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USING CONSUMER REPORTS: WHAT EMPLOYERS NEED TO KNOW

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Introduction

Effective September 30, 1997, Congress amended the Fair Credit Reporting Act (FCRA)¹ in a number of ways that impose significant new responsibilities on employers. First enacted in 1968, the FCRA is designed primarily to protect the privacy of consumer report information and to insure that the information provided by consumer reporting agencies is as accurate as possible. Among other things, the FCRA governs the circumstances under which employers may request consumer reports² for prospective or current employees and the terms under which employers may take adverse action against applicants or employees whose consumer reports contain negative information.

Prior to 1997, employers had few restrictions in connection with obtaining or relying on consumer reports and could fire or refuse to hire or promote candidates or employees based on information contained in these reports. Concerned that inaccurate information might cause candidates to be unjustly denied jobs or promotions, Congress has now imposed several legal requirements with which employers must comply or face serious potential liability.³

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1. 15 U.S.C. §§ 1681 *et seq.* The FCRA is a part of the Consumer Credit Protection Act, 15 U.S.C. § 1601.

2. A consumer report is any written, oral, or other communication by a consumer reporting agency relating to a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. FCRA §603(d).

3. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition to a private right of action, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties. FCRA §§616, 617, 618, and 621.

This bulletin summarizes the amendments to the Fair Credit Reporting Act regarding the use of consumer reports when making employment decisions and the implications of these amendments for employers.

Employer Duties under the FCRA

Sections 604, 606,⁴ and 615 of the FCRA detail an employer’s responsibilities in using consumer reports for employment purposes. In pertinent part, the amendments require employers to:

- Certify to a credit reporting agency before obtaining a consumer credit report that the employer is in compliance with the FCRA and will not misuse any information contained in the report in violation of the law;
- Disclose to employees or candidates, before the report is procured, that a consumer credit report may be obtained and used in making employment decisions;
- Obtain written permission from the employee or candidate to obtain the consumer credit report;
- Provide the employee or candidate with a pre-adverse action disclosure that includes a copy of the individual’s consumer report and a description of the consumer’s rights under the FCRA;
- Provide the candidate for employment or the employee with the name, number, and address of the consumer reporting agency that supplied the report if an adverse action is taken. The employer must state that the reporting agency that supplied the report did not itself make the decision or take the adverse action and cannot give specific reasons for it. The employer must give notice of the individual’s right to dispute information contained in the report as well as the right to obtain a free copy of the report from the reporting agency within sixty days.

In sum, the amendments require employers to tell employees or candidates, in a document that contains nothing but this disclosure, that credit reports may be sought and used in making employment decisions.

4. Section 606 of the FCRA mandates that specific procedures be followed when an “investigative consumer report” is requested by an employer. An investigative consumer report is defined by FCRA § 603(e) as a consumer report in which information is gathered by interviews with a consumer’s neighbors, friends, or others who have knowledge of the consumer.

Additionally, employers must get an employee or candidate’s permission—in writing—to procure such a report. The Federal Trade Commission (FTC) has stated that the disclosure and written authorization required by the FCRA can be provided for in a single document. However, any such document must include no more language than is absolutely necessary to achieve disclosure by the employer and authorization from the employee or candidate. While employers may continue to notify candidates in an employment application that consumer reports may be sought, this notification does not relieve them of the duty to make a separate disclosure as required by Section 604(b)(2)(A) of the FCRA.

Employers are also required under the FCRA amendments to inform prospective or active employees that adverse action will be taken based on the consumer credit report, and employers must do this before such action occurs. Additionally, the amendments require an employer to supply an employee or candidate with a copy of his or her consumer report and a notice of the individual’s rights under the FCRA.

What to Consider before Requesting a Consumer Report

The law does not provide guidance regarding how long after giving pre-adverse action notification an employer must wait before actually taking an adverse action such as a failure to hire. However, in developing appropriate procedures, employers should bear in mind that the purpose of this FCRA provision is to allow employees or candidates to discuss reports with employers or to otherwise respond before any adverse action is taken. Accordingly, if an employer takes an adverse employment action based on a credit report, the employer should wait at least five business days after giving notification to the employee or candidate before taking that action. If you frequently use consumer reports to aid in your hiring decisions, you may wish to first narrow the field of candidates for a particular position to the smallest number possible *using other criteria* before requesting these reports. Doing this should reduce the number of pre-adverse action notices that may ultimately be required.

The FTC has cautioned that any adverse action based—even in part—on information contained in a consumer report triggers the full array of duties imposed on employers under the Fair Credit Reporting Act, most specifically the notification duty. These same duties are triggered even if a candidate for employment with a good credit history is turned down in favor of a candidate with a better one.

Comment [LLF1]: Section 604(b)(1)(A)

Comment [LLF2]: Section 604(b)(2)(A)

Comment [LLF3]: Section 604(b)(2)(Break)

Comment [LLF4]: Section 604(b)(3)

Comment [LLF5]:

Comment [LLF6]: Section 615(a)

Conclusion

Concerns about liability coupled with the relative ease of obtaining information about current and prospective employees have led employers to use background checks—including a review of consumer reports—more frequently than ever before.

While the law does not prevent employers from obtaining pertinent information, it does require that

individuals be made aware that consumer reports may be used in making employment decisions and that they need to consent to such use. Individuals also must be promptly notified if information contained in a consumer report could result in a negative employment decision. Employers using consumer reports as a screening mechanism must be aware of the FCRA's legal requirements, as failure to comply with them could lead to serious legal consequences.

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