

# Morrison & Foerster Client Alert.

October 13, 2011

## California Restricts Use of Consumer Credit Reports for Employment Purposes

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On October 9, 2011, California Governor Jerry Brown signed a bill that dramatically limits the circumstances under which an employer may use consumer credit information in connection with hiring and employment decisions in California. Assembly Bill 22<sup>1</sup> ("AB 22") will become effective on January 1, 2012.

AB 22 strictly prohibits employers and prospective employers from using a consumer credit report for employment purposes, unless the position of the person for whom the report is sought meets any of the following criteria:

- A "managerial" position;<sup>2</sup>
- A position in the state Department of Justice;
- A sworn peace officer or other law enforcement position;
- A position for which the information contained in the report is required by law to be disclosed or obtained;
- A position involving "regular access" to (1) the bank or credit card account information, (2) the Social Security number, and (3) the date of birth of any one person;<sup>3</sup>
- A position held by (1) a named signatory on the employer's bank or credit card account, (2) someone authorized to transfer money on behalf of the employer, or (3) someone authorized to enter into financial contracts on behalf of the employer;
- A position that involves access to trade secrets;<sup>4</sup>

<sup>1</sup> The text and legislative history of AB 22 is available at <http://www.leginfo.ca.gov/>.

<sup>2</sup> AB 22 defines a "managerial position" as an employee covered by the executive exemption set forth in the Industrial Welfare Commission's Wage Order 4, Section 1, paragraph (A)(1). 8 Cal. Code Regs. § 11040.

<sup>3</sup> This exception does not encompass employees who access this information for the routine solicitation and processing of credit care applications in a retail establishment.

<sup>4</sup> For the purposes of AB 22, trade secrets are defined in the same way as in California's Uniform Trade Secrets Act, Cal. Civ. Code § 3426 *et seq.*

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- A position that involves regular access to cash totaling \$10,000 or more of the employer, a customer, or a client, during the workday; or
- A position for which the information contained in the report is required by law to be disclosed or obtained by the employer.

AB 22 clarifies that “consumer credit report” does not include a report that (a) verifies income or employment and (b) does not include credit-related information, such as credit history, credit score, or credit record. Accordingly, AB 22 would not appear to limit an employer’s ability to obtain criminal background check reports in accordance with federal and California law, as long as the reports do not include credit-related information.

Persons or businesses subject to the financial privacy provisions of the Graham-Leach-Bliley Act are exempt from AB 22’s coverage.

AB 22 also amends California’s Consumer Credit Reporting Agencies Act (“CCRAA”), which requires employers to provide advance notice to consumers before requesting a consumer credit report for employment purposes.<sup>5</sup> Once AB 22 takes effect, an employer that requests a consumer credit report for employment purposes pursuant to one of the exceptions listed above will be required to identify in the form of notice which exception specifically supports its request.

Former California Governor Arnold Schwarzenegger vetoed similar legislation in 2008, 2009, and 2010.

In recent years, there has been much legislative activity seeking to curtail use of consumer credit information in connection with hiring and employment decisions. With the passage of AB 22, California joins Connecticut, Illinois, Hawaii, Maryland, Oregon, and Washington, all of which states restrict the use of credit reports for employment purposes.<sup>6</sup>

Congress has considered similar legislation at the federal level. The Equal Employment for All Act (H.R. 3149), introduced in July 2009, would have amended the federal Fair Credit Reporting Act to restrict employers from considering a consumer credit report as a contributing factor in adverse employment decisions. Although H.R. 3149 did not pass the legislature before the legislative term expired, the Equal Employment for All Act was reintroduced as H.R. 321 in January 2011.<sup>7</sup> H.R. 321 is currently before the House Subcommittee on Financial Institutions and Consumer Credit.

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<sup>5</sup> Cal. Civ. Code § 1785 *et seq.*

<sup>6</sup> Conn. Pub. Act 11-223; Haw. Rev. Stat. § 378-2(8); 820 Ill. Comp. Stat. 70; Md. Code Ann., Lab. & Empl. § 3-711; Or. Rev. Stat. § 659A.885; Wash. Rev. Code § 19.182.020.

<sup>7</sup> The text and legislative history of H.R. 321 is available at <http://thomas.loc.gov>.

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