

## **Beware: Criminal History And Credit Checks**

Law360, New York (September 1, 2011) -- Employers which use criminal background and consumer credit reports in conjunction with their hiring processes are at risk of substantial liability if they do not comply with notice and disclosure requirements of the Fair Credit Reporting Act.

The FCRA requires that an employer provide written notification to an applicant that a consumer credit report may be obtained and used in conjunction with his or her application for employment and to obtain the applicant's written authorization before requesting a consumer report. It defines a consumer credit report as "a 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."

The FCRA specifies that, before relying on a consumer report to deny a job application, an employer must give the applicant a pre-adverse action disclosure that includes a copy of the individual's consumer report and of A Summary Of Your Rights Under The Fair Credit Reporting Act as prescribed by the Federal Trade Commission.

After the employer has denied employment to an applicant based on the report, the FCRA provides that the employer must give the applicant an adverse action notice that includes (1) the name, address and phone number of the consumer reporting agency that supplied the report; (2) a statement that the consumer reporting agency which supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and (3) a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished and of his or her right to request an additional free consumer report from the agency within 60 days.

An employer which willfully fails to obtain an applicant's permission before requesting a consumer report or which fails to provide requisite pre-adverse or an adverse action notice is liable to the applicant for (1) actual damages or damages of not less than \$100 and not more than \$1,000, (2) court costs and reasonable attorney fees if the action is successful, and (3) punitive damages "as the court may allow."

Recent settlements of class actions alleging violations of the FCRA reinforce why employers should ensure that all aspects of their hiring practices are compliant with the FCRA as well as other applicable federal, state and local employment laws. See, e.g., *Hall v. Vitran Express Inc.*, Case No. 1:09-cv-00800 (N.D. Ohio). The lead plaintiff claimed in the case that the prospective employer's failure to seek or receive appropriate approval from job applicants before obtaining criminal background reports and its failure to provide pre-adverse action notice to job applicants, including a copy of the applicant's criminal background report and a statement of the applicant's rights, constituted "willful, wanton and reckless" violation of the FCRA.

The class certified for purposes of the case included all applicants for employment from within the United States about whom the prospective employer procured criminal background reports or other consumer credit reports without giving the written notice or obtaining the authorization required by the FCRA. The company settled the case for \$2.6 million.

In March 2011, another company agreed to pay \$5.9 million to settle two similar class actions premised on alleged FCRA violations brought against the company and its subsidiaries in Illinois. There are several other class action lawsuits involving claims for violation of the FCRA pending against employers around the country.

Employers should audit their hiring practices to ensure that these are compliant with the FCRA and all applicable state and local laws pertaining to use of criminal background and consumer credit reports when assessing an applicant's qualifications for employment. In this latter regard, an increasing number of states and municipalities have enacted or are considering enacting laws or ordinances which impact whether an employer may permissibly use an applicant's criminal record or credit history to disqualify the applicant from employment or when during the hiring process it is permissible to inquire about these matters. Congress also is considering legislation that will amend the FCRA to limit employer use of consumer credit reports.

Notwithstanding, an employer which permissibly obtains and uses criminal background and consumer credit reports about applicants should not automatically disqualify an applicant from employment simply because of a past criminal conviction or poor credit history. Instead, the employer should assess on an individualized basis and in conjunction with bona fide duties and requirements of the position for which application was made whether any adverse characteristics disclosed in an applicant's criminal record or credit history render the applicant unqualified or unfit for the position to avoid an inference of discrimination against racial or ethnic groups.

The employer should document bona fide job related reasons for selection and disqualification of each job applicant and should be prepared if necessary to demonstrate that any decision disqualifying an applicant from employment based on adverse criminal background or credit history is justified based on bona fide job related criteria since the Equal Employment Opportunity Commission, analogous state administrative agencies, and plaintiff lawyers are increasingly scrutinizing and legally challenging such decisions depending on the circumstances.

--By Raymond J. Carey, Foley & Lardner LLP

*Raymond Carey is a partner in Foley's labor and employment practice, in the firm's Detroit and Chicago offices. He has more than 30 years of experience counseling and representing employers in employment and labor-related matters.*

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