

# Newsletter

## March Employment Insights

3/15/2013

### CFPB Issues New Requirements for Employers

#### REGARDING CREDIT CHECKS

- Employers who conduct background or credit checks on job applicants or current employees, take note: The Consumer Financial Protection Bureau (CFPB), the primary enforcer of the Fair Credit Reporting Act (FCRA), recently issued new forms that employers must begin using effective January 1, 2013.
- What is the FCRA, and what does it require?
- The FCRA regulates the collection and use of “consumer reports,” which are broadly defined to include “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for,” among other things, employment purposes. 15 U.S.C. § 1681a(d)(1). This can include everything from credit and criminal background checks to motor vehicle records.

#### UNDER THE FCRA, BEFORE AN EMPLOYER REQUESTS A CONSUMER REPORT, IT MUST:

- Notify the applicant or employee that it may use the information in his/her consumer report for decisions related to employment.
- This notice must be in a stand-alone written document, and may not be included in an employment application.
- Obtain written permission from the applicant or employee to pull the consumer report. This permission may be contained in the same document that is used to notify the applicant or employee that the employer will be pulling a consumer report. If an employer wishes to have the option of receiving consumer reports throughout an employee's employment, the written authorization must state this clearly and conspicuously.
- Provide written certification to the company that will provide the consumer report. The certification must state that the employer: (1) notified the applicant or employee and obtained their permission to get a consumer report; (2) will give the applicant or employee a copy of the consumer report and a summary of his/her rights under the FCRA before taking adverse action based on the contents of the consumer report; and (3) will not discriminate against the applicant or employee, or otherwise misuse the information in the consumer report, in violation of applicable state and federal law.
- If an employer wishes to take adverse action based on the contents of a consumer report, the employer must do the following things before taking the adverse action:
- Give the applicant or employee notice of intent to take adverse action that includes a copy of the consumer report; and
- Give the applicant or employee a copy of the FCRA “Summary of Rights” form (discussed below).

#### AFTER THE ADVERSE ACTION IS TAKEN, THE EMPLOYER MUST THEN TAKE THE FOLLOWING FINAL STEP:

- Give the applicant or employee notice of adverse action. The notice must contain (1) a statement that adverse action was taken based on the consumer report; (2) contact information for the consumer reporting agency; (3) a statement that the consumer reporting agency did not make the adverse decision and cannot explain why the decision was made; and (4) an explanation of the applicant's or employee's rights under the FCRA to obtain a free copy of the consumer report from the consumer reporting agency and to dispute with the agency the accuracy or completeness of the report. If adverse action is based on a criminal record, the notice must be in writing and must state that the decision is based on the criminal record.

## WHAT NEW FORMS MUST EMPLOYERS USE, AND WHY DO THEY MATTER?

- The following three forms have changed, each of which is mandated under the FCRA in certain situations:
- “A Summary of Your Rights Under the Fair Credit Reporting Act” This is the form referenced above that must be provided to an applicant or employee before taking adverse action based on a consumer report. This is the form that will be most commonly used by employers.
- “Notice to Users of Consumer Reports: Obligations of Users Under the FCRA” This is a form that consumer reporting agencies must provide to each user of their services (e.g., employers).
- “Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA” This notice is aimed at certain furnishers of information to consumer reporting agencies and must be provided in prescribed situations, such as a re-investigation where the consumer disputes the report, or in situations involving theft.

Copies of the new FCRA forms may be accessed [here](#).

The forms were changed to reflect that consumers can now obtain information about their rights under the FCRA from the CFPB instead of the Federal Trade Commission. Although the changes are relatively minor, it is critical that employers begin using the newly promulgated forms for a couple of reasons.

First, penalties for violating the FCRA can be steep. Employers that “negligently” or “willfully” fail to comply with the FCRA’s requirements may be subject to lawsuits brought by applicants or employees. Negligent failure to comply with the FCRA can lead to actual damages and attorneys’ fees, while willful failure to comply can lead to statutory damages (\$100 - \$1,000 per violation), attorneys’ fees and punitive damages.

Second, there has been a significant increase in public and private enforcement actions for violations of the FCRA. For example, Kmart Corporation recently paid \$3 million to settle a class action lawsuit involving claims that it failed to properly warn more than 60,000 job applicants that they could be denied employment based on background checks. *Pitt v. K-Mart Corp.*, Civil Action No. 3:11-cv-00697 (E.D. Va.). The plaintiffs’ complaint alleged a number of FCRA violations, one of which was that the employer utilized an outdated version of the “Summary of Rights” form. As this case illustrates, it is critical that employers meet all technical and procedural requirements imposed by the FCRA.

In addition to ensuring that the new FCRA forms are used moving forward, employers should take the time to generally review their compliance obligations and efforts under the FCRA. Taking these types of preventative measures on the front end will substantially reduce the risk of liability later on. Please contact us for more information regarding employer obligations under the FCRA.

### Related Practices

Labor & Employment