



## Recent Legislative Changes to Disability Law and The Use of Employee Credit Reports

by Evan D. Chinn and Jillian Barron

The Washington State legislature recently passed two significant laws affecting employers. First, amendments to the Washington Law Against Discrimination (WLAD) have greatly expanded the definition of what is a protected "disability." Second, state lawmakers enacted limitations on employers' right to obtain credit reports of job applicants and employees.

### New Definition of Disability -- RCW 49.60.040

**Background:** Last year in *McClarty v. Totem Electric*, 157 Wn.2d 214 (2006), the Washington State Supreme Court adopted the federal Americans with Disabilities Act's (ADA) definition of "disability." Under the ADA, a "disability" is a physical or mental impairment that *substantially limits one or more major life activities*, or where an individual has a record of or is regarded as having such an impairment. Federal courts have held that the ADA does not protect conditions that: are temporary; are mitigated by medication or other means (such as the use of eyeglasses for poor vision); or, if the limitation is on the ability to work, limit only the ability to perform specific tasks rather than a broad category of jobs. As our August 2006 Note predicted it might, the Washington legislature has concluded *McClarty* improperly narrowed the state's protections and has enacted a far broader definition of "disability."

**What's New?** Under the new legislation, "disability" means a sensory, mental, or physical impairment that is medically cognizable or diagnosable, exists as a record or history, or is perceived to exist. Rejecting ADA case law, the statute explicitly states that a "disability" can be "temporary or permanent, common or uncommon, [and] mitigated or unmitigated." Moreover, a *disability exists whether or not it limits the ability to work a particular job or in general, or to engage in any other activity* covered by the WLAD. "Impairment" is defined expansively to include *any* physiological disorder or condition, cosmetic disfigurement, or anatomical loss affecting virtually any of the body's systems, as well as mental, developmental, traumatic, and psychological disorders.

To qualify for reasonable accommodation, the employee's impairment must be known by the employer or shown through an interactive process to exist, and: (1) the impairment must substantially limit the individual's ability to perform the job, apply or be considered for a job, or access equal benefits, privileges, or terms of employment; or (2) there must be a reasonable likelihood that engaging in job functions without accommodation would aggravate the impairment to the extent that it would substantially limit the employee's ability to perform the job. If accommodation is sought based on potential aggravation of the impairment, there must be supporting medical documentation. For purposes of accommodation, "a limitation is not substantial if it has only a trivial effect;" the statute provides no other guidance as to the parameters of those terms.

**What Does It Mean?** Washington employers need to be even more aware than before of potential disability-based claims. Given the breadth of the new definition, virtually any physical or mental condition—for example, obesity, acne, a facial scar, or a sprained ankle—may now be considered protected and grounds for a discrimination claim if it adversely impacts employment decisions. Similarly, any condition that limits a person's ability to perform the job in more than a "trivial" way will trigger an employer's duty to provide reasonable accommodation. Unfortunately, the outer boundaries of employers' obligations will only be fully established as cases applying the new law make their way through the courts.

## Fair Credit Reporting and Consumer Privacy -- RCW 19.182.020

**Background:** Many employers use outside agencies to provide "consumer reports" on potential and current employees. Such reports may include information concerning the individuals' credit standing and other characteristics, such as their criminal background. Previously, Washington's consumer privacy laws required only that employers provided written notice to job applicants and employees that such a report might be obtained; in the case of employees, notice could be satisfied by mentioning the possibility in employee guidelines or manuals.

**What's New?** The legislature amended Washington's consumer credit statute to provide greater privacy regarding credit information, in particular. The statute now states that "*a person may not procure a consumer report for employment purposes where any information contained in the report bears on the credit worthiness, credit standing, or credit capacity*" of a job applicant or employee, with two exceptions. Employers may obtain credit-related information: (1) when the report is substantially related to the individual's current or potential job, and the reasons for using such information are disclosed to the individual in writing; or (2) when the report is required by law. The statute does not define circumstances in which credit information might be substantially related to a job. Logically, however, that could be true where the employee's position involves access to and responsibility for business or personal financial information, check-writing authority, or access to large amounts of cash. While silent on the subject, the statute does not appear to prohibit obtaining reports regarding criminal background, general reputation or personal characteristics, so long as the general notice and procedural requirements of the act are followed.

**What Does It Mean?** Employers should:

- Revise general written consent forms for obtaining consumer reports on job applicants or employees to expressly exclude credit information.
- Identify positions for which credit information is relevant. If a credit report will be requested for applicants or employees in those positions, justify the reasons for obtaining a report in writing and make the reasoning available to the employee/applicant in conjunction with the required written consent form.
- Instruct background/credit reporting contractors to refrain from investigating credit worthiness, standing, or capacity unless the consent form specifically states that such information is to be included.
- Use prior job history, references, and work performance to make employment decisions.
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