

Employment Practice Update

RADEY | THOMAS | YON | CLARK

Attorneys & Counselors at Law

Keeping You Informed About Employment Matters

June 25, 2009



Using credit reports to evaluate job applicants: the Fair Credit Reporting Act requires disclosure, authorization, and more disclosure

By: Tom Crabb and Christopher B. Lunny

Federal law prohibits an employer from simply pulling and evaluating an applicant's credit report for use in employment decisions such as hiring. There are specific disclosure and authorization requirements imposed on all such employers and this intersection between consumer credit rights and employment decisions can present a costly trap for an unwary employer.

During this economic downturn, each job posting by an employer can easily lead to hundreds or even thousands of applications. More and more employers are evaluating an applicant's credit report as part of the application process. If an employee is going to be handling money or put into a position of responsibility, it may be relevant to check an applicant's credit. The federal Fair Credit Reporting Act imposes strict requirements on employers using credit reports for employment purposes. These requirements apply to virtually every employer (even an employer of one) and virtually every use of a credit report for employment purposes.

Disclosure by the employer and authorization by the applicant BEFORE obtaining the report

Before obtaining a credit report about an applicant, an employer must make a "clear and conspicuous" disclosure in writing to the applicant that his or her credit report may be obtained for employment purposes. This document must consist solely of the disclosure. In other words, it cannot be part of a broader employment application. The applicant must then authorize the procurement of his or her credit report.

Disclosure by the employer BEFORE taking adverse action against the applicant

If an employer intends to reject an applicant because of the credit report, it must then provide another disclosure. This second disclosure must include a copy of the credit report and "A Summary of Your Rights Under the Fair Credit Reporting Act," which is published by the Federal Trade Commission. This requirement

This article is meant to provide a brief overview and points of discussion regarding employment law topics. Should a particular issue arise or should you desire additional consultation to protect your firm, the advice of a competent counsel should be sought.

allows the applicant a chance to contest the report content and applies when an adverse action is taken in whole or in part because of information in the credit report. For this reason, an employer may want to evaluate the applicants using other selection criteria first in order to limit the number of applicants to whom a pre-adverse action disclosure must be sent. For example, if an applicant will necessarily be declined for lack of relevant experience, pulling that applicant's credit report will serve no purpose and only trigger these additional rounds of disclosure.

Disclosure by the employer AFTER taking adverse action against the applicant

Once the employer actually declines an applicant because of information in his or her credit report (i.e., takes an "adverse action"), yet another round of disclosure is required. Among the items required to be included in the third disclosure are the name of the reporting agency that supplied the credit report, and another notice of the applicant's right to dispute the accuracy or completeness of the credit report used to take the adverse action.

"These requirements apply to virtually every employer (even an employer of one)..."

The penalties for violation of the Act can be severe and may include actual damages, administrative penalties, costs, attorney's fees, and perhaps even punitive damages. This could all amount to tens of thousands of dollars. Fortunately, a few proactive steps by an employer to make the Act's requirements part of its standard operating procedures can avoid the potential for problems.

Conclusion

Employment practices collide with consumer rights when an employer uses credit reports of applicants or existing employees. The Fair Credit Reporting Act can trap an employer that is unfamiliar with the Act's detailed disclosure and authorization requirements. Long before pulling the first credit report, an employer should have in place a formal program of compliance with the Act. Additional information about the Act can be found on the FTC's website at <http://www.ftc.gov/os/statutes/fcrajump.shtm>.



Christopher B. Lunny



Tom Crabb