

# Fisher Broyles

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## Corporate Law Update

### Are Your Employment Screening Procedures Asking for Trouble?

Companies that screen job applicants or employees with credit checks or criminal background checks should proceed cautiously—such screenings are heavily regulated by a myriad of federal, state, and local laws.

#### **Fair Credit Reporting Act – Notices Galore!**

A key statute for employers to be cognizant of is the federal Fair Credit Reporting Act (“FCRA”), which is enforced by the Federal Trade Commission. Under FCRA, employers who use commercially prepared credit reports as part of any employment decision (not simply hiring) must comply with a detailed list of requirements. Initially, an employer must get the applicant or employee’s written permission to do and utilize the background check. This notice must be in a stand-alone format and not in a job application. Before taking an adverse action (e.g., not hiring an applicant or firing an employee) based on a credit report, an employer must also provide the applicant or employee with a notice that includes both a copy of the report that the employer relied on to make its decision and a copy of a summary of rights under FCRA, which the employer should receive from the agency that conducted the check. Then, if the employer proceeds to take an adverse employment action, the employer must convey specific information to the applicant or employee, as prescribed by law, and should utilize a prescribed form for this purpose.

#### **Other Federal Law Considerations—Don’t Be the Next “Target”**

In addition to FCRA, employers need to be aware of federal anti-discrimination laws. An employer may violate these laws if its use of credit checks or criminal background checks results in discrimination against members of any protected class (race, color, sex, national origin, religion, disability, and age 40 or older under federal law). In a recent example of employer difficulty in this area, earlier this month, Target Corp. agreed to pay \$3.74 million to establish a settlement fund for applicants who were denied employment based on their criminal records and charges of discrimination filed by applicants with the

Equal Employment Opportunity Commission (“EEOC”), the federal agency that enforces the federal anti-discrimination laws. Target also agreed to revise its hiring screening guidelines in response to allegations that its procedures discriminate against black and Hispanic applicants with criminal records for offenses too minor or old to affect their performance as employees.

If you are using credit checks or criminal record checks, take care to apply such policies consistently and without regard to an individual’s inclusion in a protected class. However, employers must consider the possibility that even when they treat all applicants or employees equally and there is no discriminatory intent, a company’s policy may exclude or have a greater impact on members of a protected class; this is referred to as having a disparate impact. Even though the disparate impact may be unintentional, the result may still violate federal anti-discrimination laws unless the employer can demonstrate that the policy in question has a demonstrable relationship to the requirements of the job in question.

One of the simplest ways to minimize these risks is to examine carefully all aspects of the company’s employment screening policies to ensure that they are applied uniformly and do not have a disparate impact on any protected class. Consult with counsel if needed.

## **State and Local Laws**

Approximately twenty states have enacted laws, some quite detailed, restricting credit report use in employment decisions. Connecticut, for example, generally prohibits employers with as few as one employee from using credit reports in employment decisions, although there are exceptions. Elsewhere, Texas permits employers to use credit agency reports in hiring decisions, but the information in the report generally may not date back more than seven years unless an individual is to make more than \$75,000 a year. Many states regulate the use of criminal background checks in hiring, with these laws varying substantially state-by-state.

Some municipalities also regulate these areas. For example, New York City enacted the Stop Credit Discrimination in Employment Act, which prohibits credit checks of potential or current employees except in certain enumerated circumstances, and the Fair Chance Act, which prescribes the timing and circumstances under which an employer may perform a criminal background check. Austin, Texas places restrictions on certain private employers and when they can ask about a job applicant’s criminal history and how that information can be used. On the Pacific coast, both Los Angeles and San Francisco have

their own sets of rules prohibiting employers from requiring job applicants to disclose criminal histories at the outset of the hiring process.

The use of credit reports and criminal record checks in employment is a complex and heavily regulated area. Employers who use these tools are likely to benefit from discussion of their policies and practices with counsel experienced in this area to be sure they comply with all applicable federal, state, and local laws.

## Contacts

If you would like additional information, please contact any of the following FisherBroyles partners:

### Atlanta

Carl Johnston

[carl.johnston@fisherbroyles.com](mailto:carl.johnston@fisherbroyles.com)

(404) 330-8179

### Chicago

Marty Robins

[martin.robins@fisherbroyles.com](mailto:martin.robins@fisherbroyles.com)

(847) 277-2580

### Washington D.C.

Amy Epstein Gluck

[amy.gluck@fisherbroyles.com](mailto:amy.gluck@fisherbroyles.com)

(301) 526-1184

### Los Angeles

Steve Papkin

[steven.papkin@fisherbroyles.com](mailto:steven.papkin@fisherbroyles.com)

(310) 415-6254

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