Credit Reports and Criminal Records Checks

by L. Lynnette Fuller-Andrews

AN EMPLOYER who uses the services of a consumer reporting agency[1] to check on the credit history or criminal records of applicants or employees must comply with the requirements of the Fair Credit Reporting Act (FCRA).[2] In short, that means that the employer must tell the individual that such a check will take place, obtain written permission from the individual, and allow the individual to see the report if an adverse employment action is based upon it.

Prior to the 1997 enactment of the FCRA requirements, employers had few restrictions in connection with obtaining or relying on consumer reports and could fire or refuse to hire or promote applicants or employees based on information contained in these reports. Concerned that inaccurate information might cause candidates to be unjustly denied jobs or promotions, Congress that year imposed several legal requirements with which employers must comply or face serious potential liability.[3] This article summarizes the 1997 amendments to the FCRA regarding the use of consumer reports when making employment decisions and the implications of these amendments for public employers.

There are two significant instances in which the provisions of the FCRA do *not* apply. The first instance occurs when an employer checks criminal records itself; for example, by sending an employee to the county courthouse to check with the clerk of court. The records held in the clerk's office are public records and the employer is not required to inform an employee or applicant of such a check. The second instance occurs when an employer checks the computerized criminal records files maintained by the Federal Bureau of Investigation (FBI) or the State Bureau of Investigation (SBI) through special authority granted by legislation to a limited range of employers. Public school systems have such authority. (For the special requirements for conducting FBI and SBI records checks, see "Special Provisions for Computerized Criminal History Checks" on page 17 of this issue of *School Law Bulletin*. For a discussion of the FCRA exemption for such checks, see "Federal Trade Commission Letter Explaining When the FCRA Applies to Public Schools" on page 14.)

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1. A "consumer reporting agency" is defined as any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility or interstate commerce for the purpose of preparing or furnishing consumer reports. 15 U.S.C. § 1681a(f).

2. The FCRA is a part of the Consumer Credit Protection Act, 15 U.S.C. § 1601. It governs circumstances in which employers request consumer reports from reporting agencies. 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. 15 U.S.C. § 1681a(d)(B).

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. 15 U.S.C. §§ 1681n, 1681o, and 1681s.

In most instances, however, employers—including public school systems—engage the services of consumer reporting agencies. It is in those instances that the requirements of the FCRA come into play.

Three sections of the FCRA—15 U.S.C. §§ 1681b, 1681d[4] and 1681m—detail the employer's responsibilities in using consumer reports for employment purposes. In pertinent part, the requirements are as follows:

1. The employer must certify to a reporting agency before obtaining a consumer report that it is in compliance with the FCRA and will not misuse any information contained in the report in violation of the law.
2. Before the report is procured, the employer must disclose to employees or applicants, in a document solely consisting of the disclosure, that a consumer report may be obtained and used in making employment decisions.
3. The employer must obtain written permission from the employee or applicant to procure the consumer credit report.
4. Before taking any adverse action—including a failure to hire or promote—the employer must provide the employee or applicant 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. *and*
5. After the adverse action, the employer must provide the applicant for employment or the employee with the name, number, and address of the consumer reporting agency that supplied the report; a statement to the effect that the reporting agency did not make the decision or take the adverse action and cannot give specific reasons for it; and a notice of the individual's right to obtain a free copy of the report from the reporting agency within sixty days and to dispute the information contained in the report.

In sum, the amendments require the employer to disclose to employees or applicants that credit reports may be sought and used in making employment decisions. Additionally, employers must obtain the written permission of the employee or applicant to procure such a report.

The Federal Trade Commission (FTC) has stated that the disclosure and written authorization can be provided for in a single document, but any such document must include absolutely no more language than is necessary for the disclosure and the authorization for obtaining the consumer report.[5] While employers may continue to notify candidates in an employment application that consumer reports may be sought, this notification does not relieve an employer of the duty to make a separate disclosure as required by Section 1681b(2)(A).

Under the FCRA, employers are also required to inform prospective or active employees that adverse action will be taken based on the consumer report *before* that action occurs. Additionally, the amendments require employers to supply employees or candidates with a copy of the consumer report and a notice of their rights under the FCRA.

The law does not provide guidance in regard to how long an employer must wait after giving pre-adverse action notification before taking the adverse action, such as a decision not to hire. However, in developing appropriate procedures, employers should bear in mind that the purpose of the law is to allow persons to discuss reports with employers or otherwise respond before adverse action is taken. Accordingly, if an employer proposes to take an adverse employment action based on a credit report, it is advisable to wait at least five business days after notification to the employee or candidate before taking that action. If the employer makes frequent use of consumer reports, it may wish to narrow the field of candidates for a position by means of other criteria before requesting consumer reports, so as to reduce the number of notices of adverse action that may ultimately be required.

Finally, the FTC has also cautioned that any adverse action based, even in part, on information contained in the consumer report triggers the notification

4. 15 U.S.C. § 1681d mandates that specific procedures be followed when an "investigative consumer report" is requested by an employer. An "investigative consumer report" is defined by 15 U.S.C. § 1681a(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.

5. See Letter of Cynthia S. Lamb, Division of Credit Practices, Bureau of Consumer Protection, Federal Trade Commission, October 21, 1997, to Richard L. Steer, http://www.ftc.gov/os/statutes/fcra/steer.htm. "The reason for specifying a stand-alone disclosure was so that consumers will not be distracted by additional information at the time the disclosure is given. We believe that including an authorization in the same document with the disclosure, as you suggest, will not distract from the disclosure itself."

Federal Trade Commission Letter Explaining When the FCRA Applies to Public Schools

The Federal Trade Commission issues letters of advice concerning the Fair Credit Reporting Act (FCRA). These letters do not have the force of law, but they indicate the commission's interpretation of the statute. One such letter, regarding a public school system, is reprinted below. In summary, the letter says that

- the FCRA does *not* apply to criminal records checks through the FBI and SBI (see Bob Joyce's article beginning on page 17 of this issue of *School Law Bulletin*);
- it does *not* apply to reference checks performed by school system personnel;
- it *does* apply to investigations by a private investigator hired by the school system;
- it does *not* apply to background investigations conducted by the school system's own employees.

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July 10, 1998

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222 East Birch Avenue
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Re:
(1) State law enforcement agencies — FCRA § 603(f) [15 U.S.C. § 1681a(f)]
(2) Employers/investigative consumer reports — FCRA §§ 604(b) [15 U.S.C. § 1681b(b)], 606 [15 U.S.C. § 1681d], 615(a) [15 U.S.C. § 1681m(a)]

Dear Mr. Pickett:

This responds to your letter concerning the application of the Fair Credit Reporting Act ("FCRA") to public school districts in connection with background checks they conduct on employment applicants. Specifically you state that "schools are requesting, and in many cases are required by law to obtain, one or more of the following kinds of information" after which you enumerate five fact patterns. We list verbatim each of those five items and follow each with our analysis of the FCRA's applicability.

1-2. Criminal history background information obtained by means of submitting an applicant's fingerprints, via a state agency designated to complete these tasks (here, the Arizona Department of Public Safety), to the Federal Bureau of Investigation, which in turn will provide to the employing school district a criminal history record concerning the

applicant based upon records maintained by the FBI. A similar report, limited to criminal records within this state, that is obtained solely based upon the records maintained by the designated law enforcement agency in this state to retain and provide this data (again, the Arizona Department of Public Safety).

In our opinion, a state agency does not become a "consumer reporting agency" (CRA) under the definition of that term set forth in Section 603(f) [15 U.S.C. § 1681a(f)] of the FCRA by conducting criminal background checks as part of its statutory duties. Our reasoning is explained in the attached staff letter* (Copple, 6/10/98), where we discuss the inapplicability of the FCRA to reports provided by Iowa's Department of Criminal Investigation and by the FBI. The Iowa agency provides reports to the health care industry that appear to be virtually parallel to those the Arizona Department of Public Safety (DPS) provides to educational managers in your state. Even though the Iowa agency received a statutory fee for the service (which you report DPS does not), we did not consider it a CRA because it was a public agency carrying out its mandate to protect the public by assisting employers to monitor individuals hired in a sensitive sector. It is similarly our opinion that DPS is not a CRA, and that the criminal records reports that it provides directly to educational employers pursuant to its duties under Arizona law are not consumer reports governed by the FCRA, regardless of whether or not they include FBI input.

3. A "reference check" performed by personnel of the school district by contacting those persons listed as personal references by the applicant in an application or resume, to inquire generally about the applicant's employment history and job performance at previous work sites.

The FCRA would not apply to any communication by a previous employer about the applicant's job performance because Section 603(d)(2)(A)(i) [15 U.S.C. § 1681a(d)(2)(A)(i)] specifically exempts "experiences between the consumer and the —person making the report" from the definition of "consumer report" in the FCRA. Because the "reference check" that you describe—a communication from a person listed as a reference by a job applicant, directly to a party considering the consumer's application—is not a consumer report from a CRA, the FCRA is inapplicable to it.

4. A background investigation completed by a private investigator or detective retained under contract by a school district, where the private investigator or detective contacts persons identified by the applicant from the applicant's previous work sites, and perhaps others whose names are discovered as inquiries are made, who can verify various kinds of information such as dates of employment, positions held, reasons for leaving, performance, character, whether the person would be rehired and the like.

The investigator hired by the school district would be a CRA, and any communication to the district reporting on an employment applicant would be a "consumer report" (probably an "investigative consumer report") subject to the FCRA. See attached staff opinion letters* (Beaudette, 6/9/98; Hinkle, 7/9/98), where we discuss the applicability of the FCRA to third parties that investigate applicants on behalf of employers. The main duties of the school district would be to make the disclosures required by Sections 604(b) [15 U.S.C. § 1681b(b)],

606 [15 U.S.C. § 1681d], and 615(a) [15 U.S.C. § 1681m(a)] of the FCRA of parties that use consumer reports. See the attached staff opinion letters* (Hawkey, 12/18/97; Steer, 10/21/97; Weisberg, 6/27/97) and brochure† ("Using Consumer Reports: What Employers Need to Know") where we discuss these duties in detail.

5. The same type of background investigation as described in paragraph 4 above, when the school district utilizes its own employees to make the contacts and obtain the information requested, as part of their regularly assigned job duties.

As discussed in our reply to #3, the FCRA does not apply to communications concerning job applicants that the school district obtains directly from prior employers or others.

The opinions set forth in this informal staff letter are not binding on the Commission.

Sincerely yours,
Clarke W. Brinckerhoff

* The staff opinion letters (Copple, 6/10/98; Beaudette, 6/9/98; Hinkle, 7/9/98; Hawkey, 12/18/97; Steer, 10/21/97; and Weisberg, 6/27/98) are available on the FTC Web site at http://www.ftc.gov/os/statutes/fcra/.

† The brochure ("Using Consumer Reports: What Employers Need to Know") is available on the FTC Web site at http://www.ftc.gov/bcp/conline/pubs/buspubs/credempl.htm.

duty under the FCRA.[6] The 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.

Concerns about liability—coupled with the relative ease of obtaining information about prospective employees—have led employers to use background checks, including reviews of credit and criminal history reports, more frequently than ever before. While the law does not prevent employers from obtaining pertinent information, it does require them to comply with the Fair Credit Reporting Act. Employers using consumer reports as a screening mechanism must be aware of the FCRA's legal requirements, since failure to comply could lead to serious legal consequences.

6. 16 C.F.R. § 600.2.