Complying with the Fair Credit Reporting Act

In this article and future articles, I will provide an overview of legal issues and an update on the current state of the law regarding background screening. Due to the idiosyncrasies of state law and issues of liability, nothing written in these articles should be considered legal advice—you should always consult with an attorney who is knowledgeable in employment law before performing background screens.

Introduction

Due to recent events and the prevalence of employment litigation, employers have become acutely aware that hiring a job applicant with an undesirable background, criminal record or falsified credentials can create enormous economic and legal consequences. Many employers utilize pre-employment background screening to be more careful about who is hired in order to minimize the likelihood of problems down the road. That being said, many employers are conducting background checks without any regard for the laws regulating this practice.

Background screening is normally conducted by outside agencies called Consumer Reporting Agencies (CRA). Employers generally cannot competently conduct such screenings in-house due to the difficulty in finding current information, as well as the specialized skills and knowledge involved. In addition, employers risk legal liability if the background check is negligently performed, or if the procedures utilized to check on applicants infringe on legally protected areas of privacy.

A federal law called the Fair Credit Reporting Act (FCRA) governs pre-employment screening obtained from outside agencies. The FCRA sets out the federal rules and requirements for pre-employment background reports, called Consumer Reports. This law was substantially amended in 1996, 1997 and 1998 to provide greater privacy protection to consumers, and to ensure that background information is accurate and complete.

A Consumer Report is much broader in scope than just a credit report—it includes criminal and civil records, driving records, civil lawsuits, reference checks and any other information obtained by a CRA. When engaging the services of a CRA, both the employer and the CRA must follow the four steps described in this article. Failure to do so can result in substantial legal exposure, including fines, compensatory damages, punitive damages and attorneys fees. For this reason, it is strongly recommended that employers should engage the services of a reputable outside screening firm.

Step-By-Step Guide to Complying With the FCRA

STEP ONE—Prior certification by the employer to the CRA that it will follow the FCRA (FCRA Section 604)

A CRA may not furnish a consumer report to an employer until the employer certifies that it has given the required notice and received written authorization from the employee or applicant to obtain the report. The employer also must certify that it will comply with the FCRA's

requirements if it subsequently uses information from the consumer report to take adverse action with regard to the employee or applicant.

The specific FCRA requirements are explained in a document prepared by the Federal Trade Commission entitled, "Notice to Users of Consumer Report." The FCRA requires a CRA to provide a copy of that document to every employer who requests a report.

STEP TWO—Prior written disclosure/authorization from an employee or applicant before obtaining a Consumer Report (FCRA Sections 604 and 606)

Before obtaining a consumer report from a CRA, the employer must obtain written consent from the employee or applicant and provide him/her with a clear and conspicuous written disclosure that a background report may be requested. Although the disclosure must be provided in a stand-alone document to prevent it from being hidden in an employment application, a 1998 amendment to the FCRA clarified that the disclosure and consent may be in the same document. The CRA should be able to provide these documents to an employer at no cost.

It should be noted that special procedures are necessary when the employer requests a CRA to obtain employment references. If a CRA is merely verifying factual matters, such as the dates of employment or salary, no special procedure is necessary. However, if the CRA is asking for information such as job performance or personal characteristics, then that falls into a special category of consumer report called an "Investigative Consumer Report."

When an Investigative Consumer Report is requested, there are some special procedures to follow:

- There must be a disclosure to the applicant that an investigative consumer report is being requested, along with a certain specified language. Unless it is contained in the initial disclosure, the consumer must receive this additional disclosure within three (3) days after the request is made.

- The disclosure must tell the applicant that they have a right to request additional information about the nature of the investigation.

- If the applicant makes a written request, then the employer has five (5) days to respond with additional information and must provide a copy of a document prepared by the Federal Trade commission called, "A Summary of Your Rights Under the Fair Credit Reporting Act" (which your CRA should provide).

STEP THREE—Provide a copy of the Consumer Report and Notice of Rights before taking adverse action against the employee or applicant. (FCRA Section 604)

When an employer receives a Consumer Report, and decides not to hire or promote the employee/applicant based upon the report, then the employee/applicant has certain rights.

Before taking the adverse action, the employer must provide the following information to the applicant:

- A copy of the Consumer Report
- The FTC document "A Summary of Your Rights Under the Fair Credit Reporting Act."

The purpose of these requirements is to give an applicant the opportunity to see the report that contains the information that is being used against them. If the report is inaccurate or incomplete, the applicant then has the opportunity to contact the CRA to dispute or explain what is in the report. Even if there are other reasons for not hiring an applicant in addition to matters contained in a consumer report, the adverse action notification procedures still apply. In a situation where the employer would have made an adverse decision anyway, regardless of the background report, following the adverse action procedures is still the best practice for legal protection.

A common question that arises is how long an employer must wait before denying employment based upon information contained in a Consumer Report. Although the FCRA is silent on this point, the FTC staff has stated in an opinion letter that a period of five (5) business days "appears reasonable." (Brinckerhoff-Weisberg letter of June 27, 1997). Some employers may find that the FTC's definition of "reasonable" is unworkable or unduly burdensome, but caution should be exercised before taking adverse action on a more aggressive time table.

STEP FOUR—Give an employee/applicant notice after taking an adverse action (FCRA Section 615)

After sending out the documents required in Step 3, if the employer decides to take adverse action based in whole or in part on a Consumer Report, the employer must:

- Provide oral, written or electronic notice of the adverse action to the employee/applicant;
- Provide the name, address and telephone number of the CRA that furnished the report, and a statement that the CRA did not take the adverse action and is unable to provide the specific reasons adverse action was taken; and
- Provide the employee/applicant an oral, written or electronic notice of his/her rights under the FCRA to obtain a free copy of the report from the CRA and to dispute the accuracy or completeness of any information contained in the report.

Conclusion

The FCRA and its amendments impose a number of new requirements on employers who wish to use Consumer Reports as a means to screen job applicants or current employees. In many

cases, these new provisions will add significant compliance burdens, time delays and costs on employers. However, considering the penalties for failing to comply with the FCRA and the substantial benefits associated with background screening, an employer who fails to screen its employees/applicants does so at its own peril. Background screening promotes a safe and profitable workplace, it protects an employer from negligent hiring/retention exposure, wrongful termination lawsuits, incidents of sexual harassment, financial loss, false claims, theft, workplace disruption and time wasted in recruiting and training the wrong candidates. Employers should carefully review all of these FCRA requirements with their legal counsel to ensure that they fully understand its nuances and have proper compliance procedures in place.

If you have any specific questions relating to the FCRA or other employment-related issues raised in this article, you may contact the author, Seth P. Briskin at Kohrman Jackson & Krantz, 1-888-696-8700 or at his website, spb@kjk.com.