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FIVEL COMPANY

WESTMINSTER, MARYLAND

ON BEHALF OF THE

SOCIETY FOR HUMAN RESOURCE MANAGEMENT

PRESENTED TO THE

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

OCTOBER COMMISSION MEETING

WEDNESDAY, OCTOBER 20, 2010
Introduction
Chair Berrien, and distinguished Commissioners Ishimaru, Barker, Feldblum, and Lipnic, my name is Christine Walters. I am the sole proprietor of the FiveL Company in Westminster, Maryland, and a member of the Society for Human Resource Management (SHRM) with nearly 25 years combined experience in human resources administration, management, employment law practice and teaching. Prior to FiveL, I was a practicing human resource (HR) professional for over ten years with private employers in Maryland. I thank you for the opportunity to appear before the Commission today to discuss the use of credit background checks in employment.

The Society for Human Resource Management is the world’s largest association devoted to human resource management. Representing more than 250,000 members in over 140 countries, the Society serves the needs of HR professionals and advances the interests of the HR profession. Founded in 1948, SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China and India.

SHRM has been monitoring the intensifying debate on the national and state, legislative and regulatory levels regarding efforts to restrict an employer’s ability, in the employment process, to access and consider the credit history of applicants and current employees.

To be clear, we believe that employment decisions should be made on the basis of an individual’s qualifications – such as education, training, professional experience, demonstrated competence – and not on factors that have no bearing on one’s ability to perform job-related duties. Furthermore, SHRM and its members fully appreciate that the high unemployment rate and overall health of the economy in the U.S. have had a severe impact on countless individuals’ credit history. Therefore, this issue has heightened attention right now.

However, SHRM believes there is a compelling public interest in enabling our nation’s employers—whether that employer is the government or in the private sector--to assess the skills, abilities, and work habits of potential hires. Further, SHRM believes the ability to obtain reliable and accurate job performance information about prospective employees has a direct impact on critical business concerns such as quality, workplace safety and customer satisfaction. SHRM also believes that a job applicant has a right to know that he or she has been denied a job as a result of a third-party report, as required by the Fair Credit Reporting Act of 1970 (FCRA).

In my statement today, I will explain what background information employers currently seek, how and why credit reports are used in the employment process, present the results of SHRM research on employment background screening, and outline our concerns regarding proposals to eliminate the ability of employers to consider credit information when evaluating applicants for key positions.

The Use of Background Information in Employment
At private and public organizations, large and small, HR professionals are responsible for ensuring that each individual hired possesses the knowledge, skills and abilities needed for
the organization’s success. The consequences of making a poor hiring choice can be great, possibly leading to financial losses or an unsafe work environment. Employers have a fiduciary responsibility to protect its assets and those of its clients, customers and members. If an employee engages in severe misconduct, organizations may face legal actions from customers, shareholders or other employees in the form of negligent hiring, negligent retention, vicarious liability lawsuits or other legal claims. SHRM research shows that the top reasons why organizations conduct credit background checks are to limit theft and embezzlement in the workplace, reduce liability for negligent hiring, assess the overall trustworthiness of the job candidate, and comply with applicable state laws requiring a background check for particular positions. Accordingly, HR professionals strive to make the most informed choices possible when selecting candidates for their organizations.

Let me begin by explaining how human resource professionals consider applicants during the hiring process. In today’s market, it is not uncommon to receive hundreds of responses to just one ad for a vacant position. To cull through those applications, employers use many factors to narrow that applicant pool to those who are most qualified. Factors may include years of work experience, related work experience, work experience in the same industry, education, certifications and more. Once a group of candidates or a finalist is selected for a position, the HR department typically conducts a background check on the candidates or candidate.

While the background check process is often a standard practice for most employers, the process varies, depending on the employer and the position in question. The process may include checking previous work history, personal references, education, professional credentials, motor vehicle history, criminal history and credit history. In addition, employers may place a different emphasis on each element of the process depending on the position and the requirements of the job. For example, some employers put a great deal of importance on a steady work history, personal references, and credit history. Others value education and work history above all else.

In addition, some states statutorily require employers to conduct specific background checks for certain positions, such as licensed health care professionals, day care providers, teachers and athletic coaches, and police officers and firefighters. A related recent development that is having an impact on the type of background checks performed by employers is the issuance of the Payment Card Industry’s Data Security Standards (PCI DSS), otherwise known as PCI Compliance. PCI Compliance is a complex set of network security and business practice guidelines adopted by Visa, MasterCard, American Express, Discover Card, and JCB to establish a minimum security standard to protect customers’ credit card information. In short, all businesses that accept, handle, store, or process consumer credit card data must be PCI Compliant. If an organization is not compliant with these requirements, the credit card companies will not allow it to process credit cards for any aspect of its business until the organization can pass an audit by an independent auditor. PCI Security Standard Requirement 12.7 states that the employer shall “Screen potential employees . . . prior to hire to minimize the risk of [credit card data security]...

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1 PCI Security Standards Council (2010). Supporting Documents PCI DSS V1.2
attacks from internal sources.” In addition, PCI Audit Procedure 12.7 states that HR will “verify that background checks are conducted (within the constraints of local laws) on employees prior to hire who will have access to cardholder environment. (Examples of background checks include previous employment history, criminal record, credit history and reference checks).”

Based on the above, the PCI standards seem to indicate that employers should be performing these types of checks on anyone who handles credit cards directly or who has access to computer networks, servers, etc. where such credit card data is stored, lest the employer risk not being able to accept customers’ or vendors’ credit cards as a part of its business operations—a result that would be disastrous for many organizations.

A major problem of the current background review process is that employers are reluctant to provide an accurate assessment of a former employee’s work history, strengths, and weaknesses. They fear that an unabridged assessment of a candidate’s work background—whether good or bad—could expose them to liability in claims made by the former employee (in the form of a defamation or retaliation lawsuit) or the potential employer (negligent referral). As a result, most employers provide only the minimum in a reference check—“name, rank, and serial number” and confirm that the candidate had worked for them, his or her title, and dates of employment.

This lack of direct, complete reference information motivates many employers to seek additional information about the candidate that can be legally obtained through the use of third-party background check companies. Employers may employ the services of such companies to obtain the most accurate picture of a potential employee’s work history, personal references, education and professional credentials, criminal history and credit history.

The FCRA specifically allows for the use of background checks for “employment purposes.” It also provides protections for job-seekers by requiring an employer that uses a third-party provider or Consumer Reporting Agency (CRA) in the background process to notify the potential employee in advance and obtain the applicant’s approval to have his or her background checked by the provider.

Before taking any adverse action based on a background report, such as deciding to not hire an individual, an employer is first required to give the applicant a pre-adverse action notice. That notice must include:

(1) a copy of the background report; and
(2) a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” — a document prescribed by the Federal Trade Commission (FTC).

The individual must then be given a “reasonable” period of time to contact the employer if any of the information in the report is incorrect. This protects an individual from losing an employment opportunity due to incorrect information, such as a transposed Social Security number or an incorrectly reported date of birth, resulting in “bad” credit information being
reported about the individual. It is only after that “reasonable” period that the employer may decide to not hire the individual. In that instance, the employer must provide the candidate with an adverse action notice that includes:

1. the name, address, and phone number of the CRA that supplied the report;
2. a declaration that the CRA did not make the decision to take the adverse action and cannot give specific reasons for it; and
3. 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 report from the agency upon request within 60 days.  

As explained above, while credit histories are but one piece of the puzzle used by HR professionals in evaluating job candidates, the information can be useful in determining whether a candidate has the skills and decision-making qualities for a particular job. It can also help a potential employer assess whether the individual is qualified to handle money. In addition, at a time when financial pressures on households are increasing, employee theft is on the rise resulting in major financial problem for companies. The National Retail Security Survey estimates that the U.S. retail industry lost about $14.4 billion in 2009 due to employee theft.  

According to the Association of Certified Fraud Examiners’ 2010 Report to the Nation on Occupational Fraud and Abuse, employee financial pressures are one of the key motivating factors behind check tampering, theft, and fraudulent reimbursement schemes by employees, who are usually first-time offenders. The study found that “living beyond financial means” (43 percent of cases) and “experiencing financial difficulties” (36 percent) were the two most common warning signs displayed by perpetrators of workplace fraud.  

A previous report by the association, in 2008, concluded: “Given that financial difficulties are often associated with fraudulent behavior, it would seem advisable for organizations to devote more efforts to conducting credit background checks on new applicants.”

In light of these findings, it should be re-emphasized that employers have a fiduciary responsibility to safeguard critical assets and sensitive information that belong to employees, customers and the public, as well as the organization. As an example, consider identity theft prevention. A number of states have enacted laws that prohibit employers from printing employees’ full Social Security number (SSN) on pay stubs and certain wage and payroll records. The purpose is not to presume that just because an employee works in a payroll or accounting department and has access to employees’ SSNs that such an employee is predisposed to steal another employee’s identity. It was intended only as a reasonable measure to prevent identity theft. Likewise, we do not presume that just because an individual has slow or bad credit then she or he is automatically not qualified for any job. Credit checks are intended, like shielding the publication of SSNs, as just one

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reasonable measure toward a purpose. In this case, choosing the most qualified candidate for a particular position.

SHRM Research on the Use of Credit Checks in Hiring
Recent media reports have implied that nearly all employers run credit checks on nearly all job applicants, and then use the results to deny employment regardless of the position sought. Many of these publications have even used SHRM data to support this interpretation. In the current economic climate, such stories are particularly compelling. But they also give the public a misleading description of the use of credit reports during the hiring process.

In order to provide a more complete picture of the background check process, SHRM recently released one of the most complete sets of data on employer background screening practices. The report includes data from large employers (500 or more workers), medium-sized employers (100-499 employees), and small employers (1-99 employees) from both the public and private sectors. The survey results are attached to this testimony.

The survey’s key findings include:

- **Credit checks on all job candidates are the exception—not the rule.** Only 13 percent of organizations conduct credit checks on all job candidates. While another 47 percent of employers consider credit history, they do so only for candidates for select jobs. Those findings are little changed from SHRM’s last survey in 2004, when 19 percent of respondents said they “always” check the credit history of job candidates and a combined 42 percent do so “sometimes” or “rarely.”

- **Many organizations do not conduct credit checks at all.** Four out of 10 organizations revealed that they do not conduct credit checks at all.

- **Employers generally conduct credit checks only for certain positions.** Those positions include ones with financial or fiduciary responsibilities (91 percent of employers that conduct credit checks), senior executive positions (46 percent), and ones with access to highly confidential employee information (34 percent). In other words, organizations conduct credit checks when this information is most job-relevant to the particular position.

- **Credit history is not among the most important factors in making a hiring decision.** Credit checks ranked the lowest among a list of criteria employers typically use in making hiring decisions.

- **Employers overwhelmingly use credit checks at the end of the hiring process, not to screen out applicants up front.** At least 87 percent of organizations initiate credit checks only after a contingent offer (57 percent) or after the job interview (30 percent). This finding substantiates other data showing that organizations place relatively more importance on other job-relevant factors in making hiring decisions.

- **Medical treatment debt is not considered during hiring process.** Of the relatively few employers that check applicants’ credit reports, practically no employers consider past medical-related debt (1 percent) and very few consider home foreclosures (11 percent) when making an employment decision.
Employers regularly go beyond current law requirements and allow candidates to explain their credit history. The survey showed that 87 percent of organizations allow job candidates, in certain circumstances, the opportunity to explain results of their credit report.\(^5\)

This last data point is particularly relevant because some assert that consumer reports are frequently error-laden. Unquestionably, consumer credit reports can contain typos and information that is incorrect. While the FCRA requires that an individual must be given a “reasonable” period of time to address inaccurate information in the report; the SHRM data show that HR professionals overwhelmingly provide job applicants an opportunity to explain or correct facts and figures found in consumer reports during the hiring process.

As reflected in the SHRM data above, organizations overwhelmingly are not taking a broad, one-size-fits-all approach to the use of credit checks in the hiring process. In contrast, employers are using these tools in a very narrow, job-focused way: they consider the nature of the position in question before seeking a credit report; they do so at the end of the hiring process so fewer candidates are impacted; they consider the nature of the credit information on the report, and, if negative information is found, they give the candidate a chance to explain it.

Current Statutory Protections for Employees

Under current federal law, employees already enjoy significant protections from unauthorized uses of credit checks. First, as noted above, the FCRA requires that an employer give a job applicant advance notice and secure the applicant’s signed consent before a credit check can be performed. If an applicant is not hired in whole or in part because of a credit report, the employer must inform the applicant in advance of making the decision, plus provide a copy of the report and a statement of the individual’s rights under the FCRA. Finally, the employer must then provide the same individual with a second adverse action notice after the final decision to not hire is made.

As the Commission is aware, Title VII of the Civil Rights Act of 1964, prohibits employment discrimination based on race, color, religion, sex, or national origin. It bars employment decisions based on policies, tests, or standards, such as credit checks, that have a “disparate impact” on protected groups, unless those policies, tests or standards are job-related and consistent with business necessity. Disparate impact refers to any test or system that appears to be neutral, but results in a disproportionate impact on specific groups of people protected by the equal employment opportunity laws. In cases of disparate treatment, employees or applicants must show that intentional discriminatory practices took place. In response, an employer must show a legitimate reason for the practice.

Consistent with this approach, the Commission has provided guidance on the use of certain tests and background checks for employment purposes. Specifically, the Commission has issued policy guidance which requires that any employer making an employment decision

based on conviction records must consider the following three factors to show that the
conviction is job-related and consistent with business necessity: (1) the nature and gravity
of the offense(s), (2) the time that has passed since the conviction and/or completion of the
sentence, and (3) the nature of the job held or sought.6

Concerns with Proposed Restrictions on Employer Use of Credit Checks
We share the Commission’s desire to ensure that employees continue to have ample
protections against practices that result in either disparate treatment or disparate impact
during the hiring process. We do not presume to know what future actions the Commission
or Congress will pursue in the area of credit background checks, but we have concerns
about the direction of the current debate on the use of credit information in employment.

Concurrent to the Commission’s consideration of the background check issue, the U.S.
Supreme Court heard oral arguments on October 5 in the case of NASA v. Nelson (U.S., No.
09-530). While not pertaining directly to credit information, the pending case concerns the
National Aeronautics and Space Administration’s (NASA) right to conduct background
investigations for employees working on a federal contract. In this particular case, the
federal government has argued that NASA’s background check practices in the employment
context are legitimate and consistent with the federal Privacy Act of 1974.

A third area of federal activity is the U.S. House of Representatives’ consideration of
legislation to amend the FCRA through the “Equal Employment for All Act” (H.R. 3149).
This bill would prohibit the use of credit checks on prospective and current employees for
employment purposes. H.R. 3149 would not apply to job applicants subject to a national
security clearance, people applying for public-sector positions that require a credit check,
or candidates for supervisory or managerial positions at financial institutions.

The exceptions in H.R. 3149, and the federal government’s position in NASA v. Nelson,
appear to recognize that credit history is relevant for positions in which a professional is
required to manage financial or sensitive information. Such credit history is equally
relevant for similar positions in the private and non-profit sectors.

We urge the Commission and Congress to bear in mind the numerous positions in a variety
of industries that warrant an employer having access to information from credit reports to
assist them in making sound hiring decisions for those positions—particularly where
ensuring employee integrity and confidence is in the public interest. Such positions include
those with responsibility for managing money, property, personal identity or financial
information, and other critical resources. The following are just a handful of examples of
such positions:

• Managerial positions at educational institutions that manage significant
  endowments, including taxpayer-funded grants and appropriations; financial aid

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Procedures.
administration positions that have access to personal identity and financial information

- Attorneys who have access to personal, financial and legal documents
- Real estate professionals and property managers who process financial transactions
- Information technology professionals who have the knowledge necessary to access company databases that store employee and customer information
- Pharmacists who have access to medical and financial information
- Human resource, payroll and accounting positions that have access to Social Security numbers, bank account numbers, and other personal information
- Positions at all organizations that process or store consumer credit card data and must be PCI compliant
- Certain counselors and consultants who provide education and training to consumers on how to manage and maintain good credit
- Property management staff who may have keys to residents’ homes or apartments and the personal belongings therein
- Healthcare professionals who have access to patients’ personal belongings

In sum, it is unclear why credit checks would be deemed critical for government employers but not for private-sector employers. The threats of embezzlement, fraud, security breaches and identity theft are present at public and private employers alike.

Conclusion

Given current economic pressures, SHRM and its members understand the heightened relevance of the issue of credit history and employment. SHRM believes there is a compelling public interest in ensuring that employers can assess the skills, abilities, work habits, and integrity of potential hires. HR professionals, whether working in the public or private sector, need a consistent set of rules to follow in obtaining background information about applicants during the hiring process.

HR professionals commend the Commission’s efforts to balance the needs of both the employer and employees of an organization. SHRM believes that employees already have significant federal protections from misuse of credit background reviews. The Fair Credit Reporting Act of 1970 requires employers to secure written permission from applicants and employees before conducting a credit check, and to inform applicants if an adverse employment decision was based on a credit-related issue. In addition, employers are barred by the Civil Rights Act of 1964 from using background checks to screen out protected job applicants.

SHRM’s research on the use of credit checks in employment reveals several important considerations for the Commission. First, only a small minority of organizations conduct credit checks on all job candidates. Second, organizations generally conduct credit checks only for certain positions with financial responsibilities that affect other employees and consumers. Third, credit check results are one important component of the hiring decision but are not typically the overriding factor in the consideration of a job candidate. Fourth, employers overwhelmingly review credit history of applicants only after an interview, not
to screen out applicants early in the hiring process. Fifth – and importantly - employers regularly go beyond the requirements of current law and allow candidates to explain their credit history, a consideration that frequently benefits both the employee and employer. Finally, even in the downtrodden economy of recent years, the use of credit background checks in employment decisions has not increased. In sum, SHRM’s data shows that organizations are not using credit checks in a blanket, one-size-fits-all manner, but in focused and narrow fashion.

For these reasons, SHRM has significant concerns with efforts to eliminate the ability of employers to consider relevant credit information during the employment process – especially as Congress and the federal government continue to assert that credit checks remain important for government employers. Thank you for your invitation to participate in today’s meeting.