



THE WORKPLACE WORD

www.swlaw.com

August 2009

CONTACTS

If you have questions about this article, please feel free to contact your Snell & Wilmer attorney or one of the following:

DENVER

Katrin Miller Rothgery
303.634.2047
krothgery@swlaw.com

LAS VEGAS

Swen Prior
702.784.5262
sprior@swlaw.com

ORANGE COUNTY

Brian Mills
714.427.7484
bmills@swlaw.com

PHOENIX

Kate Hackett
602.382.6332
khackett@swlaw.com

SALT LAKE CITY

Mark Morris
801.257.1904
mmorris@swlaw.com

TUCSON

Joe Kroeger
520.882.1254
jkroeger@swlaw.com

Federal Government Steps Up Enforcement of Fair Credit Reporting Act

When most people think about the Fair Credit Reporting Act ("FCRA"), they think about consumer reporting agencies, like Experian, Equifax, and TransUnion, and their various obligations in collecting and disseminating consumer credit information. Many companies are unaware that the FCRA applies to a variety of actions that a company might take in the employment context as well.

Since September 11, 2001, there has been a significant increase in the number of companies conducting background checks on their employees by third parties. Many of these companies are unaware that they must comply with the FCRA or face civil penalties.

When Does the FCRA Apply?

Whenever an employer conducts a background check (*e.g.*, credit check, criminal background check, etc.) using a third party, the background check is possibly covered by the FCRA and subject to its requirements.

There are two types of background checks that the FCRA identifies, each having its own set of requirements that a company must satisfy before the company may lawfully conduct and use the background check:

- (1) *Consumer Report* – Broadly defined as any report obtained from a consumer reporting agency ("CRA") that bears on a person's credit, character, reputation, or personal characteristics.
- (2) *Investigative Consumer Report* – Largely the same as a consumer report, but, in addition, some or all of the information is obtained through personal interviews of those who know the individual.

What Does the FCRA Require?

Before a company may obtain a consumer report for employment purposes, it must notify the individual of this intent in a separate and conspicuous writing and obtain the individual's written consent to obtain



the consumer report. In addition, when contacting a CRA in order to obtain the consumer report, a company must also certify to the CRA that it will comply with the FCRA.

If a company, as a result of a consumer report, decides to take an adverse action against an individual (e.g., decides not to hire him or her), there are further requirements. *Before* any adverse action is taken, the company must give the individual a copy of the actual consumer report. The company must also provide the individual with a copy of the "Summary of Your Rights Under the Fair Credit Reporting Act," available at www.ftc.gov.

After the adverse action is taken, the company must then provide to the individual:

- (1) Notice of the adverse action;
- (2) The name, address, and telephone number of the CRA utilized by the company; and
- (3) Inform the individual that they have the right to obtain a free copy of the report from the CRA and dispute its accuracy.

Investigative consumer reports are subject to the aforementioned requirements as well, and they have additional requirements and restrictions on their use. If a company is unfamiliar with these requirements and procures investigative consumer reports, it should involve legal counsel to insure proper compliance.

Consequences for a Company's Failure to Follow FCRA Requirements

Two new cases issued on August 11, 2009 demonstrate the dangers to an unwary company of failure to comply with the FCRA. In both cases, the Federal Trade Commission, the entity responsible for enforcing the FCRA, filed a complaint alleging that the company

contracted with a CRA to conduct background checks for employees and job applicants and then made hiring and firing decisions based on those background checks. The companies allegedly failed to provide the employees and applicants with either the pre-adverse action notices or the post-adverse action notices set forth above. The companies agreed to the following consent judgments to settle the complaints:

- \$77,000 in collective civil penalties;
- Comply with the FCRA in the future and allow the FTC to monitor compliance; and
- Record-keeping and reporting obligations.

These two cases provide potent reminders to companies that already conduct background checks or would like to start doing so. A company should take careful precautions to ensure compliance with the FCRA when conducting background checks.

Conclusion

Background checks are a valuable tool for companies in hiring and retaining the right employees. However, background checks are subject to strict requirements under the FCRA and failure to follow these requirements can result in monetary penalties to the unwary company.

If you have any questions on this article, please contact your Snell & Wilmer attorney or one of the attorneys listed in this *Workplace Word* newsletter.

Save the Date!

Wednesday, Sept. 30, 2009

Watch your e-mail for more information on an upcoming breakfast seminar in our Phoenix office on Social Media and Employment Law Issues.

Snell & Wilmer
L.L.P.
LAW OFFICES

Character comes through.®

DENVER LAS VEGAS LOS ANGELES LOS CABOS ORANGE COUNTY PHOENIX SALT LAKE CITY TUCSON

©2009 All rights reserved. The purpose of this newsletter is to provide our readers with information on current topics of general interest and nothing herein shall be construed to create, offer, or memorialize the existence of an attorney-client relationship. The articles should not be considered legal advice or opinion, because their content may not apply to the specific facts of a particular matter.