

What Employers Need To Know About The Fair Credit Reporting Act And Its Updated Regulations

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The Federal Trade Commission (FTC) has enacted new regulations implementing the Fair Credit Reporting Act's (FCRA) amendments. The regulations are effective January 31, 2005. The FTC regulations update the summary of the rights under the FCRA of victims of identity theft; the general summary of consumer rights under FCRA; the notice of the duties of persons that furnish information to consumer reporting agencies; and the notice of the duties of users of information obtained from consumer reporting agencies. Employers often encounter FCRA when conducting background checks when hiring or promoting employees.

Background

Employers must be aware of FCRA's requirements because of the broad definition of "consumer reports." Consumer credit reports are generally any oral, written, or other information communication by a credit reporting agency concerning an individual's credit eligibility, standing or capacity. Consumer reports include not only financial disclosures but also common requests such as criminal background checks. (See 15 U.S.C. § 1681a(d)(1)). Employers may use a consumer report to make an employment decision, for example making decisions regarding hiring, promotion, reassignment or retention.

Requesting Consumer Reports

Employers seeking to use consumer reports when making employment decisions must satisfy several requirements. First, an employer must provide the employee or potential employee with clear, written notice that the report will be requested. This notice must "consist solely of the disclosure," and be in a separate document, rather than simply part of an employment application. (See 15 U.S.C. § 1681b(b)(2)(A)(i)). Second, an employer must also receive written authorization from the employee or applicant before requesting the consumer report from the consumer reporting agency. This authorization may be made by acknowledgement on the same document in which the employee is given notice of the employer's intent to seek the report. Third, after notifying the employee or applicant of the intent to



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seek a consumer report, and obtaining written authorization, the employer must then certify to the credit reporting agency that the consumer report will be used only for permitted purposes under FCRA, and not in violation of any applicable state or federal equal opportunity law or regulation. (See 15 U.S.C. § 1681b(1)(A)(i) & (ii)).

Taking Adverse Action In Reliance On Consumer Reports

Once an employer has satisfied the above requirements, and received a consumer report, FCRA imposes additional restrictions before the employer may take an adverse action based on that report. First, before adverse action is taken, the employee or applicant must be provided with a copy of the report, and given a reasonable time to present evidence challenging the information in the report. No specified time is required. However, as a general rule, employers may wish to provide five business days with the employee or applicant having the option to extend the time for a reasonable additional period upon written request, for good cause. (See 15 U.S.C. § 1681b(b)(3)(A)(i)). Next, the employee or applicant must also be provided with a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act." The employer should receive this document from the fair credit reporting agency generating the consumer report, but it can also be found at the Federal Trade Commission's Web Site (www.ftc.gov) (See 15 U.S.C. § 1681b(b)(3)(A)(ii)). Finally, after an employer has taken adverse action based in whole or in part on the consumer report, it must give the individual notice that such action has been taken. The notice must be provided within three days of the adverse action and must include the following: identification of the adverse action taken; the name, address and telephone number of the consumer reporting agency that provided the consumer report (including a toll-free number if the agency compiles and maintains files on consumers on a nationwide basis); a statement that the consumer reporting agency did not make the adverse decision and is unable to provide the consumer with the specific reasons why the adverse action was taken; a notice of the individual's right to obtain a free copy of the consumer report from the

consumer reporting agency within sixty days; and a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished to the employer. (See 15 U.S.C. § 1681b(b)(3)(B)(i)).

Amendments

The FTC has recently published updates to FCRA regulations and documents because FCRA was amended by the Fair and Accurate Credit Transactions Act (FACT). The regulations update the model summary of the rights of consumers regarding fraud or identity theft, a general summary of consumer rights, a summary of the duties of entities that furnish information to consumer reporting agencies and a summary of the duties of users of information from consumer reporting agencies. Employers may begin distributing the updated summaries and notices earlier, but not later than January 31, 2005.

Repeal Of Existing Summaries And Notices

With these updated documents the general summary of the rights of consumers under the FCRA, the notice of the duties under FCRA of persons that furnish information to consumer reporting agencies and the notice of the duties under the FCRA of persons that use information obtained from consumer reporting agencies previously used are obsolete and are being repealed by the FTC. The new and revised model summaries and notices will be codified in 16 C.F.R. part 698.

Identity Theft Rights

The FTC, in connection with the Federal Banking Agencies and the National Credit Union Administration, is required to prepare a model summary of the rights of consumers regarding the procedures for remedying the effects of fraud or identity theft. This model summary must be distributed by consumer reporting agencies to any consumer who contacts a consumer reporting agency and expresses a belief that he or she is a victim of fraud or identity theft. Employers, as users of consumer reports, are not required to distribute this summary. If an employee complains about fraud or identity theft regarding his or her consumer report, employers can direct them to the consumer reporting agency furnishing the report.

General Summary Of Consumer Rights

Employers provide this document to an employee or potential employee after taking an adverse action in reliance on a consumer report. Employers should receive this document from the credit reporting agency generating the consumer report. However, if an employer maintains its own documents to distribute to employees, it should be sure to update this document. The new document includes the list of federal agencies enforcing FCRA to provide additional necessary information to consumers in this one document.

The new regulations continue to permit the distribution of a "disclosure that is substantially similar" to the model summary. The regulations require that all information be "clearly and prominently displayed." Also, the list of federal regu-

lators that is included in the FTC's model summary "may be provided separately so long as this is done in a clear and conspicuous way." Also, translations of the summary will be in compliance with the FTC's model summary "provided that the translation is accurate and that it is provided in a language used by the recipient consumer." (See 16 C.F.R. part 698, appendix F). The FTC also added to the regulations a definition of "substantially similar," which requires that all information included in the FTC's model summary would be included in any substantially similar summary. The FTC stated that it "intends only that consumer reporting agencies have the leeway to make minor changes without being in violation of the FCRA." (See 69 F.R. 69779).

Furnisher And User Notices

Employers will receive updated notices of their duties as furnishers of information to consumer reporting agencies or users of consumer reports, if applicable, from the consumer reporting agencies. The FTC stated that it intends to revise the model notices again when the relevant rulemaking proceedings are complete, although there is no indication as to when that will be, but until the rulemaking proceedings are complete consumer reporting agencies may deliver revised "interim" notices to new users and furnishers who never before received the notices. However, "all furnishers and users must comply with every new duty as it becomes effective, without regard to whether they have been notified of the duty by a consumer reporting agency." (See 69 F.R. 69781). Therefore, employers may not receive an updated summary of its duties as a furnisher or user until the rulemaking proceedings are complete although there are new obligations that are already imposed. Employers that are "furnishers" or "users" should review the new summaries at <http://www.ftc.gov/opa/2004/11/facta.htm>.

The most significant change specifically regarding the use of consumer reports by employers is that Section III.A. of the notice to users of employment reports has been expanded to make clear that consumers may give a blanket authorization to employers for consumer reports to be obtained during the term of employment.

Also, the FTC has revised its definition of adverse actions. The explanatory text regarding what constitutes an adverse action has been shortened and the text now refers specifically to Section 603(k) of the FCRA. This change continues to include any employment action, such as hiring, promotion or retention.

Employers are encouraged to visit the Federal Trade Commission's website regarding FCRA, <http://www.ftc.gov/opa/2004/11/facta.htm>, to review the new documents to analyze the specific amendments and how they may affect its particular use of consumer reports. Also, employers may be subjected to additional requirements or restrictions under state law beyond those imposed by FCRA and, thus, should consult state law as well.

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