

Employment Law Advisory for 9/7/2011

Checking Applicants' Criminal And Credit Histories? Make Sure You Follow The Rules

The ease of obtaining information in the current electronic age has made it very simple for employers to routinely check whether an applicant has any criminal record and also to check the applicant's credit history. While this information can certainly be put to fair and good use by prospective employers, the federal Fair Credit Reporting Act ("FCRA"), and its California counterpart, have certain notice and disclosure requirements that must be followed in order to avoid any potential liability when an employer uses this information as part of the hiring process. A recent uptick in class action litigation against employers alleging violation of the FCRA should motivate all employers to review established practices with respect to criminal background and credit history checks to make sure their process fully complies with the FCRA.

The FCRA defines a "consumer credit report" as a "written, oral or other communication of any information by a consumer credit reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." This broad definition of a consumer credit report means that many background checks, including criminal history checks, come within the definition and are subject to the notice and disclosure requirements of the FCRA. California has enacted parallel legislation that governs "investigative consumer reports" and "consumer credit reports." The definition of an investigative consumer report is broader than the federal consumer credit report definition and includes any report in which information on a consumer's character, general reputation, personal characteristics or mode of living is obtained through any means.

Both the FCRA and its California counterpart have numerous reporting and disclosure requirements. Before requesting a consumer report on any job applicant, the employer must make a separate, clear and conspicuous written disclosure to the applicant that the employer may obtain a consumer report for employment purposes and must obtain the applicant's written authorization to order the report. To secure the greatest legal protection, employers should also provide applicants with a copy of the "Summary of Your Rights Under the FCRA" created by the Federal Trade Commission.

In addition, once a consumer report is received by an employer, if information obtained in the report may be the basis for the employer not offering employment to the applicant, the employer must provide the applicant a "pre-adverse action disclosure" informing the applicant that information in the report may cause employment to be denied. This pre-adverse action disclosure must contain the name and contact information of the consumer reporting agency that provided the information as well as other specified information. The purpose of this notice requirement is to allow the applicant/consumer to dispute any incorrect information that the agency may have reported.

Finally, if the employer ultimately decides to deny employment based on information in the report, the employer must send a second notice called an "adverse action disclosure" informing the applicant that adverse action is being taken based on the report and again providing certain required information to the applicant.



The good news is that most reputable consumer reporting agencies have some familiarity with the disclosure and notice requirements established by the FCRA and its California counterpart. However, it is still incumbent on the employer to make sure that the application and employment process properly documents compliance with state and federal law. If you have any questions about obtaining and using credit and criminal histories in the employment application process, or any other issue relating to employment law, please contact one of our attorneys