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UTILIZING CREDIT REPORTS FOR EMPLOYMENT PURPOSES: A LEGAL BAIT AND SWITCH TACTIC?

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In our previous article, “Holding Credit Reporting Agencies Accountable: How the Financial Crisis May be Contributing to Improving Accuracy in Credit Reporting” we reviewed the legal history of the Fair Credit Reporting Act (FCRA), its amendments, and the federal case law by circuit.¹ We suggested that the ability of consumers to ensure the accuracy and security of their credit reports might lead to an expansion of the litigation surrounding accurate credit reporting.² This article takes the discussion further by exploring the ever-expanding use of credit reports in the employment law arena. We review the state legislation limiting the use of credit reports by employers, the exceptions to these state statutes, and litigation related to those laws to date. This analysis is followed by an examination of the federal legal landscape and broader legal issues related to the use of credit reports, including whether the use of credit reports by employers discriminates against various protected groups. We conclude with a summary of our research, draw conclusions, and point to areas that should be explored in the future, and also speculate, based on a case from the US Court of Appeals for the 4th Circuit that we discuss, that this consequence could once again operate to increase the accuracy of credit reporting and hold those agencies more accountable.

STATE RESTRICTIONS ON THE USE OF CREDIT REPORTS IN EMPLOYMENT

Currently, ten states³ have enacted legislation that restricts an employer’s use of credit reports to evaluate current employees and applicants. In the 2013 legislative session, forty-seven bills in twenty-six states and the District of Columbia were introduced relating to the use of credit information in employment decisions,⁴ as compared to only seventeen⁵ states in 2012

¹ David D. Schein & James D. Phillips, *Holding Credit Reporting Agencies Accountable: How the Financial Crisis May be Contributing to Improving Accuracy in Credit Reporting*, 24 LOY. CONSUMER L. REV. 329, 330 (2012).

² *Id.* at 354.

³ See *Use of Credit Information in Employment 2013 Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-info-in-employ-2013-legis.aspx> (last updated June 20, 2013) (identifying these states as: California, Colorado, Connecticut, Hawaii, Illinois, Maryland, Nevada, Oregon, Vermont, and Washington).

⁴ See *id.*

⁵ See *Use of Credit Information in Employment 2012 Legislation*, NAT’L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-info-in-employ-2012-legis.aspx> (last updated Mar. 6, 2013) (identifying these states as: Colorado, District of Columbia, Florida, Georgia, Indiana, Iowa, Kansas, Massachusetts, Missouri, Nebraska, New Jersey, New York, Oklahoma, Pennsylvania, Rhode Island, South Carolina, Vermont, and Wisconsin).

and twenty-nine⁶ states in 2011. Thus, it appears there is an increase in the number of states proposing such legislation. Generally, these laws prohibit employers from obtaining a person's credit report to make an employment-related decision. All of the enacted and proposed laws, however, provide specific exceptions that operate to allow an employer to secure an employee's or prospective employee's credit report for the purposes of making employment decision depending on the job requirements.⁷ We summarize in the following discussion the state statutes that have been enacted in the ten respective states as well as the litigation attendant thereto.

Washington was the first state to enact this type of legislation in 2007.⁸ Washington's statute prohibits potential employers from using a credit report as part of the applicant's background check.⁹ The exception to this general rule is that employers may consider credit reports when that information is substantially related to future job responsibilities, and the employer has communicated that process in writing to the individual.¹⁰ The employer is required to explain to the individual how the credit report is substantially related to the specific job.¹¹

While Washington courts have yet to rule on a case involving the state statute, in *Krienke v. Chase Home Finance, LLC*, the Washington Court of Appeals addressed Krienke's claim that a credit reporting agency, Northwest Trustee Services, Inc. ("NWTS"), had violated the Fair Credit Reporting Act ("FCRA") for failing to investigate their disputed claim with Chase Bank.¹² In this case, Krienke had a mortgage with Chase bank.¹³ Chase

⁶ See *Use of Credit Information in Employment 2011 Legislation*, NAT'L CONFERENCE OF STATE LEGISLATURES, <http://www.ncsl.org/research/financial-services-and-commerce/use-of-credit-information-in-employment-2011-legis.aspx> (last updated Dec. 19, 2011) (identifying these states as: Alabama, Arizona, Arkansas, California, Colorado, Connecticut, District of Columbia, Florida, Georgia, Indiana, Kentucky, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nebraska, Nevada, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, South Carolina, Texas, Vermont, Washington, and Wisconsin).

⁷ See *Use of Credit Information in Employment 2013 Legislation*, *supra* note 3.

⁸ See *Use of Credit Information in Employment 2013 Legislation*, *supra* note 3.

⁹ WASH. REV. CODE ANN. § 19.182.020(2)(b) (West 2007).

¹⁰ WASH. REV. CODE ANN. § 19.182.020(2)(c)(i).

¹¹ *Id.*

¹² *Krienke v. Chase Home Fin., LLC*, No. 35098-0-II, 2007 Wash. App. LEXIS 2668, at ¶1 (Wash. Ct. App. Sept. 18, 2007); see also 15 U.S.C. § 1681 (2014) (The purpose of the Fair Credit Reporting Act is to ensure that consumer reporting agencies maintain accurate credit reports, resolve disputed reports promptly and fairly, and adopt reasonable procedures to promote consumer confidentiality and the proper use of credit data); *Summary of Your Rights Under the Fair Credit Reporting Act*, FED. TRADE COMM'N, <http://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf> (last visited July 29, 2014) (Under the FCRA credit reporting agencies must inform you if information in your file has been used against you. Anyone who uses a credit report or another type of consumer report to deny your application for credit, insurance, or employment – or to take another adverse

sent Krienke multiple notices informing them that they were delinquent on their mortgage payments.¹⁴ While Krienke made it clear to Chase that they disputed the delinquency by placing their contentions in writing, they failed to notify NWTs.¹⁵ The Court of Appeals upheld the lower Court's decision dismissing the plaintiff's claim because Krienke failed to notify NWTs of the dispute.¹⁶ The Court stated that the FCRA "only takes effect after the credit reporting agency ("CRA") receives notice of the dispute."¹⁷

Hawaii enacted its statute in 2009,¹⁸ making it an unlawful discriminatory practice to use credit reports in any employment-related decision, unless that information is a "bona fide occupational qualification."¹⁹ The statute prohibits all employers from using credit reports unless the potential employer has given the individual a conditional employment offer.²⁰ No other state has included this provision in their related statute.²¹ Hawaii's statute appears to be one of the most individually protective out of the ten states that have enacted such legislation.

Similar to Washington, Hawaii Courts have not yet ruled on a case involving the state statute. In *Deutsche Bank Nat. Trust Co. v. Tejada*, the Intermediate Court of Appeals of Hawaii was unable to thoroughly analyze Tejada's claim that Deutsche Bank had violated the FCRA.²² The court found that not only did the *pro se* defendants lack standing, but they also

action against you – must tell you, and must give you the name, address, and phone number of the agency that provided the information. Additionally, you have the right to dispute incomplete or inaccurate information. If you identify information in your file that is incomplete or inaccurate, and report it to the consumer reporting agency, the agency must investigate unless your dispute is frivolous.); *Credit and Loans*, FED. TRADE COMM'N, www.ftc.gov/credit (last visited July 29, 2014) (offering an explanation of dispute procedures). Most importantly however, consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information. Inaccurate, incomplete or unverifiable information must be removed or corrected, usually within 30 days. Credit reporting agencies are prohibited from reporting outdated information. *Summary of Your Rights Under the Fair Credit Reporting Act, supra*.

¹³ *Krienke*, 2007 Wash. App. LEXIS 2668, at ¶2.

¹⁴ *Id.*

¹⁵ *Id.* at ¶39.

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ HAW. REV. STAT. § 378-2.7 (2009) available at http://www.capitol.hawaii.gov/hrscurrent/Vol07_Ch0346-0398/HRS0378/HRS_0378-0002_0007.htm.

¹⁹ HAW. REV. STAT. § 378-2.7(a)(1) ("Inquiry into and consideration of a prospective employee's credit history or credit report may take place only after the prospective employee has received a conditional offer of employment, which may be withdrawn if information in the credit history or credit report is directly related to a bona fide occupational qualification.").

²⁰ *Id.*

²¹ See *Credit Checks- State by State*, TALENTWISE, <http://corp.talentwise.com/blog/201209/credit-checks-state-state> (last visited July 29, 2014).

²² *Duetsche Bank Nat. Trust Co. v. Tejada et. al.*, No. 30654, 2011 Haw. App. LEXIS 1137, at *7-8 (Haw. Ct. App. Oct. 12, 2011).

failed to cite specific statutory authority or applicable case law to support their contention that *Duetsche Bank* had violated the FCRA.²³

Illinois enacted its statute in 2010.²⁴ The statute prohibits employers from inquiring about or using an employee's or prospective employee's credit history as a basis for employment, recruitment, discharge, or compensation.²⁵ Similar to other states' statutes, it has exceptions that allow the use of credit reports in situations where the employee has unsupervised access to, *inter alia*, \$2,500 or more, control over a business, or the employee has access to personal information.²⁶ Illinois Courts have yet to decide a case regarding this statute.

Oregon also enacted its statute in 2010.²⁷ Under this statute, it is an unlawful employment practice for an employer to obtain or use for employment purposes any information contained in the credit history of either an applicant for employment or an employee.²⁸ This includes rejecting an applicant, as well as discharging, demoting, suspending, and retaliating or otherwise discriminating against an employee with regard to promotion, compensation, or terms and conditions or privileges of employment.²⁹ The statute enacted in Oregon provides many of the same exceptions provided in other states with similar statutes, but Oregon also requires that the employer disclose to the individual, in writing, the reasons for obtaining the credit report.³⁰ No cases have been litigated in Oregon with respect to this statute.

California, Connecticut, and Maryland enacted their legislation in 2011.³¹ California and Maryland have similar statutes: both proscribe most

²³ *Id.* at *5, 7–8.

²⁴ See 820 ILL. COMP. STAT. ANN. 70/10 (West 2011); *Use of Credit Information in Employment 2012 Legislation*, *supra* note 5.

²⁵ 820 ILL. COMP. STAT. ANN. 70/10(a)(1).

²⁶ 820 ILL. COMP. STAT. ANN. 70/10(b)(2).

²⁷ OR. REV. STAT. ANN. § 659A.320 (West 2010); *Use of Credit Information in Employment 2012 Legislation*, *supra* note 5.

²⁸ OR. REV. STAT. ANN. § 659A.320(1).

²⁹ *Id.*

³⁰ OR. REV. STAT. ANN. § 659A.320(2)(d). Subsection 1 of the statute does not apply to: 1) employers that are federally insured banks or credit unions, 2) employers that are required by state or federal law to use individual credit history for employment, 3) the application for employment or the employment of a public safety officer who will be or who is a member of law enforcement, a peace officer, or responsible for enforcing criminal laws, 4) The obtainment or use by an employer of information in the credit history of an applicant or employee because the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing. § 659A.320(2).

³¹ See CAL. LAB. CODE § 1024.5 (West 2011); CONN. GEN. STAT. ANN. § 31-51tt (West 2011); MD. CODE ANN., LAB. & EMPL. § 3-711 (West 2012); *Use of Credit Information in Employment 2012 Legis-*

employers from using credit reports as a factor or basis for employment decisions, unless the employer has a bona fide reason based on the type of employment, and the employer discloses to the individual in writing its reasons and use of the report.³² The Courts in both California and Maryland have yet to rule on cases regarding their respective statutes.

Connecticut's statute attempts to limit employers' use of credit reports by stating that an employer or prospective employer cannot require an individual to consent to an employer obtaining a credit report containing certain credit information.³³ The statute contains significant statutory exceptions, and subject to those exceptions, an employer is barred from accessing information about an individual's credit score, credit account balances, payment history, savings or checking account balances and account numbers as a condition of employment.³⁴ However, Connecticut's statute is the only one that does not explicitly prohibit an employer's use of credit reports.³⁵ The statute appears to provide employers with the ability to transform a voluntary request for consent into a requirement, in that if an employer indicates to an employee or prospective employee the significance of consent in the employment decision making process, without making it a requirement, a "Catch 22" choice arises. The issue would then become whether a current employee or prospective employee would feel that they are free to decline consent. In most instances an individual would most likely feel reluctant to decline consent, fearing that this would indicate to their current or prospective employer that they were hiding something, or that it would preclude them from being hired for the position. This is especially true in the current tight job market. Unfortunately however, there is no answer to this question as this issue has not been addressed by the Connecticut courts.

Vermont enacted its statute in 2012.³⁶ Like other states, Vermont prohibits an employer from using credits reports as a basis for refusing to hire

lition, supra note 5.

³² CAL. LAB. CODE § 1024.5; MD. CODE ANN., LAB. & EMPL. § 3-711.

³³ CONN.GEN. STAT. ANN. § 31-51tt(b) ("Enforcement (b) No employer or employer's agent, representative or designee may require an employee or prospective employee to consent to a request for a credit report that contains information about the employee's or prospective employee's credit score, credit account balances, payment history, savings or checking account balances or savings or checking account numbers as a condition of employment unless (1) such employer is a financial institution, (2) such report is required by law, (3) the employer reasonably believes that the employee has engaged in specific activity that constitutes a violation of the law related to the employee's employment, or (4) such report is substantially related to the employee's current or potential job or the employer has a bona fide purpose for requesting or using information in the credit report that is substantially job-related and is disclosed in writing to the employee or applicant.").

³⁴ *Id.*

³⁵ *Id.*

³⁶ See VT. STAT. ANN. tit. 21 § 495i (West 2012); *Use of Credit Information in Employment 2012 Legis-*

or recruit an applicant, to discharge an employee, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment.³⁷ Vermont also provides exceptions to this prohibition, such as if the employee has access to confidential financial information, if the employer is a financial institution, or if the individual is a member of law enforcement.³⁸ If a credit report is sought by an employer, they must obtain consent from the individual, and explain in writing the reasons for accessing the credit report.³⁹ Like many of the other states, there has been no litigation regarding this statute.

Colorado and Nevada are the two most recent states to restrict an employer's use of credit reports when making employment decisions, enacting legislation in 2013.⁴⁰ Colorado's statute, known as the "Equal Employment Opportunity Act," prohibits an employer's use of consumer credit information for employment purposes unless the information is substantially job related,⁴¹ i.e. the person for whom the information is sought has access to money. Additionally, Colorado "requires an employer to disclose to an employee or applicant for employment . . . when the employer uses the employee's consumer credit information to take adverse action against him or her and the particular credit information upon which the employer relied."⁴² Colorado's statute, however, appears to paint with a much broader brush than the states that preceded it in this type of legislation. It does not define access to money, or place a threshold minimum dollar amount for employee access in order to subject them to credit history disclosure, as some other states do.⁴³ It appears that an employer would be justified in accessing the

lation, supra note 5.

³⁷ VT. STAT. ANN. tit. 21 § 495i(b) ("An employer shall not: (1) Fail or refuse to hire or recruit; discharge; or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment because of the individual's credit report or credit history. (2) Inquire about an applicant or employee's credit report or credit history.").

³⁸ VT. STAT. ANN. tit. 21 § 495i(c)(1)(A)–(G).

³⁹ VT. STAT. ANN. tit. 21 § 495i(d)(1)–(2) ("If an employer seeks to obtain or act upon an employee's or applicant's credit report or credit history pursuant to subsection (c) of this section that contains information about the employee's or applicant's credit score, credit account balances, payment history, savings or checking account balances, or savings or checking account numbers, the employer shall: (1) Obtain the employee's or applicant's written consent each time the employer seeks to obtain the employee's or applicant's credit report; (2) Disclose in writing to the employee or applicant the employer's reasons for accessing the credit report, and if an adverse employment action is taken based upon the credit report, disclose the reasons for the action in writing. The employee or applicant has the right to contest the accuracy of the credit report or credit history.").

⁴⁰ COLO. REV. STAT. § 8-2-126 (2013); *See Use of Credit Information in Employment 2012 Legislation, supra* note 5.

⁴¹ COLO. REV. STAT. § 8-2-126(1)-(3)(a)(III).

⁴² S.B. 12-003, 68th Leg., 2nd Reg. Sess. (Colo. 2012); *see also* COLO. REV. STAT. § 8-2-126(4).

⁴³ *See* 820 ILL. COMP. STAT. ANN. 70/10(b)(2) (allows an employer to access an employee's or applicant's credit report if they have access to assets valued at \$2500 or have signatory power over business

credit history of an employee who has access to as little as one penny on the job. Colorado's statute took effect on July 1, 2013, and only applies to acts occurring on or after that date.⁴⁴

Nevada's legislation, when compared to the other states, imposes the most stringent restrictions on employers who seek to use credit reports when making employment decisions. Nevada's statute makes it unlawful for an employer to "directly or indirectly, require, *request, suggest or cause* any employee or prospective employee to submit a consumer credit report or other credit information as a condition of employment."⁴⁵ The statute also prohibits an employer from using, accepting, referring, *or even inquiring* into an employee's or prospective employee's credit information as a condition of employment.⁴⁶ Additionally, Nevada makes it unlawful for an employer to "discharge, discipline, discriminate against in any manner or deny employment or promotion to, or threaten to take any such action against an employee or prospective employee who refuses, declines, or fails to submit a credit report or other credit information, or on the basis of the results of a credit report or other credit information."⁴⁷ Nevada's statute makes it unlawful for an employer to even suggest to an employee or prospective employee that a credit report is a condition of employment.⁴⁸ Moreover, it explicitly prohibits an employer from taking retaliatory actions against any employee who files a complaint, testifies in a legal proceeding against the employer, or who exercises their rights under the law.⁴⁹ This statute took effect on October 1, 2013, and applies to acts occurring on or after that date.⁵⁰

assets of \$100); *see also* CAL. LAB. CODE § 1024.5(a)(8) (permits an employer access to an employee's or applicant's credit report if they have regular access to cash totaling ten thousand dollars).

⁴⁴ COLO. REV. STAT. § 8-2-126.

⁴⁵ S.B. 127, 2013 Leg., 77th Sess. (Nev. 2013) (emphasis added), *available at* http://www.leg.state.nv.us/Session/77th2013/Bills/SB/SB127_EN.pdf.

⁴⁶ *Id.*

⁴⁷ *Id.*

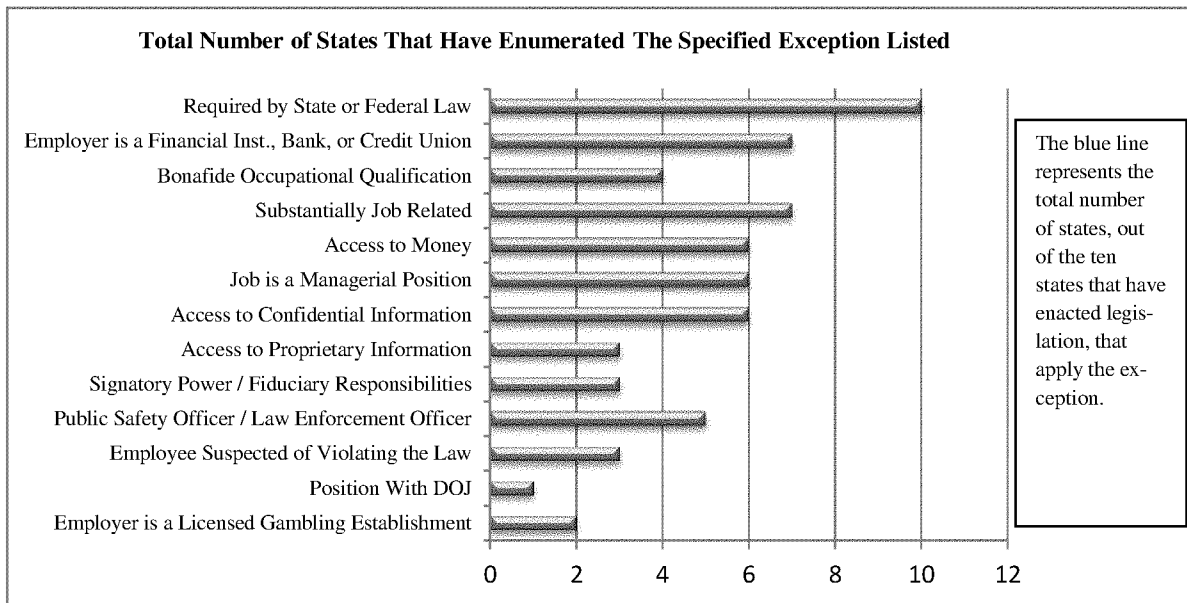
⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ Rod M. Fliegel, Bruce Young & Jennifer L. Mora, *Nevada is the Latest State to Restrict the Use of Credit Reports for Employment Purposes*, LITTLER (May 30, 2013), <http://www.littler.com/publication-press/publication/nevada-latest-state-restrict-use-credit-reports-employment-purposes#sthash.tQ7tx93Q.dpuf> ("On May 25, 2013, Nevada Governor Brian Sandoval signed a new law making Nevada the third state in the last 12 months to enact legislation restricting use by employers of credit reports and other credit history information for hiring and other employment-related purposes. Nevada's new law, which goes into effect October 1, 2013, follows closely on the heels of similar legislation enacted by Colorado in April 2013, 1 and adds Nevada to the handful of other states that have similar laws: California, Connecticut, Hawaii, Illinois, Maryland, Oregon, Vermont, and Washington.").

EXCEPTIONS TO THE STATE STATUTORY FRAMEWORK

While each of the ten states referenced above has, at least ostensibly, outlawed employer's use of credit reports as a requirement or condition of employment, these statutes should not be considered by the practitioner as an absolute prohibition. Each state, despite the general ban on this practice, has enumerated exceptions whereby an employer may legally access an employee's or prospective employee's credit history or make its disclosure a requirement or condition of the employment. An overview of this research is presented in the chart below.



Predictably, all ten states are in agreement that an employer can access an employee's or prospective employee's credit history if it is required for employment by other state or federal laws.⁵¹ Similarly, seven of the ten states allow employers who are financial institutions, federally insured banks, or

⁵¹ CAL. LAB. CODE § 1024.5(a)(4); COLO. REV. STAT. § 8-2-126(3)(a)(II); CONN. GEN. STAT. ANN. § 31-51tt(b); HAW. REV. STAT. § 378-2.7(a)(2); 820 ILL. COMP. STAT. ANN. 70/10(b)(1); MD. CODE ANN., LAB. & EMPL. § 3-711(a)(1); OR. REV. STAT. ANN. § 659A.320(2)(b); VT. STAT. ANN. tit. 21 § 495i(c)(1)(A); WASH. REV. CODE ANN. § 19.182.020(2)(c)(ii); Nev. S.B. 127.

credit unions, to access an individual's credit history report or make it a condition of the employment.⁵² Four states allow an employer to access an individual's credit history if the report directly relates to a bona fide occupational qualification,⁵³ while seven states allow this if the credit report is substantially job related.⁵⁴ However, because the latter two exceptions are so broad, nearly every state has articulated specific job related requirements that make clear when these exceptions are applicable and under what circumstances they will provide an employer with legally sufficient grounds to make a credit history check a requirement or condition of the employment.

For example, six states provide that if an employee is a manager,⁵⁵ has access to money⁵⁶ or confidential information,⁵⁷ the employer may require a credit report as condition of the employment. An employer may also access an employee's or prospective employee's credit history report if that individual, in their employment capacity, would have access to proprietary information.⁵⁸ Lastly, three states have determined that if the employment provides an employee or prospective employee with signatory powers or fiduciary responsibilities, an employer may require a credit history check as a condition of the employment.⁵⁹

The next category applies specifically to those who intend to pursue a career in law enforcement or the public safety sector. In five states, any individual who seeks to be employed as a public safety officer will be required to grant the prospective employer consent to access their credit history.⁶⁰

⁵² COLO. REV. STAT. § 8-2-126(3)(a)(I); CONN. GEN. STAT. ANN. § 31-51tt(a)(3), (b); HAW. REV. STAT. § 378-2.7(a)(4); MD. CODE ANN., LAB. & EMPL. § 3-711(a)(2)-(4); OR. REV. STAT. ANN. § 659A.320(2)(a); VT. STAT. ANN. tit. 21 § 495i(c)(1)(C); Nev. S.B. 127.

⁵³ CONN. GEN. STAT. ANN. § 31-51tt(a)(4), (b); HAW. REV. STAT. § 378-2.7(a)(1); 820 ILL. COMP. STAT. ANN. 70/10(b)(6); MD. CODE ANN., LAB. & EMPL. § 3-711(c)(1)(ii), (2).

⁵⁴ COLO. REV. STAT. § 8-2-126(3)(a)(III); CONN. GEN. STAT. ANN. § 31-51tt(b); HAW. REV. STAT. § 378-2.7(a)(1); MD. CODE ANN., LAB. & EMPL. § 3-711(c)(1)(ii); OR. REV. STAT. ANN. § 659A.320(2)(d); WASH. REV. CODE ANN. § 19.182.020 (2)(c)(i); Nev. S.B. 127.

⁵⁵ CAL. LAB. CODE § 1024.5(a)(1); COLO. REV. STAT. § 8-2-126(2)(g)(I); HAW. REV. STAT. § 378-2.7(a)(3); 820 ILL. COMP. STAT. ANN. 70/10(b)(4); MD. CODE ANN., LAB. & EMPL. § 3-711(2)(i); Nev. S.B. 127.

⁵⁶ CAL. LAB. CODE § 1024.5(a)(6)(B), (a)(8), (b); COLO. REV. STAT. § 8-2-126(2)(g)(I)(D); 820 ILL. COMP. STAT. ANN. 70/10(b)(2), (b)(3); MD. CODE ANN., LAB. & EMPL. § 3-711(2)(iii), (2)(iv); VT. STAT. ANN. tit. 21 § 495i(c)(1)(B), (E), (G); Nev. S.B. 127.

⁵⁷ CAL. LAB. CODE § 1024.5(a)(5)(A)-(C); COLO. REV. STAT. § 8-2-126(2)(g)(I)(C); 820 ILL. COMP. STAT. ANN. 70/10(b)(5); MD. CODE ANN., LAB. & EMPL. § 3-711(2)(iii), (2)(v); VT. STAT. ANN. tit. 21 § 495i(c)(1)(B), (G); Nev. S.B. 127.

⁵⁸ CAL. LAB. CODE § 1024.5(A)(7); COLO. REV. STAT. § 8-2-126(2)(g)(I)(C); 820 ILL. COMP. STAT. ANN. 70/10(b)(5); MD. CODE ANN., LAB. & EMPL. § 3-711(c)(2)(ii).

⁵⁹ CAL. LAB. CODE § 1024.5(a)(6)(A); COLO. REV. STAT. § 8-2-126(2)(g)(I)(B); 820 ILL. COMP. STAT. ANN. 70/10(b)(3).

⁶⁰ CAL. LAB. CODE § 1024.5; COLO. REV. STAT. § 8-2-126; OR. REV. STAT. ANN. § 659A.320; VT. STAT. ANN. tit. 21 § 495i; Nev. S.B. 127.

Oregon law provides significant clarity as to what occupations are covered by the “public safety officer” exception. The statute provides in pertinent part that a public safety officer includes any member of a law enforcement unit; any individual employed as a peace officer commissioned by a city, port, school district, mass transit district, county, Indian reservation, the Criminal Justice Division of the Department of Justice, the Oregon State Lottery Commission or the Governor and who is responsible for enforcing the criminal laws of this state or laws or ordinances related to airport security.⁶¹ The chart below displays the specific exceptions and the states whose statutes explicitly list them.

<i>Exceptions that Make Disclosure of an Employee's or Prospective Employee's Credit History a Requirement or Condition of Employment Lawful</i>	<i>States That Apply the Exception</i>
Required By Other State or Federal Laws	Washington, Hawaii, Illinois, Oregon, California, Maryland, Connecticut, Vermont, Nevada, Colorado
Financial Institution, Federally Insured Bank or Credit Union	Hawaii, Oregon, Maryland, Connecticut, Vermont, Nevada, Colorado
Bona Fide Occupation Qualification	Hawaii, Illinois, Maryland, Connecticut
Substantially Job Related	Washington, Hawaii, Oregon, Maryland, Connecticut, Nevada, Colorado
Access to Money	Illinois, California, Maryland, Vermont, Nevada, Colorado
Managerial Position	Hawaii, Illinois, California, Maryland, Nevada, Colorado
Access to Confidential Information	Illinois, California, Maryland, Vermont, Nevada, Colorado
Access to Proprietary Information	Illinois, California, Colorado, Maryland
Signatory Power / Fiduciary Responsibilities	Illinois, California, Colorado
Public Safety Officer / Law Enforcement	Oregon, California, Vermont, Nevada, Colorado
Reasonable Belief that Employee/Applicant Violated the Law	Connecticut, Nevada
Predictor of Job Performance	Vermont
Disclosure in Writing	Washington, Oregon, Maryland, Connecticut, Vermont, Colorado
Employee Consent	Washington, Maryland, Vermont

⁶¹ OR. REV. STAT. ANN. § 659A.320.

Generally speaking, the above referenced exceptions constitute a comprehensive list of the common categorical exceptions shared among the states that have enacted legislation. However, this list is not exhaustive, as there are certain state-specific exceptions. For example, two states grant an employer authority to obtain an employee's or prospective employee's credit report if they have a reasonable belief that the employee or applicant has violated laws.⁶² Nevada provides that any employee or prospective employee working at a "licensed gambling establishment" may be required by his or her employer to disclose or give consent to disclose their credit history as a requirement or condition of the employment.⁶³ Given the importance of gambling to the State of Nevada, this is a significant exception to its law.⁶⁴ In turn, Vermont grants an employer the authority to access an individual's credit report if their credit history can be a predictor of job performance.⁶⁵ This vague exception could be an easy excuse for creative employers to access this type of information.

It should also be noted that some states place notice requirements on an employer who seeks to obtain or does in fact obtain an individual's credit history, including: Washington, Oregon, Maryland, Connecticut, Vermont, and Colorado. However, these states vary in terms of when notice is required, as well as the degree of specificity required in the notice.⁶⁶

Employers in Maryland and Connecticut appear to have the lowest burden to meet in satisfying the notice requirement, as the statutes require only that an employer inform the employee or prospective employee in writing that they are attempting to obtain or have in fact obtained their credit history report.⁶⁷ However, employers in Oregon have a slightly higher burden to satisfy because not only are they required to disclose to the employee or prospective employee in writing of their intent to obtain their credit information, but they must also articulate the specific reasons for the intended or actual use of the information.⁶⁸ Similar to Oregon, Washington requires that an employer either seek authorization before procuring the credit report

⁶² CONN. GEN. STAT. ANN. § 31-51tt; Nev. S.B. 127.

⁶³ Nev. S.B. 127.

⁶⁴ See David Frum, *Las Vegas Made a Big, Bad Bet on Casinos*, CNN (Apr. 1, 2014, 7:50 AM), <http://www.cnn.com/2014/04/01/opinion/frum-las-vegas-economy/>.

⁶⁵ VT. STAT. ANN. tit. 21 § 495i (This exception is extremely broad and may open up an opportunity to challenge the meaning of "predictor of job performance", as there may be no end to indicators of job performance).

⁶⁶ COLO. REV. STAT. ANN. § 8-2-126; CONN. GEN. STAT. ANN. § 31-51tt; MD. CODE ANN., LAB. & EMPL., § 3-711; OR. REV. STAT. ANN. § 659A.320; WASH. REV. CODE ANN. § 19.182.020; VT. STAT. ANN. tit. 21 § 495i.

⁶⁷ CONN. GEN. STAT. ANN. § 31-51tt; MD. CODE ANN., LAB. & EMPL., § 3-711.

⁶⁸ OR. REV. STAT. ANN. § 659A.320.

or provide the employee or prospective employee with a “clear and conspicuous disclosure, in writing,” before the report is procured.⁶⁹ However, the law does provide that a written statement contained in employment documents satisfies this burden.⁷⁰

Employers in Vermont and Colorado, however, have the highest burden to meet when seeking an individual’s credit history. Colorado law requires employers who take adverse action based on an employee’s or prospective employee’s credit history, to disclose to the individual in writing the fact that they have accessed that individual’s credit history as well as inform the individual of the information upon which they relied in taking that action.⁷¹ Employers in Vermont have the greatest burden to satisfy. The Vermont statute requires an employer to obtain the written consent of an employee or prospective employee prior to obtaining their credit report in addition to disclosing to the employee or prospective employee in writing the reasons for accessing the information.⁷² Vermont also mandates that the employer bear all costs of obtaining the credit report and mandates that the employer keep the information confidential.⁷³

We assume that the forty states which have not enacted legislation prohibiting an employer’s use of a credit report for an employment decision have no such prohibitions in effect, either as a matter of policy or by administrative ruling or regulation.⁷⁴ Therefore, the practitioner should note that the above conclusion with respect to the other forty states, coupled with our conclusion that the exceptions to the ten state statutes have virtually swallowed those states’ legal prohibitions, clearly indicates that under state law, an employer is virtually free to utilize credit reports to make employment decisions. This is in effect the bait and switch: states which have passed legislation, arguably at the request of consumers, forbidding credit scores use in employment decisions, have virtually gutted those restrictions by exception. Accordingly, it is highly recommended that each state’s statute be consulted to determine the specific statutory exceptions that may apply, or whether the state legislature has spoken on this issue. Whether there is leg-

⁶⁹ WASH. REV. CODE ANN. § 19.182.020.

⁷⁰ *Id.*

⁷¹ COLO. REV. STAT. ANN. § 8-2-126.

⁷² VT. STAT. ANN. tit. 21 § 495i.

⁷³ *Id.* at § 495i(d)(3)–(4).

⁷⁴ For the other forty (40) states, those that have not enacted legislation prohibiting an employer’s use of credit reports in employment decisions, an individual may only seek redress under FCRA or the employment discrimination statutes. These other forty states have not enacted any legislation that expressly prohibits or provides an employer with the right to access an individual’s credit report as a condition or requirement of employment. *See Use of Credit Information in Employment 2013 Legislation*, *supra* note 3.

isolation in a particular state or not, the practitioner will also need to refer to federal statutes. Accordingly, a review of the federal legal credit reporting landscape is next.

FEDERAL RESTRICTIONS ON THE USE OF CREDIT REPORTS IN EMPLOYMENT

FCRA and FACT

The Fair Credit Reporting Act,⁷⁵ “FCRA,” as amended by the Fair and Accurate Credit Transactions Act of 2003,⁷⁶ “FACT,” provides a baseline of protection for applicants who are subject to a background check by a potential employer.⁷⁷ Whether a credit check is part of the background check or not, these federal laws require advance written consent.⁷⁸ If the applicant is going to be denied employment, then the FCRA requires that the applicant be given written notice, and if the applicant is ultimately denied employment, the employer must give written notice that it was due to a background check.⁷⁹ If the applicant requests the information, the employer must provide the applicant with the name and address of the agency that provided the report.⁸⁰ Note that many of the state laws referenced above contain essentially similar restrictions for notice to applicants by employers, and therefore largely duplicate the federal protection already available.

A recent interpretation of FCRA by the US Court of Appeals for the 4th Circuit illuminates the current judicial view of FCRA and the rights of consumers to correct incorrect information in their credit reports. In *Dreher v. Experian Information Solutions, Inc.*, the Plaintiff, Michael T. Dreher, brought suit against the defendant, Experian Information Solutions, Inc., for alleged violations of the FCRA.⁸¹ Dreher claimed that Experian violated the FCRA “willfully,” by failing to clearly and accurately disclose all relevant information in his credit report, thus entitling him to actual, statutory, and punitive damages.⁸²

⁷⁵ Pub. L. No. 91-508, § 601, 84 Stat. 1114, 1127-28 (1970) (codified as amended at 15 U.S.C. §§ 1681a-1681x (2012)).

⁷⁶ Pub. L. No. 108-159, 117 Stat. 1952 (2003) (codified as amended at 15 U.S.C. §§ 1681a-1681x (2012)).

⁷⁷ See 15 U.S.C. § 1681b(a)-(b) (2012).

⁷⁸ *Id.* at § 1681b(b)(1)-(2).

⁷⁹ *Id.* at § 1681b(b)(3).

⁸⁰ *Id.* at § 1681b(b)(3)(B)(ii).

⁸¹ *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-cv-00624-JAG, 2013 WL 2389878, at *1 (E.D. Va. May 30, 2013).

⁸² *Id.* at *1-2.

An identity thief victimized Dreher in late 2008 but he did not discover this fact until 2010 after applying for employment with the federal government.⁸³ While processing Dreher's security clearance, the Government discovered and revealed to him that he had a delinquent account on his credit report in the name of "Advanta Credit Cards."⁸⁴ Dreher denied ever applying for an account with any "Advanta" entity and immediately contacted Experian to request his credit report.⁸⁵ Experian sent Dreher several credit reports listing "Advanta Credit Cards" as the sole delinquent account.⁸⁶ However, Experian was aware and made no mention to Dreher that Advanta Bank had collapsed and Cardworks, Inc. and Cardworks Servicing, LLC were appointed as the "Successor Servicer" of the accounts originated by Advanta Bank.⁸⁷ Moreover, Experian exclusively listed Advanta Credit Cards, not Cardworks, on the credit report as the sole source of the negative information, thus preventing Dreher from contacting Cardworks to correct his credit report.⁸⁸

When faced with determining whether Experian was "objectively unreasonable" in disclosing Advanta Credit Cards and not Cardworks as the sole source of information in Dreher's credit report, the court ultimately ruled in favor of Dreher.⁸⁹ The Court determined that in order for Dreher to prevail on his claims, he was required to prove that Experian engaged in willful violations of the FCRA.⁹⁰ To satisfy this burden he needed to establish that Experian knowingly or recklessly violated the law.⁹¹

While the court ruled that Experian did not knowingly violate the law because they were unaware that they were engaging in unlawful conduct at the time of their decision, the court ruled that Experian was, in fact, reckless.⁹² Recklessness is defined under the Act as "conduct of an objective standard: action entailing an unjustifiably high risk of harm that is either known or so obvious that it should be known."⁹³ Put in other terms, "a company subject to FCRA does not act in reckless disregard of it unless the

⁸³ *Id.* at *1.

⁸⁴ *Id.* at *1.

⁸⁵ *Id.* at *1.

⁸⁶ Dreher v. Experian Info. Solutions, Inc., No. 3:11-cv-00624-JAG, 2013 WL 2389878, at *1 (E.D. Va. May 30, 2013).

⁸⁷ *Id.* at *2.

⁸⁸ *Id.*

⁸⁹ *Id.* at *1.

⁹⁰ *Id.* at *3.

⁹¹ Dreher v. Experian Info. Solutions, Inc., No. 3:11-CV-00624-JAG, 2013 WL 2389878, at *3 (E.D. Va. May 30, 2013).

⁹² *Id.*

⁹³ *Id.* at *4 (citing *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 68 (2007)).

action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."⁹⁴

While Experian argued that the term "sources" as contained in 15 U.S.C. § 1681(g)(a) had multiple meanings and did not require them to disclose Cardworks on Dreher's credit report, the court ruled that Experian utterly disregarded the plain meaning of the statute when deciding how to comply.⁹⁵ The Court explained that the statute required Experian to disclose all sources of information, including Cardworks, on Dreher's credit report so as to allow him to identify inaccurate information.⁹⁶ The court further stated that Experian's express decision not to list CardWorks as a source of the information in Dreher's credit report could not be considered objectively reasonable considering that their decision 1) violated the FCRA's requirement compelling Experian to list all sources of information, 2) violated industry standards, 3) listed a source (i.e. Advanta) that no longer existed, and 4) failed to place CardWorks, the current servicer, and sole entity that supplied the actual content on Dreher's credit report, on his report.⁹⁷ The court concluded that "Experian was not 'merely careless,' but 'substantially' more culpable when it disclosed Advanta," as opposed to CardWorks, the most logical source of the information, as the sole source of information on Dreher's credit report.⁹⁸ The court therefore dismissed the defendant's motion for partial summary judgment.⁹⁹

A recently reported FCRA case in the U.S. District Court for the District of Oregon has drawn attention due to the amount awarded to the plaintiff. In *Miller v. Equifax*, decided July 26, 2013, a jury awarded Julie Miller, the plaintiff, \$18 million for her damages due to Equifax's failure to correct errors in her credit report allegedly caused by Equifax's mixing of negative credit information from another Julie Miller into the plaintiff's file.¹⁰⁰ As this is not an appellate level case and is very likely to be appealed, it is too

⁹⁴ *Id.* (citing *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47, 68 (2007)).

⁹⁵ *Id.* at *5.

⁹⁶ *Dreher v. Experian Info. Solutions, Inc.*, No. 3:11-CV-00624-JAG, 2013 WL 2389878, at *7 (E.D. Va. May 30, 2013).

⁹⁷ *Id.* at *8.

⁹⁸ *Id.* at *8.

⁹⁹ *Id.* at *1.

¹⁰⁰ Tara Siegel Bernard, *An \$18 Million Lesson in Handling Credit Report Errors*, N.Y. TIMES, Aug. 2, 2013, http://www.nytimes.com/2013/08/03/your-money/credit-scores/credit-bureaus-willing-to-tolerate-errors-experts-say.html?pagewanted=all&_r=0; see also Verdict Form, *Miller v. Equifax Info. Serv.*, No. 3:11-CV-01231-BR (D. Or. July 26, 2013).

early for this to raise significant concern for the credit reporting agencies.¹⁰¹ However, it does suggest that the jurors wanted to send a message to the credit reporting agencies. Should the agencies take heed of such a large award and act in a more provident manner in the future, it should make it easier for employers to rely on credit reports in the employment process.

Discrimination Statutes

Various federal statutes prohibiting discrimination provide protection for applicants who feel that they have been exposed to either disparate treatment or disparate impact due to employers' use of credit reports in evaluating applicants.¹⁰² Disparate treatment means just that: some applicants are treated differently than others.¹⁰³ The majority of employers in the current age are careful about treating all applicants for similar positions in a similar manner.¹⁰⁴ Therefore, most of the focus is on disparate impact. This is when an ostensibly neutral policy has a different impact on one or more protected groups.¹⁰⁵ Specifically, the Equal Employment Opportunity Commission, "EEOC," has maintained that minorities have more credit problems than Caucasians and therefore a seemingly neutral credit report screening may unfairly screen out minority applicants.¹⁰⁶

The employer response to the EEOC position is that if the credit report is truly work related, then even if there appears to be a disparate impact, it does not mean that the result is illegal discrimination. Recent case law supports this position. In 2010, the EEOC sued Kaplan Higher Education for use of credit checks in evaluating applicants.¹⁰⁷ The case was resolved in a

¹⁰¹ Bernard, *supra* note 100.

¹⁰² See *Title VII of the Civil Rights Act of 1964*, EEOC, <http://www.eeoc.gov/laws/statutes/titlevii.cfm> (citing Civil Rights Act of 1964, 42 U.S.C. 2000e (1964)); *The Age Discrimination in Employment Act of 1967*, EEOC, <http://www.eeoc.gov/laws/statutes/adea.cfm> (citing 29 U.S.C. 621 (2011)).

¹⁰³ See EEOC, COMPLIANCE MANUAL: DIRECTIVES TRANSMITTAL, 15-9, 15-25 (2006).

¹⁰⁴ See generally, Karen Alphonse, *Good Interview Practices: Employers Perspective*, EXECSEARCHES.COM (Feb. 18, 2011), http://www.execsearches.com/non-profit-jobs/recruiter_Articles/Good-Interview-Practices.asp; *Instructions to Federal Agencies for EEO MD-715*, EEOC (July 20, 2004),

<http://www.eeoc.gov/federal/directives/715instruct/section1.html> (laying out the model EEOC program requirements to which the EEOC recommends employers in the U.S. follow).

¹⁰⁵ *Employment Tests and Selection Procedures*, EEOC (Sept. 23, 2010), http://www.eeoc.gov/policy/docs/factemployment_procedures.html.

¹⁰⁶ See *Pre-Employment Inquiries and Credit Rating or Economic Status*, EEOC, http://www.eeoc.gov/laws/practices/inquiries_credit.cfm (last visited July 24, 2014).

¹⁰⁷ Press Release, EEOC, EEOC Files Nationwide Hiring Discrimination Lawsuit Against Kaplan Higher Education Corp. (Dec. 21, 2010), available at <http://www.eeoc.gov/eeoc/newsroom/release/12-21-10a.cfm>.

heavily reported outcome when the District Court for the Northern District of Ohio granted summary judgment to the employer on January 28, 2013.¹⁰⁸ The Court found that the EEOC failed to show that the use of credit reports resulted in statistically significant disparate impact for Black applicants.¹⁰⁹ Of course, a possible factor in the Court's decision in *Kaplan* might have been the following observation from the Court's ruling:

The EEOC also runs credit checks on job applicants. It appears that the Office of Personnel Management ("OPM"), screens applicants for jobs with the EEOC. According to the EEOC's Personnel Suitability and Security Program Handbook, credit checks are required for 84 of the 97 positions at the EEOC. The handbook bases the need for credit [*9] checks on the notion that "overdue just debts increase temptation to commit illegal or unethical acts as a means of gaining funds to meet financial obligations."¹¹⁰

The Federal courts have also been hostile to the EEOC's attempt to bootstrap earlier potential claimants into current court actions. In *Kaplan*, possible earlier claimants were denied membership in the group of plaintiffs; the Ohio District Court followed the lead of the Maryland District Court in *EEOC v. Freeman*¹¹¹ by dismissing claimants whose claims arose more than 300 days before the EEOC charge was filed.¹¹²

Two other federal disparate impact cases involving claims of discrimination due to consideration of credit checks have had similar outcomes to *Kaplan*. In one of the earlier reported cases, the District Court for the Eastern District of Virginia ruled in 1977 that requesting credit reports for all applicants for teller positions by a bank directly related to the business of the bank since it handled other people's money.¹¹³ A 1996 Massachusetts district court case considered the more complex issue of whether an applicant who was delinquent on his student loans was discriminated against when he was rejected for employment.¹¹⁴ The type of position was not indicated, but from a careful reading of the decision, it appears to have been a clerical position.¹¹⁵ The applicant claimed discrimination due to race and the employer responded that it rejected him due to his unexplained delin-

¹⁰⁸ *EEOC v. Kaplan Higher Learning Edu.*, No. 1:10CV2882, 2013 WL 322116, 12 (N.D. Ohio Jan. 28, 2013).

¹⁰⁹ *Id.* See also *EEOC v. Kaplan Higher Learning Edu.*, No. 1:10CV2882, 2013 WL 1891365, at *6 (N.D. Ohio May 6, 2013) (denying reconsideration).

¹¹⁰ *EEOC*, 2013 WL 322116, at *3.

¹¹¹ *EEOC v. Freeman*, No. RWT 09CV2573, 2010 WL 1728847, at *7 (D. Md. Apr. 27, 2010).

¹¹² *EEOC*, 2013 WL 322116, at *6.

¹¹³ *EEOC v. United Va. Bank/Seaboard Nat'l*, No. 75-16-N, 1977 WL 15340 (E.D. Va. 1977).

¹¹⁴ *Terry v. Elec. Data Sys. Corp.*, 940 F.Supp. 378, 379-80 (D. Mass 1996).

¹¹⁵ *Id.* at 380.

quency on student loans and his lack of remorse about his delinquency.¹¹⁶ The court granted summary judgment to the employer.¹¹⁷

The EEOC pursued department store chain Von Maur regarding allegations that the employer discriminated on the basis of race in hiring for certain positions.¹¹⁸ One specific allegation involved the requirement for credit checks for truck drivers.¹¹⁹ The EEOC reported on its website that the case was settled for \$50,000 in 2008.¹²⁰ While cases that are not fully litigated lack details for analysis, in this case the plaintiffs claimed that the employer used different hiring criteria for White and Black applicants.¹²¹ Therefore, this was a disparate treatment case, not a disparate impact case.

The key element for employers is to show that they are consistent in their use of credit checks and that they apply them to positions that logically require a credit check for access to money of the company or clients and customers. Of course, compliance with various federal statutes may require credit checks for security clearances to be a contractor on a federal contract or to become a licensed security dealer.¹²² Reliance on these federal statutes could hardly be the basis for a discrimination claim.

STATE DISCRIMINATION ACTIONS FOR USE OF CREDIT CHECKS IN EMPLOYMENT

Various states and localities have agencies parallel to the EEOC that provide employment discrimination protection and which may take a more restrictive view of employer use of credit reports.¹²³ Note also that employers of certain types of workers are required to conduct thorough background

¹¹⁶ *Id.* at 379–80, 386.

¹¹⁷ *Id.* at 387.

¹¹⁸ EEOC v. Von Maur, Inc., No. 4:07-mc-19-RAW, 2007 U.S. Dist. LEXIS 86046, at *2 (S.D. Iowa 2007).

¹¹⁹ *Id.* at *2–3.

¹²⁰ *Significant EEOC Race/Color Cases*, ERADICATING RACISM & COLORISM FROM EMPLOYMENT, EEOC, <http://www1.eeoc.gov/eeoc/initiatives/e-race/caselist.cfm?renderforprint=1> (last visited July 31, 2014).

¹²¹ *Id.*

¹²² See Exec. Order No. 12,968, 60 Fed. Reg. 40245 (Aug. 2, 1995); William Henderson, *Security Clearance Investigations Process Updated*, CLEARANCEJOBS.COM (Oct. 9, 2011), <http://news.clearancejobs.com/2011/10/09/security-clearance-investigations-process-updated/>; see also SEC, UNIFORM APPLICATION FOR BROKER-DEALER REGISTRATION, <http://www.sec.gov/about/forms/formbd.pdf> (last visited July 31, 2014).

¹²³ DAVID D. SCHEIN, EVALUATION OF THE PROPOSAL TO AMEND THE BANKRUPTCY CODE TO PROHIBIT PRIVATE EMPLOYERS FROM REFUSING TO HIRE APPLICANTS ON THE BASIS OF BANKRUPTCY FILING 4 (2013), available at http://www.alsb.org/wp-content/uploads/2013/11/NP-2013-Schein_Evaluation1.pdf.

checks, including in some cases credit checks, for teachers, home healthcare workers, daycare workers, and for certification and licensing.¹²⁴

A survey of state litigation has revealed little in the way of cases specifically litigating the use of credit checks to screen applicants or employees. An unpublished case from California gives a flavor to the type of analysis undertaken by state courts when evaluating a discrimination complaint related to a credit check.¹²⁵ Cleveland Hunter claimed that he was denied a promotion due to his race.¹²⁶ The employer, Knott's Berry Farm, defended on the basis that he was not promoted to a security officer position due to his poor credit.¹²⁷ The trial court granted summary judgment to the employer on the basis that using Hunter's credit history was a non-discriminatory reason for rejecting his application for promotion.¹²⁸ Further, that Hunter had not produced any evidence that this action was a pretext for discrimination.¹²⁹ The Court of Appeal of California upheld the lower court's summary judgment.¹³⁰

VALIDATION RELATED TO CREDIT REPORTS

The most hotly debated aspect of the use of credit reports to screen applicants is whether the use of such reports actually helps to select better employees.¹³¹ The concept of "better" employees includes those who are hard workers, do not steal and will not commit some type of mayhem that has led to increased reports of violence in the workplace.¹³² Employers invest significant sums in selecting employees, and incur the cost when an employee is unsuccessful, or worse, steals or wastes the resources of the employer due to inattentiveness or absenteeism.¹³³

¹²⁴ *Id.*

¹²⁵ *Hunter v. Knott's Berry Farm*, No. G029735, 2003 Cal. App. Unpub. LEXIS 4143, at *8, *12 (Cal. Ct. App. 2003).

¹²⁶ *Id.* at *2.

¹²⁷ *Id.*

¹²⁸ *See id.*

¹²⁹ *Id.* at *3.

¹³⁰ *Hunter v. Knott's Berry Farm*, No. G029735, 2003 WL 1949783, at *5 (Cal. Ct. App. Apr. 24, 2003).

¹³¹ Lea Shepard, *Toward a Stronger Financial History Antidiscrimination Norm*, 53 B.C.L. REV. 1695, 1698 (2012).

¹³² See Gary Rivlin, *The Long Shadow of Bad Credit in a Job Search*, N.Y. TIMES, May 11, 2013, <http://www.nytimes.com/2013/05/12/business/employers-pull-applicants-credit-reports.html>.

¹³³ *Qualify Employees*, SARMA <http://web.archive.org/web/20130119211652/http://www.sarma.com/solutions/qualify-employees> (last visited July 29, 2014, 4:40 PM) (accessed in the internet archive index because this page is no longer available); see Shepard, *supra* note 131, at 1706.

Assuming private sector employers are rational actors, they will not spend resources for a screening tool that does not achieve the desired result. The premise is that employers believe that credit checks for certain positions are beneficial and help to select better applicants. The testimony before the EEOC in October 2010 by SHRM and the U. S. Chamber of Commerce certainly stand for the proposition that at least these strong sources believe that credit reports are a valuable tool for the selection of some employee classifications.¹³⁴

A recent article in the *Boston College Law Review* by Lea Shepard argues that there is no proof that credit history indicates that applicants would be more or less likely to steal when hired.¹³⁵ Her primary reference on that subject is an article that deals with credit scores and not credit histories.¹³⁶ The difference is significant because while a lending institution might make a quick decision based on a single three digit number, an employer is examining a report with a handful of data.¹³⁷ Evaluation of that data, and the opportunity to ask the applicant questions about specific issues, provides an opportunity persons borrowing money may not be afforded. Shepard then admits that the use of credit history as a proxy for responsibility is somewhat supported, but she does not want this correlation to support its use as an evaluation of applicants.¹³⁸ It is here that she steps into the abyss by arguing that a poor credit history should be considered an “immutable” characteristic that should be protected like other protected categories.¹³⁹

While Shepard makes short work of the consideration of two other reasons for employers to consider credit reports, these are not nominal factors to employers.¹⁴⁰ Those factors are verification of other information provided by the applicant, and avoiding negligent hiring claims.¹⁴¹ It is difficult to verify information provided by applicants due to the reticence of prior employers to provide certain information on former employees for fear of lawsuits.¹⁴² Therefore, credit reports often have key information that can be

¹³⁴ Michael Eastman, Exec. Dir., Labor Law Policy, U.S. Chamber of Commerce, Statement at the Meeting of the EEOC (Oct. 20, 2010), available at <http://www.eeoc.gov/eeoc/meetings/10-20-10/eastman.cfm>; *SHRM Research Spotlight: Credit Background Checks*, EEOC (Oct. 20, 2010), http://www.eeoc.gov/eeoc/meetings/10-20-10/credit_background.cfm.

¹³⁵ Shepard, *supra* note 131, at 1711.

¹³⁶ Adam T. Klein, Esq., Statement at the Meeting of the EEOC (May 16, 2007), available at <http://www.eeoc.gov/eeoc/meetings/archive/5-16-07/klein.html>; Shepard, *supra* note 131, at 1713.

¹³⁷ Shepard, *supra* note 131, at 1707.

¹³⁸ Shepard, *supra* note 131, at 1716.

¹³⁹ Shepard, *supra* note 131, at 1717–18.

¹⁴⁰ Shepard, *supra* note 131, at 1717–21.

¹⁴¹ Shepard, *supra* note 131, at 1717–21.

¹⁴² See Shepard, *supra* note 131, at 1718–20.

used to verify applicant information.¹⁴³ Further, claims of negligent hiring represent a constant threat to employers; they can damage the reputation of the company in addition to the cost of the claims and possible litigation.¹⁴⁴ It has been reported that employers lose 79% of negligent hiring lawsuits, with settlements ranging from \$1 million to \$1.6 million and average jury awards of \$1.6 million.¹⁴⁵ With such large amounts at stake, negligent hiring is a *bona fide* reason for employers to conduct due diligence in hiring employees.

Despite assertions by advocates such as Shepard that there is no validation for the use of credit histories, there is a five-year longitudinal study lead by Edward Oppler that compared financial history and “counterproductive work behavior,” or “CWB.”¹⁴⁶ This study analyzed the results of 2,519 randomly selected employees of a federal agency which maintained detailed personnel records.¹⁴⁷ This large database and objective information explained in the study methodology provides compelling support for the use of credit reports. The key aspects of the study involved comparing financial history data with the CWBs actually reported and recorded in the surveyed employees’ personnel records.¹⁴⁸ CWBs were defined as: “failure to pay debts, misuse of credit cards and funds, theft, and soliciting or accepting anything of value that is prohibited by law.”¹⁴⁹ The outcome of the analysis revealed that 31.3% of employees with financial issues committed CWBs while only 18.1% of the employees without financial issues were involved in CWBs.¹⁵⁰ The differential is statistically significant a $p < .001$.¹⁵¹

In contrast, a 2012 article by Laura Koppes Bryan and Jerry K. Palmer has been cited as support for the claim that use of credit reports in employment lacks validation.¹⁵² However, in examining the data presented in that article, the sample size is only 178 persons and the data manipulation is problematic due to the division of the sample into three groups: terminated

¹⁴³ Shepard, *supra* note 131, at 1718.

¹⁴⁴ Shepard, *supra* note 131, at 1720.

¹⁴⁵ Susan Gardner et al., *Does Your Background Checker Put You in Jeopardy? A Case for Best Practices and Due Diligence*, 11 J. LEGAL, ETHICAL & REG. ISSUES, 111, 115 (2008).

¹⁴⁶ Edward S. Oppler et al., *The Relationship Between Financial History and Counterproductive Work Behavior*, 16 INT’L J. SELECTION & ASSESSMENT 416, 416 (2008).

¹⁴⁷ *Id.* at 417.

¹⁴⁸ *Id.* at 418.

¹⁴⁹ *Id.* at 417.

¹⁵⁰ *See id.* at 418.

¹⁵¹ *See* Edward S. Oppler et al., *The Relationship Between Financial History and Counterproductive Work Behavior*, 16 INT’L J. SELECTION & ASSESSMENT 416, 418 (2008).

¹⁵² *See* Laura Koppes Bryan & Jerry K. Palmer, *Do Job Applicant Credit Histories Predict Performance Appraisal Ratings or Termination Decisions?*, 15 PSYCHOLOGIST-MANAGER J., 106, 106 (2012).

for cause, left voluntarily, and not terminated.¹⁵³ For the purposes of employment, grouping the latter two groups (thus simply dividing the sample into “good and bad”) would most likely produce a different statistical result — a result that might be more favorable to the use of credit history/reports to screen applicants for some positions. Curiously, while Bryan and Palmer cite various earlier studies, some of which include Oppler as an author, they fail to cite Oppler’s major 2008 study, referenced above, which has a much stronger statistical basis.¹⁵⁴

An earlier study, reported in 2004, indicates that financial stress can indeed impact workplace performance.¹⁵⁵ That study used a sample size of 262 and divided respondents into high financial stress, medium stress and low stress groups.¹⁵⁶ They found that the latter two groups were similar in nature.¹⁵⁷ The conclusion based on standard statistical analysis was: “those who experienced high levels of financial stress were less likely to be satisfied with their pay, used more work time handling financial matters and were more frequently absent from their work.”¹⁵⁸ This study was also not cited by Bryan and Palmer.

While not an overwhelming number of studies validate the work performance-good credit link, there are at least some good quality and fairly recently reported studies which validate the use of credit reports for screening applicants. It is certainly not true, as suggested repeatedly by the proponents of restricting the use of credit reports by employers, that there are **no** empirical studies supporting the use of this tool.

PAYING BILLS AND GOOD EMPLOYEES:

What does a credit report show? In a few words, it shows that the party pays their bills. When a party does not pay their bills, for whatever reason, their credit report shows one or more problems. While the argument for sympathy for persons with impaired credit reports are extensive, and certainly not to be ignored as we enter the waning days of the “Great Recession,” there is a big difference between someone who does not pay their bills chronically, and those who do not due to divorce, job loss or a major

¹⁵³ See *id.* at 106, 115.

¹⁵⁴ See *id.* at 110.

¹⁵⁵ See Jinhee Kim & E. Thomas Garman, *Financial Stress, Pay Satisfaction and Workplace Performance*, 36 COMP. & BENEFITS REV. 69, 69 (2004).

¹⁵⁶ See *id.* at 70.

¹⁵⁷ See *id.* at 72.

¹⁵⁸ *Id.* at 72.

illness, and have either a single problem or a cluster of problems related to the specific event. Evidence from sources such as SHRM, cited above, indicate that as employers do not receive credit scores, but actually receive credit reports, therefore the problems on the report are subject to review. Most employers do not use the reports as an absolute decision point and further give the applicant an opportunity to explain problems.¹⁵⁹

In analyzing the positive attributes of paying one's bills, a 2012 article by law professor Richard Flint analyzes the BAPCPA, discussed briefly above, with reference to means testing and the ability to pay.¹⁶⁰ He suggests that even in bankruptcy, it is the moral thing to pay what can be paid by the party seeking the assistance of the bankruptcy courts.¹⁶¹ Likewise, employers expect that applicants will generally pay their bills, absent some compelling reason, as this may be an indication of ethical behavior that will be practiced at work.

FUTURE RESEARCH

There remains confusion about the application of credit reports as part of the employment process. Beyond asking: "Is it fair?" the issue is more appropriately: "Does it produce better employees?" Future research needs to be conducted evaluating the use of credit reports for specific types of employment positions. Further validation of the utility of credit reports in employment must be conducted to determine if these reports in fact are predictors of higher quality employees. While often alleged by opponents of the use of credit reports, the anecdotal evidence suggests that minorities are not necessarily disadvantaged by the use of credit reports. Significantly more research must be done to investigate these claims. One specific question might be: if an employer uses a credit report based on inaccurate information to make an adverse employment decision, and the consumer has not been afforded an opportunity to correct it, is there a resulting cause of action for that consumer either against the employer or the credit reporting agency?

¹⁵⁹ See, e.g., *Background Checks: What Employers Need to Know*, EEOC & FTC, http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm (last visited Oct. 15, 2014).

¹⁶⁰ See Richard E. Flint, *Consumer Bankruptcy Policy: Ability to Pay and Catholic Social Teaching*, 43 ST. MARY'S L.J. 333, 389 (2012).

¹⁶¹ See *id.* at 410–11.

CONCLUSION

Led by various state legislatures and the EEOC, and supported by advocates for various interest groups, the use of credit reports as part of background checks for employees and prospective employees has been under assault. In those states which passed legislation precluding credit report use, there has been significant opposition resulting in sweeping exceptions. As our research demonstrates there is another side to the story. The courts have upheld the existing federal protections under the FCRA, as amended, and there is a reasonable amount of support that the use of credit reports is useful for certain employment positions. Further, while it may seem old fashioned, attaching a value to those who pay their bills might be a good way to select and evaluate employees. The key, as we pointed out previously, is that for whatever use is made of credit scores, the courts are requiring that those reports are based on accurate information.

