

## **LEGALLY SPEAKING**

*by Bob Dunlevey*

So you want to hire a new bookkeeper, you have a background check done, find out she previously filed bankruptcy, and you then tell her that instead of hiring her you are hiring another more qualified candidate. Are you going to go to jail? Answer – maybe!

The Fair Credit Reporting Act (“FCRA”) is not just for credit reports. It requires employers who rely on consumer reporting agencies to conduct investigations such as background checks, criminal record checks, education verifications and the like, to disclose to the individual the employer’s intention to do the background check and to obtain authorization from the applicant prior to procuring the report. Moreover, the Federal Bankruptcy Reform Act now makes it unlawful to discriminate against job applicants or employees because they have filed for bankruptcy. Therefore, an employer should not reject an applicant merely because of a bankruptcy filing.

So, if you reject the applicant for the bookkeeping position because of a prior bankruptcy filing, or if you fail to meet all of the written notice requirements of the FCRA, you subject your company to damages, costs and attorney’s fees. While the FCRA provides for imprisonment if a person knowingly and willfully obtains information on a “consumer” (applicant) under false pretences, it is not likely that you will go to jail. If you think you need to know more about the FCRA read on.

It is important for each employer to establish policies related to background checks, who conducts them and how they are conducted. Those dealing with these matters must understand the requirements of FCRA. Before hiring an individual, an employer who wishes to obtain information from a consumer reporting agency must comply with the requirements of the FCRA. The requirements are: (1) Provide certification, before obtaining a report, to the outside agency gathering the information that the employer will comply with FCRA and will not misuse the information; (2) Provide to the applicant a clear and conspicuous disclosure, in writing, in a document that consists solely of the disclosure that a “consumer report” is being obtained for employment purposes. Merely inserting a sentence in an employment application form is not sufficient; (3) Obtain from the employee written authorization for obtaining this information; (4) Before taking any adverse action on the basis of the information obtained, notify the applicant of the employer’s intentions and provide a copy of the report on which you made the decision and a summary of the applicant’s rights prepared by the Fair Trade Commission (including the right to find out what the report contains and the right to dispute inaccurate information); and, (5) Upon finalizing an adverse action decision, send the applicant a “notice of adverse action” advising that you have made a final decision and advising further the applicant’s right to obtain full disclosure of the file from the consumer reporting agency.

If you are doing a more extensive background check by utilizing not a consumer report from a consumer reporting agency but instead an “investigative consumer report”, additional requirements exist. Investigative consumer reports gather information through personal interviews with neighbors, friends and associates. Heightened requirements exist for employers utilizing these types of reports, including notifying the applicant within three days of requesting

such a report about the specific nature of the inquiry and the employee's right to request, in writing, a detailed description of the report. A blanket authorization is insufficient for an investigative consumer report.

Remember that background investigations performed by an employer's own staff without the assistance of outside consumer reporting agencies will not invoke the FCRA requirements. However, if an employer's H.R. staff utilizes websites containing more than just public documents offered to the general public, FCRA may very well be applicable.

Finally, don't forget the Fair and Accurate Transactions Act of 2003. No, I am not making this stuff up. This December 2003 law amended the FCRA in various respects including employer disciplinary investigations and disposal of consumer documents. Employers are free to hire outside consultants, investigators or law firms to investigate and report on workplace investigations without first notifying the employee but numerous restrictions exist and you need to consult counsel. While pre-investigation notices are not applicable, post investigation disclosures are required. Also, on June 1, 2005, a new rule went into effect regarding the disclosure of sensitive information derived from consumer reports. Generally, those in possession of consumer information are required to properly destroy or erase all consumer information derived from a consumer credit report before discarding it.

Now you are armed with some basic information to help you handle background checks and disciplinary investigations. But remember that these federal laws lurk and those at your company involved with these matters need to be well trained.

For further advice on background checks, use your legal services plan – contact Bob Dunlevey at Dunlevey, Mahan & Furry (937) 223-6003.