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Employment Law Highlights

Inside This Issue

MISCLASSIFYING INDEPENDENT CONTRACTORS
AND
OREGON LEGISLATURE BANS WORKPLACE CREDIT CHECKS

The Federal Government is Scrutinizing Misclassified Independent Contractors

It is always a risky proposition to classify an employee as an independent contractor. Federal and state governments enforce actions against employers for unpaid payroll taxes and associated penalties, and lawsuits are common. Private lawsuits range from individuals seeking unpaid wages and overtime to multi-million dollar class actions. In a noteworthy class action, in 2008 a California court held that FedEx misclassified hundreds of drivers as independent contractors, and was held liable for $14 million.

Employers are advised to take note that President Obama's 2011 budget proposal would increase those risks for employers. A U.S. Department of Labor Budget Summary estimates that the misclassification of employees as independent contractors will cost the Treasury Department over $7 billion in lost payroll tax revenue over the next ten years. To address this very issue, the proposed budget includes funds earmarked for a "joint proposal" between the Department of Labor and the Treasury Department to attempt to eliminate legal incentives identifying employees as independent contractors and provides $25 million toward additional enforcement positions and for grants to induce states to assist the federal government.

The IRS publication titled Independent Contractor (Self-Employed) or Employee? is a starting point to determine whether an employee is correctly classified. If you believe that you have misclassified employees as independent contractors, now is a good time to give us a call.

SENATE BILL 1045 PROHIBITS THE USE OF CREDIT REPORT INFORMATION IN EMPLOYMENT DECISIONS

On July 1, 2010, except under limited circumstances, obtaining or using information contained in credit history for any employment purpose including hiring, discharge, promotion and compensation, will become an unlawful employment practice under ORS Chapter 659A. The law does not impact other kinds of background checks, such as criminal or educational history and references.

Oregon's law follows on the heels of Hawaii, which in 2009 became the first state to include protections against discrimination on the basis of credit history or credit report in its civil rights fair employment laws. In 2007, Washington State passed a similar prohibition in its consumer protection laws.

These laws underscore the sensitivity of using credit reports for employment purposes. Best practice is that any pre-employment assessment tool must be both a valid predictor of job performance and non-discriminatory. Credit reports have come under scrutiny on both counts. Credit reports contain errors or information that is not relevant to job performance, such as high debt brought about by medical bills.

While employment credit reports do not contain actual credit scores, the discussion in Oregon over their use mirrors the national conversation on the relevance and fairness of using credit reports in employment decisions. In addition to the general unreliability of credit reports, the essential argument against using credit reports is that credit history has no relationship to the ability to perform a job and in fact such history can result in unlawful discrimination.

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An additional argument is that job applicants whose financial situation has been severely impacted by the recession are victimized, again, when a credit report makes it even harder to get a job. Proponents of using credit reports argue that businesses need the flexibility to hire appropriate employees, and that a credit report can be critical to prevent embezzlement or other problems where someone is hired into a position that has access to cash or assets.

Under the New Law "Credit History" is Broadly Defined

"Credit history" is broadly defined as "any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing or credit capacity." While the law does not apply to background checks per se, it could apply to credit history information obtained through a background check, depending on its source. An aggrieved employee can either file a complaint with the Bureau of Labor and Industries (BOLI) or file a civil lawsuit for injunctive relief, reinstatement or back pay, and attorney's fees. The financial risk to an employer violating this law could be quite substantial.

The legislature narrowly crafted exceptions to the law. Specifically identified employers can use information on credit histories for employment purposes: banks and credit unions, public safety and law enforcement officers, and employers who are required by state and federal law to use credit histories for employment purposes. In addition, other employers can use such information as well if credit history is "substantially job-related" and the use of the credit check is disclosed in writing.

Unfortunately, the legislature neither defined nor gave guidance to assist the employer in determining what "substantially job-related" means. It is safe to assume that the term will be construed very narrowly by the courts.

Practical Steps

If an Oregon employer does not fall within one of the specific exceptions, and intends to fall within the "substantially job-related" provision, the employer is well advised to cautiously undertake an internal analysis. The employer should carefully consider how it will utilize the information contained in a credit report and ensure that its reason is substantially related to the job. The need for an applicant to have a solid and stable financial background is most likely insufficient without an analysis as to why the information meets the "substantially job-related" requirement.

It is important to tread carefully and resist the urge to craft a job description that would appear by its words to meet the "substantially job-related" requirement. Before deciding whether to obtain or use a credit report, an employer should undertake an analysis that 1) identifies its specific need; 2) assesses all potential options; and 3) evaluates the risks of both having and not having the information. In the unfortunate event that an aggrieved employee or applicant initiates a claim with BOLI or civil litigation, an employer that can show it fully explored and examined its real need for such information and its reasonable use of such information will be better suited to defend the claim.

In time, courts will sort out the application of the law and employers will have a better understanding of their risks and eventually some clarity of what "substantially job-related" means. In the meantime, employers need to assess the nature of their need for such information and weigh the risk of engaging in an unlawful employment practice under ORS Chapter 659A.

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