

Job Applicant and Employee Credit Checks in California: Proceed With Caution

AN ANALYSIS OF ASSEMBLY BILL 22

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Overview

On October 9, 2011, Governor Brown signed Assembly Bill 22 into law. The new law takes effect on January 1, 2012, and significantly changes the legal landscape for employers who request and consider credit-related information as part of job applicant and employee background checks. The law prohibits employers from obtaining credit information about applicants for employment as part of the background check process and deciding whether or not to continue the employment of an existing employee, unless the applicant/employee occupies a position specified in the law. The law also requires employers who obtain credit information as part of a background check to identify the specific basis in the law that authorizes the credit check.

Current California Law Regarding the Use of Consumer Credit Reports

Currently, in California, an employer can obtain a credit report on a job applicant or employee for employment purposes so long as the employer provides prior written notice that (1) informs the applicant/employee that a credit report will be obtained and used, (2) informs the applicant/employee of the source of the report, and (3) provides the applicant/employee with an opportunity to request a free copy of the report.

If an employer makes an adverse employment decision based on information contained in a credit report, the employer must advise the applicant/employee that the adverse action was based in whole or in part upon that information and must provide the applicant/employee with the contact information of the consumer credit agency from which the report was obtained.

New Limits on the Use of Consumer Credit Reports

AB 22 creates a new section of the California Labor Code (section 1024.5) which prohibits private sector employers from obtaining a consumer credit report as part of the background check process in connection with an application for employment or decision to continue employment of a current employee, except for applicants for, or employees in, the following positions¹:

- A “managerial” position, which is defined in the new law as meaning an employee who qualifies for the executive exemption from overtime pay requirements under Industrial Welfare Commission Order 4;

- A position that involves regular access – other than for routine solicitation and processing of credit card applications in a retail establishment – to bank or credit card account information, social security numbers, or dates of birth of others;
- A position in which the person would be a named signatory on the employer’s bank or credit card account, authorized to transfer money on behalf of the employer, or authorized to enter into financial contracts on behalf of the employer;
- A position that involves regular access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret;
- A position that involves regular access to the employer’s (or a customer’s or client’s) cash totaling at least ten thousand dollars (\$10,000); and
- A position for which credit information about the applicant/employer is required by law to be disclosed or obtained.

The specified exceptions to the general prohibition against using credit checks raise more questions than they answer. For example, what does it mean to have “regular access” to bank account or credit card information, social security numbers, dates of birth, or \$10,000 in cash?

What is a “Consumer Credit Report?”

In general, a “consumer credit report” is any written, oral or any other communication of any information by a credit reporting agency that bears on an applicant’s or employee’s credit worthiness, credit standing or credit capacity. This includes such information as credit history, credit score or credit record. AB 22 makes clear that a report that merely verifies prior income or employment, and does not include credit-related information (such as credit history, credit score or credit record) is **not** a consumer credit report and may be obtained by employers as part of the background check process for all applicants/employees.

Effect of AB 22 on the Background Check Process

AB 22 does not fundamentally alter the *process* for obtaining a credit report as part of a background check: before obtaining a credit check, an employer must continue to provide written notice to the applicant/employee that a report will be obtained and used, inform the applicant/employee of the source of the report, provide the applicant/employee with an opportunity to request a free copy of the report, and if the applicant/employee requests a copy, provide the copy at the same time that the report is provided to the employer. In addition, the new law does not change the requirement for an employer to notify the applicant/employee when there is an adverse employment decision that is based wholly or partially on information contained in a consumer credit report.

However, AB 22 adds a new, important requirement: *if an employer requests a credit report on an applicant/employee, the employer must identify which of the exceptions to the general prohibition against such reports applies.*

Remedies for Violations

AB 22 does not add any new remedies for applicants/employees. They continue to have the ability to bring a private action for actual damages suffered as a result of the failure of an employer to comply with the procedural requirements in the California Civil Code for obtaining credit checks (i.e., advance

notice to the applicant/employee containing all required information), and the law does not eliminate an employer's ability to avoid liability for violation of the procedural requirements by showing it has adopted "reasonable procedures" to ensure compliance.

What Should Employers Do?

Employers who currently use credit reports for evaluation of job applicants or current employees in California must stop using them by January 1, 2012, **unless** the applicant/employee falls into the categories exempt from the prohibition against using credit checks for employment purposes.

In addition, employers should audit their background check procedures and notice/disclosure and authorization forms (even if provided by a third party background check vendor) to verify compliance with federal and state background check laws, including the new requirement under AB 22 to specify the basis allowing consumer credit reports to be obtained.



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¹ AB 22 provides additional exceptions to the general prohibition against credit checks for public sector employers as well.