

Background Checks Under Scrutiny by State Legislators

By James Hammerschmidt

Most employers are well aware that conducting background checks on prospective employees is tricky business, particularly under the Fair Credit Reporting Act (FCRA). And it may get even trickier in Maryland if the state legislature passes the Job and Financial Privacy Protection Act, which was recently introduced in the Senate as SB 110, or HB 175, the House's version of the same bill.

The bills provide that an employer may not request a credit report for an employment applicant unless the request has a "bona fide work-related purpose," although they fail to present an actual definition of the phrase. Both bills direct the Commissioner of Labor and Industry to develop regulations to define it - and also state that an employee may sue an employer in court for violating the law.

The state legislation is a manifestation of several forces. First, the issue of unfettered and indiscriminate background checks by employers has been under attack by plaintiffs' employment lawyers for some time because it can have a disparate impact on minority applicants and other protected classes. In addition, legislators are concerned that the tough economic times have created large segments of the population that are unemployed and now have troubled credit histories. As a result, re-employment can be more difficult, which in turn causes unemployment rates to worsen.

The practice of background checks has also been the subject of intense scrutiny by the Equal Employment Opportunity Commission, which has been auditing employers with background check policies to determine whether the practice is having a disproportionate effect on minorities. Now, with the potential state legislation, an employee in the future may be able to bring a private lawsuit if he or she is subject to a credit check that is not related to the employee's job duties or responsibilities.

Employers need to be aware. If a business is considering conducting background checks, it should consult with an employment lawyer to determine which employees should legitimately be subject to such checks.