BRYAN CAVE
A Broader Perspective

Alert

Labor & Employment Client Service Group

To: Our Clients and Friends October 24, 2011

Significant Changes To California Employment Law Effective January 1, 2012

Employers' Ability To Use Consumer Credit Information Substantially Limited

Governor Jerry Brown recently signed into law Assembly Bill 22, dramatically limiting California employers' ability to use consumer credit reports in connection with employment applications or decisions to continue employment of current employees. Employers who use credit reports to evaluate applicants/employees cannot use them after January 1, 2012, unless one of the exceptions described below applies. Employers must also provide advance written notice to applicants/employees specifying the applicable exception.

Currently, California employers may generally obtain a credit report on an applicant/employee with appropriate prior written notice to the applicant/employee (*i.e.*, stating that a credit report will be obtained and used, identifying the source of the report and providing the individual with an opportunity to request a free copy of the report). If the individual requests a copy of the report, the employer must request that a copy be provided to the applicant/employee when the employer requests its copy from the credit reporting agency. The free report must be provided to the applicant/employee at the same time as the employer. If the employer makes an adverse employment decision based on information from the credit report, the employer must inform the applicant/employee the decision was based, in whole or in part, on that information and provide the contact information of the credit agency from which the report was obtained.

When AB 22 takes effect January 1, 2012,[1] California employers will be prohibited from obtaining a consumer credit report as part of the background check process unless the applicant/employee is in one of the following positions:

[1] AB 22 will be codified in a new section of the California Labor Code, section 1024.5.

- A managerial position (which means the applicant/employee must qualify for the executive exemption from overtime pay requirements set forth in the Industrial Welfare Commission wage orders);
- A position that involves regular access, for any purpose other than the routine solicitation and processing of credit card applications in a retail establishment, to all of the following types of information for any one person: bank or credit card account information, social security number and date of birth;
- A position in which the person is or would be a named signatory on the employer's bank or credit card account, or authorized to transfer money or enter into financial contracts on the employer's behalf;
- A position that involves regular access to confidential, proprietary and/or trade secret information (particularly in light of this exception, we recommend reviewing your company's confidentiality and nondisclosure agreements and ensuring they are being properly executed and maintained);
- A position that involves regular access to cash totaling $10,000 or more of the employer, a customer, or client, during the workday; or
- A position for which the information contained in the report is required by law to be disclosed or obtained.

If an employer is permitted to obtain a consumer credit report under one of the foregoing exceptions, it should continue to follow the same steps for obtaining a credit report as part of a background check as set forth above (*i.e.*, provide appropriate written notice and the opportunity to receive a free copy of the report). *In addition, however*, after January 1, 2012, the employer must also provide advance written notice to the applicant/employee identifying which exception(s) apply.

We note, however, that AB 22 only applies to "consumer credit reports." It does not apply to a report that verifies income or employment as long as that report does not include credit-related information, such as a person's credit history, credit score or credit record. AB 22 also does not apply to "investigative consumer reports" which employers may obtain in performing criminal history or other background checks. Employers must still follow California's existing notice and authorization requirements when obtaining "investigative consumer reports."

California Employers Must Provide Health Benefits For Four Months Of Pregnancy Disability

Governor Brown also signed Senate Bill 299 into law, which requires California employers to continue group health coverage to employees on pregnancy disability leave for up to four months. Under existing law, California employers with five or more employees must permit employees disabled by pregnancy to take a leave of absence of up to four months for the disabling condition. In addition, if the employer has 50 or more employees and is covered under the FMLA/CFRA, the employee may take up to an additional 12 weeks of leave to bond with his/her child.

Prior to the passage of SB 299, employees on pregnancy disability leave were entitled to the same benefits provided by an employer to employees on other types of disability leaves. Many employers limited the continuation of group health coverage to 12 weeks, which is the required time period for

continuation of coverage under the FMLA/CFRA for family and medical leaves of absence. Effective January 1, 2012, California employers must extend the continuation period to four months for pregnancy disability leaves.

An affected employee's group health benefits must be continued on the same terms and conditions as if the employee continued actively reporting to work. Therefore, if the employer pays the entire premium for employee coverage, it must continue to do so for up to four months of pregnancy disability leave. If the employee generally pays a portion of the premium, the employee may be required to continue making such contributions during the leave. An employer may recover from the employee the premium that the employer paid under the group health plan if both of the following conditions occur: (i) the employee fails to return to work after the employee's leave entitlement has expired; and (ii) the employee's failure to return is for a reason other than: (a) the employee taking a separate protected leave under the FMLA/CFRA or (b) the continuation, recurrence, or onset of a health condition that entitles the employee to leave or other circumstance beyond the control of the employee.

In light of these important legal changes taking effect soon, it is advisable to review and update your company's background check and pregnancy disability leave policies and procedures. Please contact any member of Bryan Cave's Labor and Employment Client Service Group with any questions or if you need assistance.