

MORE HURDLES AND HOOPS: NEW FEDERAL LAW COMPLICATES EMPLOYMENT INVESTIGATIONS

by Jerry H. Hogenmiller, Esquire
and Kelly A. Magiske, Esquire

If you are an employer and if you do investigations on prospective or current employees, you must comply with the new law pertaining to investigations or face civil as well as criminal penalties.

The new law is the Consumer Credit Reporting Reform Act (CCRA) of 1996, which became effective September 30, 1997. The CCRA amends the Fair Credit Reporting Act (FCRA) of 1970. 15 USCA Section 1681, *et seq.*

DON'T LET THE NAME FOOL YOU Because of the Law's name, many people think it only applies to credit reports. Based on the statute's language and what appears to be the Federal Trade Commission's (FTC's) interpretation of the statute, such is not the case.

The new law applies to "consumer reports". According to a pronouncement, dated December 1997, entitled "Using Consumer Reports - What Employers Need to Know", the FTC defines "consumer reports" as follows:

"A consumer report contains information about your personal and credit characteristics, **character, general reputation, and lifestyle.**" To be covered by the FCRA, a report



must be prepared by a consumer reporting agency (CRA) - a business that assembles such reports for other businesses. Employers often do background checks on applicants and get consumer reports on current employees. Some employers only want an applicant's or employee's credit payment records; other want driving records and criminal histories. For sensitive positions, it is not unusual for employers to order investigative consumer reports - reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA."



Practice Tip: To avoid being subject to this law, an employer might cause an investigation to be conducted without involving a CRA. At this point, the safest way to accomplish this would be for the employer to conduct the investigation itself.

EMPLOYERS SUBJECT TO THE FCRA The FCRA contains no limit on the size or type of employer that is subject to the FCRA's provisions. Every employer that uses a consumer report for the purpose of evaluating an individual for employment, promotion, reassignment or retention is governed by the FCRA.¹ Clearly, the scope of the FCRA is vast.

DISCLOSE AND ACQUIRE WRITTEN PERMISSION FOR INVESTIGATION Section 1681(b)(2) of the Act requires the employer to clearly and

conspicuously disclose to the employee/applicant, in a document that consists solely of the disclosure, the fact that a consumer report/investigation may be obtained for employment purposes.

² The disclosure must occur prior to the time the report is procured or caused to be procured. ³ The employee/applicant must authorize, in writing, the investigation.⁴ *Practice tip: Create a disclosure form which also contains a release of liability relating to the investigation .*

CERTIFICATION TO CONSUMER REPORTING AGENCY (CRA)

The employer must certify to the CRA that it has provided the proper disclosure and obtained authorization to conduct an investigation pursuant to section 1681(b)*Editor's Note: Because we find no language in the new Consumer Credit Reporting Reform Act to exempt employee investigations in the course of a workers' compensation claim from coverage , we felt the following words of caution and advice were in order.*

If you are an employer and if you do investigations on prospective or current employees, you must comply with the new law pertaining to investigations or face civil as well as criminal penalties.

The new law is the Consumer Credit Reporting Reform Act (CCRA) of 1996, which became effective September 30, 1997. The CCRA amends the Fair Credit Reporting Act (FCRA) of 1970. 15 USCA Section 1681, et seq.

DON'T LET THE NAME FOOL YOU Because of the Law's name, many people think it only applies to

credit reports. Based on the statute's language and what appears to be the Federal Trade Commission's (FTC's) interpretation of the statute, such is not the case.

The new law applies to "consumer reports". According to a pronouncement, dated December 1997, entitled "Using Consumer Reports - What Employers Need to Know", the FTC defines "consumer reports" as follows:

"A consumer report contains information about your personal and credit characteristics, **character, general reputation, and lifestyle.**" To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) - a business that assembles such reports for other businesses. Employers often do background checks on applicants and get consumer reports on current employees. Some employers only want an applicant's or employee's credit payment records; other want driving records and criminal histories. For sensitive positions, it is not unusual for employers to order investigative consumer reports - reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA."

Practice Tip: To avoid being subject to this law, an employer

might cause an investigation to be conducted without involving a CRA. At this point, the safest way to accomplish this would be for the employer to conduct the investigation itself.

EMPLOYERS SUBJECT TO THE FCRA

The FCRA contains no limit on the size or type of employer that is subject to the FCRA's provisions. Every employer that uses a consumer report for the purpose of evaluating an individual for employment, promotion, reassignment or retention is governed by the FCRA.¹ Clearly, the scope of the FCRA is vast.

DISCLOSE AND ACQUIRE WRITTEN PERMISSION FOR INVESTIGATION

Section 1681(b)(2) of the Act requires the employer to clearly and conspicuously disclose to the employee/applicant, in a document that consists solely of the disclosure, the fact that a consumer report/investigation may be obtained for employment purposes.

² The disclosure must occur prior to the time the report is procured or caused to be procured. ³ The employee/applicant must authorize, in writing, the investigation.⁴ *Practice tip: Create a disclosure form which also contains a release of liability relating to the investigation .*

CERTIFICATION TO CONSUMER REPORTING AGENCY (CRA)

The employer must certify to the CRA that it has provided the proper disclosure and obtained authorization to conduct an investigation pursuant to section 1681(b)(2), that the information being obtained will not be used in violation of any federal or state

equal opportunity law or regulation, and that, if any adverse action is taken based on the consumer report, a copy of the report and a summary of the employee's/applicant's rights will be provided to him/her.⁵

SPECIAL RULES FOR “INVESTIGATIVE CONSUMER REPORTS”

Investigative consumer reports are a special type of consumer report with information about a consumer's character, general reputation, personal characteristics, and mode of living that is obtained through *personal interviews*.⁶ Consumers who are subjects of such reports are given special rights under the FCRA. If an employer intends to obtain an “investigative consumer report,” the FCRA requires the following:

1) The employer must disclose to the applicant/employee that an investigative consumer report may be obtained.⁷ This must be done in a written disclosure that is mailed, or otherwise delivered to the applicant/employee not later than three days after the date in which the report was first requested.⁸ The disclosure must include a statement informing the applicant/employee of his/her right to request additional disclosures of the nature and scope of the investigation as described below, and must include the summary of consumer rights required by the FCRA.⁹

2) The employer must certify to the CRA that the disclosures set forth above have been made and that the employer will make the disclosure described below:¹⁰

3) Upon the written request of an applicant/employee

made within a reasonable period of time after the disclosures, the employer must make a complete disclosure of the nature and scope of the investigation that was requested.¹¹ This must be made in a written statement that is mailed, or otherwise delivered, to the applicant/employee no later than five days after the date on which the request was received from the applicant/employee or the report was first requested, whichever is later in time.¹²

BEFORE TAKING ANY ADVERSE ACTION

Before taking an adverse action, an employer must provide to the applicant/employee a copy of the investigative report as well as a summary of the applicant's/employee's rights. (The summary must be in substantially the same form as that provided by the FCRA).¹³

HOW LONG MUST AN EMPLOYER WAIT BEFORE TAKING ADVERSE ACTION?

The statute is silent on the issue of what period of time, if any, an employer must wait after supplying the materials required by Section 604(b), before taking adverse action. In a Federal Trade Commission Staff Opinion Letter (Brinckerhoff to Weisberg, 6/27/97) the FTC opines that waiting five business days appears to be reasonable. It is likely that the FTC would find a shorter period of time reasonable if required by legitimate business necessity. At this point in time however it is impossible to identify with accuracy what a “safe harbor” may be on this issue.

AFTER ADVERSE ACTION IS TAKEN

If an employer takes any type of adverse action that is based at least in part on information contained in a consumer report, the employer is required by Section 615(a) of the FCRA to notify the applicant/employee.¹⁴ The Notification may be done in writing, orally, or by electronic means.¹⁵ The notification must include the following:

1) The name, address and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report;¹⁶

2) A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made;¹⁷

3) A statement setting forth the applicant's/employee's right to obtain a free disclosure of his/her file from the CRA if he/she requests the report within 60 days;¹⁸

4) A statement setting forth the applicant's/employee's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.¹⁹

FORMS AND NOTICES

The FCRA directs the Federal Trade Commission (FTC) to prescribe three notices: a notice summarizing consumer rights under the FCRA; a notice stating the responsibilities under the FCRA of those who regularly furnish consumer report information to CRA's; and a notice stating the duties of any person who uses information covered by the FCRA.²⁰ Form versions of these notices have been produced by the FTC.²¹ However, the FCRA may be satisfied by a notice that is substantially similar to the FTC's form notice.²²

PENALTIES FOR VIOLATIONS

The FTC is charged with enforcement of the FCRA and is authorized to seek civil penalties.²³ States may also institute actions to enjoin violations of the FCRA and to recover damages on behalf of state residents.²⁴ Any "person" (an FCRA term which encompasses employers) who negligently fails to comply with the FCRA with respect to any consumer is liable to that consumer for any damages sustained by the consumer, as well as for attorney's fees and the cost of a successful action to enforce such liability.²⁵ A person who willfully fails to comply with the FCRA with respect to any consumer is liable for damages, including punitive damages, as well as for the attorney's fees and costs involved in a successful action to enforce such liability.²⁶ Further, a person who obtains a consumer report from a CRA under false pretenses, or knowingly obtains a consumer report without a permissible purpose, is liable to the CRA for any damages which the CRA may sustain.

Additionally, an officer or employee of a CRA who knowingly and willfully provides information concerning an individual from the CRA's file to an unauthorized person, or any person who knowingly and willfully obtains information on a

consumer from a CRA under false pretenses shall be subject to criminal fines and/or imprisoned for 2 years.²⁷

FCRA AND STATE WORKERS'

COMPENSATION ACTS The FTC has indicated that the FCRA is applicable to an employer's investigation of an employee in relation to Workers' Compensation matters.²⁸ This interpretation requires that an employee be given the disclosure notices prescribed by the FCRA. Although the full

CONCLUSION Since this law only recently became effective, there are many uncertainties about how it will be interpreted and applied. This is particularly true in the area of Workers' Compensation. However, if history is a guide, disgruntled employees and their attorneys are sure to add it to their arsenal of weapons when a conflict arises with their prospective or current employer. •

If you would like more information about this new law, please write or call Jerry Hogenmiller at Thomson, Rhodes & Cowie, P.C.

END NOTES:

- ¹ 15 U.S.C.A. §1681a(h)
- ² 15 U.S.C.A. §1681b(2)(A)
- ³ 15 U.S.C.A. §1681b(2)(A)
- ⁴ 15 U.S.C.A. §1681b(2)(B)
- ⁵ 15 U.S.C.A. §1681b(1)
- ⁶ 15 U.S.C.A. §1681a(e)
- ⁷ 15 U.S.C.A. §1681d(a)(1)
- ⁸ 15 U.S.C.A. §1681d(a)(1)(A)
- ⁹ 15 U.S.C.A. §1681d(a)(1)(B)
- ¹⁰ 15 U.S.C.A. §1681d(a)(2)
- ¹¹ 15 U.S.C.A. §1681d(b)
- ¹² 15 U.S.C.A. §1681d(b)
- ¹³ 15 U.S.C.A. §1681d(b)
- ¹⁴ 15 U.S.C.A. §1681m(a)
- ¹⁵ 15 U.S.C.A. §1681m(a)(1)
- ¹⁶ 15 U.S.C.A. §1681m(a)(2)(A)
- ¹⁷ 15 U.S.C.A. §1681m(a)(2)(B)
- ¹⁸ 15 U.S.C.A. §1681m(a)(3)(A)
- ¹⁹ 15 U.S.C.A. §1681m(a)(3)(B)
- ²⁰ 16 CFR 601; 15 U.S.C.A. §1681g(c); 15 U.S.C.A. §1681e(d)
- ²¹ 16 CFR 601
- ²² 15 U.S.C.A. §1681g(c); 15 U.S.C.A. §1681e(d)
- ²³ 15 U.S.C.A. §1681a(r); 15 U.S.C.A. §1681s(a)(2)
- ²⁴ 15 U.S.C.A. §1681s(c)
- ²⁵ 15 U.S.C.A. §1681o(a)
- ²⁶ 15 U.S.C.A. §1681o(a)
- ²⁷ 15 U.S.C.A. §1681r; 15 U.S.C.A. §1681q
- ²⁸ Telephone conversation with Attorney William Haynes, FTC, Division of Credit Practices (January 23, 1998).