

Two Additional States to Restrict the Use of Credit Reports

Two additional states, Nevada and Colorado, will soon have laws to restrict the obtaining and/or use of credit information in the employment context. The laws do not restrict the reporting by Consumer Reporting Agencies (CRAs). Thus it is the responsibility of the users to obey the applicable law. Section 7 of the Colorado law specifically exempts CRAs from liability for providing credit reports to employers. However, as CRAs, you may desire to make your customers generally aware of these limitations.

Nevada SB 127 NRS Title 53 Chapter 613 (sections yet to be assigned) Effective October 1, 2013

An employer cannot refuse to hire, promote or take adverse action against the employee who refuses to permit a credit report that is not permitted by this new law.

An employer can only request a credit report under the following conditions:

1. Obtaining a credit report is required by federal or state law.
2. Credit information is reasonably related to the position being filled. The following are "deemed to be reasonably related" (however, this listing evidentially is not an exclusive list and an employer can justify the use of credit reports for other positions).
 - o The job entails the care, custody and handling of money, financial accounts, corporate credit or debit cards or other assets of the employer.
 - o Access to trade secrets of the employer.
 - o A position with managerial or supervisory responsibilities.
 - o Care, custody and handling or responsibility for personal information of another person.
 - o Access to personal financial information of another.

In addition, certain employers have a right to request a credit report.

1. Federal or state charter financial institutions.
2. State or local law enforcement but only for employees with direct exercise of law enforcement authority.
3. Licensed gaming establishments.

Enforcement. Individuals may sue for violation of the statute within three (3) years. Attorney fees may be awarded to the prevailing party, not just to the consumer. Thus a consumer individually or as a class could be obligated to pay the fees of an employer who prevails on such a claim. The Labor Commission can also enforce this law and can seek injunctive relief and fines up to \$9,000 per violation.

Colorado SB 13-018 - To be enacted as CRS 8-2-126 Effective July 1, 2013

An employer cannot use consumer credit information to evaluate an applicant/employee for a job unless the law specifically permits this information to be used.

The following employers may, as a matter of right, request credit reports:

1. Banks or financial institutions.
2. Employers required by law to obtain a credit report.

Other employers may only request and use a credit report if it is "substantially related to the position" being filled. The statute provides what appears to be an exclusive list of what constitutes substantially related. A credit report is substantially related to:

1. Executive and management personnel or officers

2. Employees who constitute professional staff to executive and management personnel (officers of the corporation are not mentioned, but they may be assumed to also occupy executive or managerial positions).

AND ONE OR MORE OF THE FOLLOWING ALSO APPLY TO THOSE POSITIONS:

1. The person sets the direction or control of a business, division, unit or agency of a business.
2. Has a fiduciary relationship to the employer (fiduciary relationship is not defined in the statute. It is a very vague term and may be an exception that you can fly a 747 through because all employees have some level of fiduciary duty to their employers.)
3. Access to customers', employees', or employer's personal or financial information, other than information customarily provided during a routine retail transaction.
4. Authority to issue payments, collect debts or enter into contracts.

The law also states that a credit report is substantially related if the position (and this need not be part of an executive management team, such as staff) involves contracting with defense, intelligence, national security or space agencies of the federal government.

If a credit report is obtained under the substantially related use, then the employer must provide to the applicant/employee a notice that a credit report will be obtained. Evidentially no special notice is needed for employers who are banks, financial institutions or those required by law to obtain credit reports. CRAs should examine their Disclosures and Authorization forms.

If an employer takes adverse action based in whole or in part upon what is contained in a credit report, the employer shall disclose that fact and the actual information relied upon, in writing, to the consumer. Employer shall use the same method of communication by which the application was received. There appears to be no requirement of "pre-adverse action notice" under this law, however, such still exists under the FCRA.

Further, if the report was obtained under the substantial related justification, the employer "may" inquire further with the applicant/employee to obtain an explanation of any adverse information. This inquiry does not appear to be required, only permitted. However, these provisions seem to create a confusing situation of who gets notice, what can be inquired into and what sort of notice each person receives. For example, the statute could be read that a bank could not discuss adverse information with the consumer. I doubt that was the intention but...that is an issue for the employer and not the CRA..

Consumers may file complaints with the Division of Labor. Civil penalties up to \$2,500 may be awarded to the prevailing party (so a consumer might have to pay). Individual lawsuits are not authorized.

To survey all states with similar restrictions use the Restriction Matrix in the main menu and click on "Use of Credit Report".

Best Regards,
Larry Henry