Date of Hearing: April 21, 2008

ASSEMBLY COMMITTEE ON BANKING AND FINANCE
Pedro Nava, Chair
AB 2918 (Lieber) – As Amended: April 7, 2008

SUBJECT: Employment: usage of consumer credit reports.

SUMMARY: Further prohibits when a credit report can be pulled for employment purposes. Specifically, this bill:

1) Prohibits a credit report from being pulled for employment purposes unless the information is substantially job related and the employer's reasons for the use of the information are disclosed to the consumer in writing;

2) Specifies that a credit report cannot be pulled for employment purposes unless required by law to be disclosed to or obtained by the potential user of the report; or,

3) Extends the exemption from liability for the maintenance of reasonable procedures to ensure compliance with the provisions specified in state law to encompass the new prohibition.

EXISTING STATE LAW: establishes the Consumer Credit Reporting Agencies Act which states the following:

1) Defines "Consumer credit report" as any written, oral, or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, or credit capacity, which is used or is expected to be used, or collected in whole or in part, for the purpose of serving as a factor in establishing the consumer's eligibility for credit to be used primarily for personal, family, or household purposes, or employment purposes, or hiring of a dwelling unit, other purposes authorized in Section 1785.11. [Civil Code, Section 1785.3]

2) Defines "Employment purposes," when used in connection with a consumer credit report, as a report used for the purpose of evaluating a consumer for employment, promotion, reassignment, or retention as an employee. [Civil Code, Section 1785.3]

3) Allows a consumer credit reporting agency to furnish a consumer credit report if the user intends to sue the information for employment purposes. [Civil Code, Section 1785.11]

4) Specifies that a user shall provide written notice to the person involved when requesting a consume credit report for employment purposes. The notice shall inform the person that a report will be used and the source of the report and shall allow the consumer to receive a copy of the report if they check a box. [Civil Code, Section 1785.20.5]

EXISTING FEDERAL LAW: establishes the Fair Credit Reporting Act (FCRA) that regulates the collection, dissemination, and use of consumer credit information and states the following:

1) Defines "employment purposes" when used in connection with a consumer report as a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or

retention as an employee. [15 U.S.C. § 1681a]

2) Defines "adverse actions" as a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee. [15 U.S.C. § 1681a]

3) Allows any consumer reporting agency to furnish a consumer report if the user intends to use the information for employment purposes. [15 U.S.C. § 1681b]

4) Prohibits information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation. [15 U.S.C. § 1681b]

5) Specifies that a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless--a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and the consumer has authorized in writing the procurement of the report by that person. [15 U.S.C. § 1681b]

6) Establishes the Fair and Accurate Credit Transactions Act of 2003 (FACTA), which makes permanent the FCRAs preemption provisions that were set to expire on January 1, 2004. FACTA prohibits states from imposing requirements or prohibitions on the areas of law covered by the preemption that are inconsistent with the act. FACTA eliminates a provision of the FCRA that allowed states to enact laws that afforded consumers greater protection than the federal law. FACTA extends the FCRAs areas of preemption to include fraud or identity theft alerts, the blocking of information resulting from identity theft, the truncation of credit card and debit card account numbers, the truncation of Social Security numbers, prohibitions against the sale or transfer of debt caused by identity theft, notice by debt collectors of fraudulent information, coordination of identity theft complaint investigations and prevention of repollution (secondary disclosure of consumer reports that contain information resulting from identity theft) reports. The preemption does not, however, apply to state laws that are outside of the areas covered by the act or the resulting federal agency regulations, such as state laws governing the sale or use of social security numbers, alerts for data base hackings, or increased criminal penalties for identity theft perpetrators. Also, a new provision in the act states specifically that nothing in the FCRA is intended to preempt state laws regulating the use of credit-based insurance scores or disclosure of their use. Apparently, this provision would allow states to issue rules permitting the use of credit reports in setting insurance rates and would allow the states to determine the contents of any notice.

FISCAL EFFECT: None.

COMMENTS:

BACKGROUND: An employer may use consumer reports when hiring new employees and when evaluating employees for promotion, reassignment, and retention as long as the employer complies with state law and the FCRA.

State and federal law regarding consumer credit reports is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. In 1997, Congress expanded employer responsibilities because of concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The changes ensure that individuals are aware that consumer reports may be used for employment purposes and agree to such use, and that individuals are notified promptly if information in a consumer report may result in a negative employment decision.

Employers typically utilize a credit report to verify that an applicant is a responsible person. Few firms are interested in hiring those who cannot manage their affairs, or whose monthly debt payments are beyond their means. Many employers will limit credit checks to management and executive applicants, or positions that will have access to cash, assets, a company credit card, or confidential information. Employers are well advised, for example, to run credit reports on bookkeepers or others who handle significant cash. Conversely, running a credit report for an entry-level person with low levels of responsibility or no access to cash is not as justifiable. Unnecessary credit checks may also discourage applicants from applying, and in some situations, running mass credit reports on all applicants regardless of the position can have the effect of discriminating against certain protected classes, a risk employers want to avoid.

A credit report typically contains four types of information. First, it gives identifying data, such as name, Social Security number, and past addresses. Second, it shows how promptly you pay your credit card debts, personal loans, car payments, student loans, or mortgage payments. It also shows how much credit you've been given, how much you currently owe, and whether any debts have been sent for collection. Third, it will indicate who has requested a credit report, including inquiries by other prospective employers. Finally it will report public records such as court judgments, liens or bankruptcies. Negative information will show up for 7 years, and bankruptcies for 10 years (although there are limitations to using a bankruptcy in an employment decision). For pre-employment credit reports, the three major credit bureaus use a special reporting format that omits actual credit card account numbers, the person's credit-risk rating and age.

Under the FCRA, if an employer intends not to hire someone based upon anything in the credit report, then the applicant must first receive a copy of the report and statement of rights. In California, job applicants must also be offered a copy of the report free of charge if the employer has obtained it. The applicant can then review the credit report and dispute any information believed inaccurate or incomplete. This right applies even if the employer had additional reasons not to hire or other concerns, such as a high debt level.

In the past, only banks and financial service companies routinely ran credit checks on potential employees. But employers in other sectors increasingly are including credit checks in the screening process to assess applicants' honesty and integrity, traits not readily gleaned from a resume.

United States (U.S.) employer's use of credit checks increased 55% over the last 5 years, according to Spherion, a recruitment and staffing firm. Pulling credit has become more popular for employers outside the banking and financial servicers sector. Pulling a person's credit can make it more difficult for people who are laid off, newly divorced, or buried in student loans. The interpretation from looking at these credit reports is that these people are irresponsible, but there can be many contributing factors such as identity theft, medical bills or a layoff.

Considering the lack of financial literacy among many Californians, a number of people are one paycheck away from financial disaster. The subprime meltdown has caused a number of people who may have been lured into a bad loan to walk away from their house. This financial decision will show up on their credit report but without an explanation stating they were victims of predatory lending. Credit reports were not designed as a predictor of employability.

A recent survey conducted by Salary.com revealed that running a credit report is a relatively common practice employers use to judge an applicants' level of responsibility, verify their employment history and identity, and assess their risk for workplace theft. In fact, more than 1 in 5 small and medium sized businesses use credit reports in the hiring process.

The following highlights the primary reasons why businesses use credit history in the hiring process:

- Determine If Candidate Is Responsible: 68%
- Verify Identity: 51%
- Verify Employment History: 50%
- Assess Likelihood for Workplace Theft: 46%

From the survey responses, it is very clear that the leading reason employers run credit checks is to determine if the applicant is responsible. Employers often believe that if a person manages their finances responsibly and live within their means, they are more likely to be responsible and practical on the job as well. This is a double-edged sword when it comes to personal finances because a person may be withheld from a job or promotion because of their credit status, preventing them from increasing their means to solve the problem.

The second most prominent reason employers check an applicant's credit report is to verify their employment history and identity. Both reasons received a 50% response from businesses who must take an increasing number of steps to tighten their hiring practices to ensure the candidates identity and past employment is legit.

Whether the employer has been burned by false work experience on applications in the past or if they want to confirm an applicant's identity, credit checks are a seemingly common method to obtain the relevant information. When applying for a loan, a lender will run a credit report to verify current and past employment, employers are doing the same.

Another major reason cited for running credit checks on prospective employees is to determine if a candidate is likely to steal money from an employer. If a job candidate is currently under pressure and past due on their bills and loans, they may act irrationally and commit an uncharacteristic act like stealing money or valuables to cover their debt. With this train of thought -- somebody who has had issues in the past but is currently in good standing is not that great of a risk to an employer. Also, the survey indicates that only 46% of employers who run credit reports do so for this reason and only 42% believe that a credit report is a good predictor for workplace theft.

The survey also asked the job responsibilities that warranted a credit check. They tend to be positions that have access to cash or valuables, manage finances or supervise people and budgets. The job responsibilities most likely to receive this additional check are:

- All Positions: 51%
- Performs Finance, Accounting or Bookkeeping: 40%
- Has Access to or Handles Cash or Valuables: 37%
- Supervises People or Budgets: 23%

Additional studies show that minorities are more likely to have bad credit, but credit problems have not been shown to negatively affect job performance. In a 2004 study involving 2 million people, the Texas Department of Insurance found that African Americans have an average credit score roughly 10% to 35% worse than Caucasians; Hispanics have scores 5% to 25% worse than Caucasians. Evan Hendricks, the author of "Credit Scores and Credit Reports: How the System Really Works, What You Can Do, " states, "It's definitely a civil rights issue because of the growing use of credit report and credit scores for hiring, renting an apartment, insurance, and the fact that people of color have not been integrated into the credit scoring system as much as traditional, white, middle-class America."

Another survey conducted by Visa USA found that 56% of 400 Bay Area adults believed it was illegal for an employer to refuse to hire a job applicant with a low credit score. Nationally, the figure is 52%. The survey also found that 40% of Bay Area residents have never checked their credit score, compared with 42% of people nationwide. These statistics demonstrate that people need to care more about their credit report and check their report at least once a year. If employers are going to look at the report for employment purposes it is better for the consumer to check and fix anything before a potential employer takes a look at it.

One in four credit reports contains errors serious enough to cause consumers to be denied credit, an apartment lease or a home loan, according to a 2004 survey released by U.S.PIRG, a public interest research group. These errors could be enough for an employer to not hire a potential candidate for a job.

ADVERSE ACTION PROCEDURES: If an employer relies on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion, the employer must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission (FTC). The Credit Reporting Agency (CRA) that furnishes the individual's report will give you the summary of consumer rights. After an employer takes an adverse action, the employer must give the individual notice — orally, in writing, or electronically — that the action has been taken in an adverse action notice. The notice must include: the name, address, and phone number of the CRA that supplied the report; A statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

OTHER STATES: This measure is based SB 5827 which passed in July of 2007 in Washington State. SB 5827 states that a person may not procure a consumer report for employment purposes where any information contained in the consumer report "bears on" the credit worthiness, credit standing, or credit capacity of an applicant or current employee, unless the information is either: substantially job related and the employer discloses the use of the information to the consumer in writing; or required by law.

SUGGESTED AMENDMENTS

1) On page 2, line 6, after used, insert, "for employment purposes"

2) On page 2, line 14, delete "potential"

3) On page 2, line 17, delete " and the employer's reasons for the use of the information are disclosed to the consumer in writing" and insert a definition of "substantially job related"

4) On page 2, line 19, delete "to be disclosed to or obtained by the potential user of the report."

REGISTERED SUPPORT / OPPOSITION:

Support

None on file.

Opposition

California Bankers Association
California Financial Services Association
Personal Insurance Federation of California

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