California AB 22 and the Use of Employment Credit Reports

A Case for Candidacy Determinant in the Wake of Bad Legislation

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As someone who has been in the employment screening and credit reporting business since 1980, I have seen just about every attempt possible to thwart the use of credit reports in various settings as a candidacy determinant – especially the employment setting. Simply put, people continually try to outlaw credit reports for every reason imaginable because they work with deadly efficiency.

That said, most, if not all legislative attempts to ban the use of these incredibly valuable tools have failed because they become so watered down that the politicians are able to convince their constituencies that as long as they persevere, the law will pass. Such is the case with the new AB 22 law in California created several revisions and vetoes ago by Assemblyman Tony Mendoza and signed by Governor Jerry Brown over the weekend of October 8-9, 2011.

This bill has been presented to the Governor's desk and has twice failed to garner the Governor's signature until Jerry Brown came into office. Similarly, this one has virtually no teeth when the real measurements are made.

This legislation, like most of the knee-jerk liberally biased legislation in California, was accomplished by Assembly Member Tony Mendoza, the architect of the definitions of those areas where credit reports are no longer available in the pre-employment setting. One can only imagine what went on his mind when the NEW governor finally signed the bill after two failed attempts with the old governor!

The new law hailed by those out of the know prescribes specific areas of defined use until it gets to Chapter 7, which is the gaping loophole for most employers, and for most employment positions available in California.

Now, usually, as a guy that takes the law very seriously, I cannot help but be drawn to what some may consider the dark side, and want to advise California employers of ways around this effectively useless law (the way it is presently written) and to provide specifically the ways in which people who hire can avail themselves of this still viable and highly valuable candidacy determinant.

Let's begin with what may and may not be used in the hiring context with regard to what is included in an employment credit report.

Actually, you can read the context of the law at the following site:
http://www.leginfo.ca.gov/pub/11-12/bill/asm/ab_0001-0050/ab_22_bill_20111009_chaptered.pdf so it is easier to simply tell you what part of an employment credit report may not be used, and that part is what many that presently use credit reports don't use anyway, namely the trade line information, or, as the new law reads:

> (1) "Consumer credit report" has the same meaning as defined in subdivision (c) of Section 1785.3 of the Civil Code, *but does not include a report that (A) verifies income or employment, and (B) does not include credit-related information, such as credit history, credit score, or credit record.* "

Clearly, as long as what a prospective employer sees does not include credit history (actual payment history) and a credit score (you know what that is, namely a FICO score, which incidentally has been excluded from ALL Employment Credit Reports from the three major credit bureaus ever since "Employment Credit Reports" were invented), or "credit record" which is the same thing as "credit history," the rest of what is included in an Employment Credit Report is still available, and that is VERY important.

In practice, unless certain jobs require an actual understanding of the payment history of a candidate, most employers presently opt of using the payment histories. Instead they choose to use the parts of the credit report which *are* very important, namely the identification part and the past employment part, especially when it comes to trying to verify an applicant's prior employment history, and in determining what the candidate's identities actually are, versus who they *say* they are; which is critical in the determination of prior criminal conviction history.

In essence what this new law has done is take away mostly what employers don't care about anyway; namely the actual payment history unless the job calls for it such as an accountant, cash handler, etc. Remember, credit "scores" have never been available to employers, so that part of the law is moot – yet another example of uninformed politicians trying to make policy based on incorrect information and assumptions.

Now, let's look at the best possible gift that this new law has to offer employers, namely paragraph 7 of **Labor Code Section 1024.5, Section. 2. Chapter 3.6 which is one of the further identified areas where these reports are available to a prospective employer:**

> *"(7) A position that involves access to confidential or proprietary information, including a formula, pattern, compilation, program, device, method, technique, process or trade secret that (i) derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who may obtain economic value from the disclosure or use of the information, and (ii) is the subject of an effort that is reasonable under the circumstances to maintain secrecy of the information.."*

I don't know about you, but as a 31+ year businessman, my competitive edge has always been *the way I do things* in my business. That means that when I hire someone, I don't want them

discussing ANYTHING with my competitors or anyone else as it could compromise my competitive edge and put me out of business.

That said, how do I (as the law specifies) protect my *"confidential or proprietary information including a formula, pattern, compilation, program, device, method, technique, process or trade secret"?*

The answer is simple … with a proprietary and trade secrets agreement as well as a germane company policy that is acknowledged by every one of my employees.

What, you say? These types of agreements are unenforceable in California? Well, that may very well be true, but the very existence of them while not always enforceable establishes beyond any reasonable doubt what you as an employer decides meets the standard of confidentiality and that directly translates to Paragraph 7.

In essence, who can successfully argue that I do not have the right to reasonably determine what parts of my business are confidential and proprietary? The answer is NO ONE can determine that, except me (or potentially a court) since I own and operate the business, and I am the one who can only determine what confidential and proprietary methods and processes would be damaged if they were to be unlawfully or otherwise disclosed to a third party.

This clearly proves that with such an agreement and policy in place, specifically designed and intended to protect yourself and/or the business, and that specifically delineates what was confidential and proprietary, that's all you need to effectively be able to use credit reports in the hiring process for most if not all of your candidates.

That said, it is important to understand that the Mendoza law is essentially focused on relieving the stress on those who pose credit risks with regard to the general employment populous, namely blue collar jobs, and "lesser" skilled positions where a bad credit report shouldn't really apply. Contrary to the mistaken beliefs of Governor Brown and Assemblyman Mendoza, most employers are not concerned with a janitor's credit report.

In the end, the way to continue to use employment credit reports is to follow the law, use everything in the credit report except the payment history, and create a solid trade secrets and proprietary and confidential information policy and agreement with your employees that formally establishes that what you have is sacred and could result in the loss of business if compromised.

Once established, using employment credit reports is not a problem as long as you give proper notice to the Consumer, obtain written consent, follow the FCRA's Pre-Adverse and Adverse Action Notice Requirements and rely only on the ID components and the employment histories, when the actual credit history does not apply.

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