on Financial Institutions and Consumer Credit stated that employers' use of consumer reports promoted a "cycle of debt" that "facilitate[s] the denial of employment to those who have bad debt, even though bad debt often times results from...the denial of employment." Representative Gutierrez noted that Equal Employment Opportunity Commission (EEOC) and FTC studies found that there are "racial disparities between African Americans, Latinos and whites in credit scoring" and that, consequently, the use of consumer reports in employment decisions adversely affects certain racial and

ethnic groups. Representative Maxine Waters questioned whether consumer reports accurately predict employment qualifications, noting “[t]his is a bad policy in the best of economic times; in the current recession it makes even less sense.”

The proposed language of the bill forbids employers from using or even procuring consumer reports for employment purposes or making adverse employment decisions, even if the individual authorizes the use of such a report. The bill permits the use of consumer reports in certain situations, such as applications for jobs that require national security or FDIC clearance or high level positions in financial institutions. However, even in those limited situations, employers must follow the prior notice, authorization and disclosure requirements under the FCRA.

H.R. 3149 has been referred to the House Committee on Financial Services, where it is still pending. Regardless of the outcome of this bill, the EEOC’s findings of racial disparities in credit checks could signal an influx of adverse impact or other discrimination claims. Employers should cautiously review their own consumer report policies to ensure that this type of information is truly being used for legitimate business reasons.