

Employment Law Matters

December 18, 2012



A NEWSLETTER FROM THE LAW FIRM OF FERRARA, FIORENZA, LARRISON, BARRETT & REITZ, P.C.

SPECIAL REPORT

New Model Forms for Background Checks Must be in Use by January 1, 2013

Recently, a new federal agency (i.e., the Consumer Financial Protection Bureau [CFPB]) took over the responsibility for enforcing the Fair Credit Reporting Act (FCRA) from the Federal Trade Commission (FTC). In the process of doing so, the CFPB issued new model forms that employers and background checking companies will need to use in association with obtaining background checks on employees and applicants. These forms will need to be in use no later than January 1, 2013.

For employers, the most important of these changes were made to the model form entitled "A Summary of Your Rights Under the Fair Credit Reporting Act." Employers must provide this form to applicants and employees before taking any adverse employment action based on information received in a background check report (referred to in the FCRA as "consumer report"). Such action might include rejecting a job application, reassigning or terminating an employee, denying a promotion, etc. We have attached a copy of the revised model form for your convenience.

The other forms changed by the CFPB are: 1) the model "Notice to Users of Consumer Reports: Obligations of Users Under the FCRA," which background checking companies (referred to in the FCRA as "consumer reporting agencies") must provide to users of their services, (i.e., to employers); and 2) the model "Notice to Furnishers of Information: Obligations of Furnishers Under the FCRA," which consumer reporting agencies must give to providers of information where an employee or applicant has disputed the information.

Brief Review of FCRA-Required Procedures

The basic FCRA-required procedures have not changed. Employers must still take certain steps before they can obtain a background check (performed by a consumer reporting agency), and before and after an employer can take an adverse action based on that report.

1. *Before Getting a Background Check*

Before obtaining a background check from a consumer reporting agency, an employer must:

- Tell the applicant or employee that your organization plans to use information obtained from the background check for decisions related to their employment. This notice must be in writing and in a stand-alone format. In other words, it **cannot** be on an employment application form. While there is no model form for this notification, the notice should be brief and easily understood by the employee/applicant.
- Get written permission from the applicant or employee. This can be part of the document the employer uses to notify the individual that your organization will be obtaining a background check report.
- Certify compliance to the consumer reporting agency from which you are getting the applicant or employee's information. Specifically, the employer must certify that it:
 - notified the applicant or employee and got their permission to get a consumer report;
 - complied with all of the FCRA requirements; and
 - will not discriminate against the applicant or employee or otherwise misuse the information, in violation of any applicable federal or state equal opportunity laws or regulations.

Continued on next page

Should you need assistance in drafting the initial notice/ permission form and/or the compliance certification, please feel free to contact our office.

2. Before Taking Adverse Action

Before an employer rejects a job application or takes any other adverse employment action based on information in a consumer report, the employer must give the applicant or employee:

- a notice that includes a copy of the consumer report; and
- a copy of the recently revised “A Summary of Your Rights Under the Fair Credit Reporting Act” (attached).

Giving the employee/applicant the notice in advance gives the person the opportunity to review the report and tell you if it is correct.

3. After Taking an Adverse Action

After taking an adverse action based on information in a consumer report, employers must give the applicant or employee a notice of that fact. Such notice made be provided orally, in writing, or electronically.

An adverse action notice tells the applicant/employee about his/her rights to see information being reported and to correct inaccurate information. Again, there is no model form for this notice, but it must include:

- the name, address, and phone number of the consumer reporting company that supplied the report;
- a statement that the company that supplied the report did not make the decision to take the unfavorable action and cannot give specific reasons for it; and
- a notice of the person's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if the person asks for it within 60 days.

Again, if you need assistance in drafting this notice, please feel free to contact our office.

Potential Consequences for Failing to Comply with FCRA Rules

Employers should bear in mind that “negligently” or “willfully” failing to comply with any of the FCRA’s requirements may result in lawsuits brought by applicants or employees. If successful, these suits can lead to actual damages and attorneys’ fees. Moreover, willful failure to comply with the requirements can lead to statutory damages (\$100-\$1,000 per violation), attorneys’ fees, and punitive damages.

If you have any questions about the foregoing, please do not hesitate to contact our office.

EMPLOYMENT LAW MATTERS is published by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., 5010 Campuswood Drive, East Syracuse, New York, 13057, 315-437-7600, www.ferrarafirm.com. © Copyright 2012 by Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C., all rights reserved. Photocopying or reproducing this newsletter in any form in whole or in part for other than internal use is a violation of federal copyright law and strictly prohibited without the express written consent of Ferrara, Fiorenza, Larrison, Barrett & Reitz, P.C. The information contained in this newsletter is intended for information purposes only and should not be construed as legal advice or legal opinion on any specific facts or circumstances. Readers should not act upon any information contained herein without seeking professional counsel.