



EMPLOYMENT CREDIT CHECKS

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Andrea Bradford
206-447-5906 | andrea.bradford@foster.com

Employment-Related Credit Checks

- Laws governing their use & required procedures
- Avoiding claims
- Employer policies

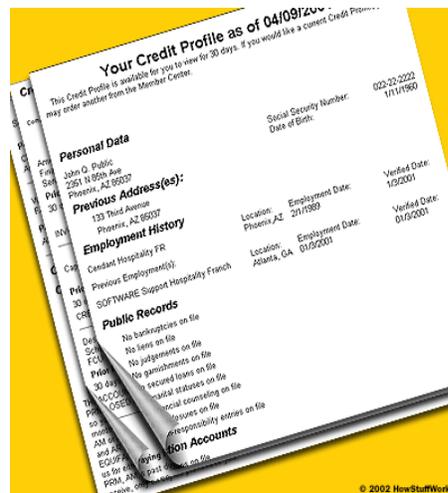


The Landscape

- Half of employers examine some applicants' credit histories when making employment decisions
 - Of employers using credit checks, employers use them for:
 - Positions with financial or fiduciary responsibilities (91 percent)
 - Senior executives (46 percent)
 - Positions with access to highly confidential employee info (34 percent)
 - DOJ/EEOC report suggests rate among law enforcement agencies is higher
- Post-recession, spate of state legislation limiting the use of credit checks (10 states including WA in past 10 years)
- Some scholarship questioning validity in employment

Fair Credit Reporting Act(s)

- **Federal law –**
15 U.S.C. § 1681 *et seq.*
- **Washington state law –**
RCW 19.182.010 *et seq.*



Federal Fair Credit Reporting Act

- Requires that **certain procedures** be followed when a “consumer report” is used for employment purposes.
- Broad definition of “**consumer report**”
- Information obtained by a **consumer reporting agency**, including:
 - Criminal and civil records
 - Driving records
 - Civil lawsuits
 - Reference checks

Federal Fair Credit Reporting Act

- Employer must follow certain procedures at **each stage of the hiring process** when a background check is used:
- Disclosure Form
 - Applicant’s written authorization
 - Addressing a negative report
 - Taking adverse action

Federal Fair Credit Reporting Act

Before taking “adverse action,” the employer must:

- Provide applicant with a copy of the report
- Provide applicant with a summary of his/her rights
 - FTC Summary of Rights,
<https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>



Protecting
America's
Consumers

Federal Fair Credit Reporting Act

Taking adverse action:

- Wait a **reasonable period of time** after providing the pre-adverse action notice and summary of rights
- Provide **notice of adverse action**
- Notice must disclose the **applicant's right to dispute information**

Washington Fair Credit Reporting Act

Employers may obtain credit reports for employment purposes **only if**:

- credit check is “**required by law**” or
- “**substantially job related**,” *and* the employer has **disclosed** the reasons for using the information to the job applicant or employee.

RCW 19.182.020(2)(b)-(c).

Washington Fair Credit Reporting Act

When is credit check “substantially job related”?

- Examine whether a credit check is warranted on a position-by-position basis
- Employer must provide reasons for using the information **in writing** - prepare form for notifying the applicant or employee of the reasons for the process

Guidance from other states

- “Substantially job related” – no definition or case law
- Other states allow checks for:
 - law enforcement
 - access to cash, proprietary or confidential info
 - managerial positions



Fair Credit Reporting Act(s) – *Penalties*

- Federal FCRA provides for damages of \$100 to \$1,000 for each willful violation of the statute
- Washington FCRA provides for damages, treble damages, and attorneys’ fees and costs under Washington’s Consumer Protection Act



EEOC Guidance: Use of Credit History

- EEOC: Policies relating to credit history are subject to challenge on disparate impact grounds
 - *“Disparate treatment” versus “disparate impact”*
- Title VII: standards must be “job-related and consistent with business necessity”
- Cases brought under this theory have challenged:
 - Credit history/score information
 - Policies of discharging persons whose wages have been garnished to satisfy creditors’ judgments



U.S. Equal Employment
Opportunity Commission

Title VII case law

- EEOC has brought cases in the past challenging employment credit checks
 - Some challenges brought in conjunction with conviction checks, more heavily litigated
 - Some cases have found discrimination; others have dismissed claims holding either (1) employees did not meet their burden to show disparate impact or (2) employers justified



U.S. Equal Employment
Opportunity Commission

Title VII case law

EEOC v. United Virginia Bank (1977):

- Bank is a fiduciary business, handles other people's money
- Not improper to consider financial background

Abbott v. Napolitano (EEOC 2009)

- TSA could consider credit check
- Position required "high degree of integrity"
- Credit check demonstrated "financially irresponsible"



U.S. Equal Employment
Opportunity Commission

Bankruptcy Act, 11 U.S.C. § 525

- Prohibits denying employment, terminating employment, or discriminating in employment solely because individual:
 - sought protection of Act
 - has been insolvent before seeking protection of Act
 - Unpaid debt that is dischargeable under Bankruptcy Act

Policies on Credit Checks

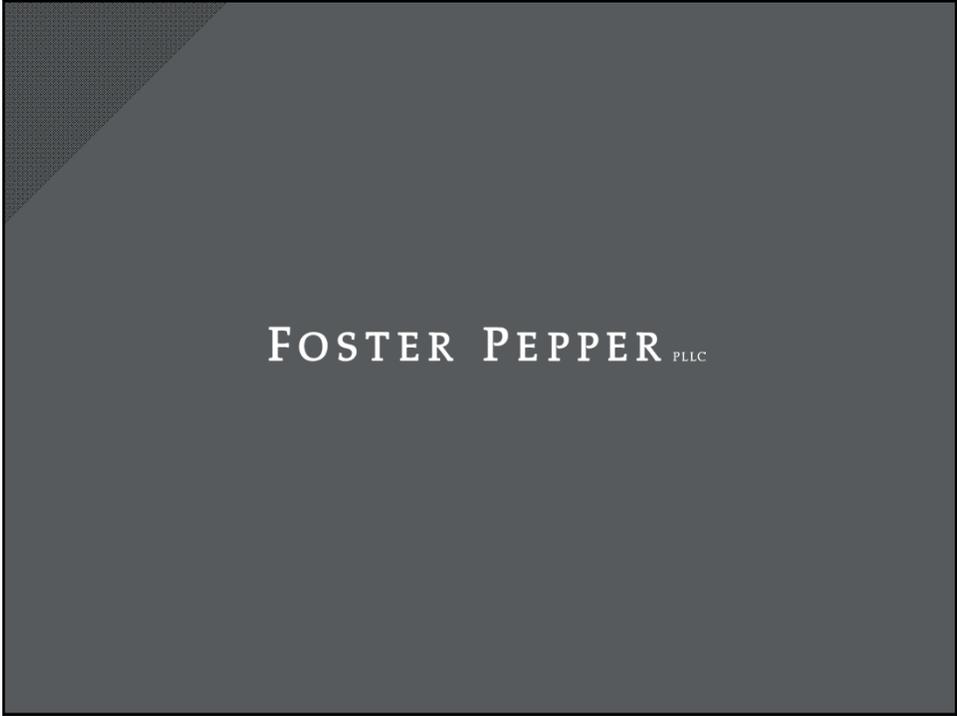
- FCRA and state law requirements
- Consider which positions at your agency really require a credit check
 - Can you make the case based on the job description that the credit check is “substantially job related”?
 - Are certain positions vulnerable to theft, abuse?



Policies on Credit Checks

- Identify which elements of a credit check your agency will consider (credit score? exclude medical or student debt? how many years back will be considered? etc.)
- Do not rely on bankruptcy status in decision-making



The logo features a dark gray square with a thin black border. The top-left corner is cut off by a diagonal line, creating a triangular area filled with a fine, light gray dot pattern. The text "FOSTER PEPPER" is centered in a white, serif font, with "PLLC" in a smaller font size to the right.

FOSTER PEPPER PLLC

Andrea L. Bradford

ASSOCIATE



SEATTLE

T 206.447.5906

F 206.749.2037

andrea.bradford@foster.com

SERVICES

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PRACTICE OVERVIEW

Andrea focuses her practice on the representation of state and local governments in connection with municipal law and litigation, including the Public Records Act and employment and labor matters. In addition, she has experience advising public school districts on various school law matters.

REPRESENTATIVE WORK

– *Kanany v. City of Bonney Lake No. 46340-7-II*, Successfully argued appeal of denial of land use petition (2015)

ACTIVITIES

– Washington State Association of Municipal Attorneys, Amicus Committee, Member
– Washington Council of School Attorneys, Board Member
– Seattle Girls' School, Mentor, 2015-Present

EXPERIENCE

– Foster Pepper PLLC, Associate, 2017-Present
– Porter Foster Rorick LLP, Associate, 2014-2017
– Washington Court of Appeals, Division I, the Hon. Ann Schindler, Judicial Clerk, 2012-2014
– Federal Trade Commission, Bureau of Competition, Summer Law Clerk, 2011
– U.S. District Court, Western District of Washington, the Hon. Thomas S. Zilly, Legal Extern, 2010
– Department of Justice, Antitrust Division, Paralegal Specialist, 2007-2009

BAR ADMISSIONS

– Washington, 2013

Andrea L. Bradford ASSOCIATE

SEATTLE T 206.447.5906 F 206.749.2037 andrea.bradford@foster.com

EDUCATION

- J.D., University of Washington School of Law (with honors), 2012
 - + Order of the Coif
 - + *Washington Law Review*, Managing Editor
 - + CALI Excellence for the Future Award
- B.A., Tufts University (*magna cum laude*), 2006
 - + National Merit Scholar
 - + *Tufts Daily Newspaper*, Assistant Features Editor