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Hot Topic: Fair Credit Reporting Act

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Hot Topics for Tennessee cities and towns

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#49

Fair Credit Reporting Act

by Richard L. Stokes
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Do you conduct background and credit checks on new hires? If you do, the amendments to the Fair Credit Reporting Act of 1997 (FCRA) may make this practice unlawful if you haven't been getting the applicants' written permission.

The FCRA is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. The amendments to the Fair Credit Reporting Act make numerous and significant changes to using consumer credit information and restrict an employer's ability to obtain background information without the consent of the individual, whether he or she is an applicant or employee. The amendments ensure that (1) individuals are aware that consumer reports may be used for employment purposes and agree to such use, and (2) individuals are notified promptly if information in a consumer report may result in a negative employment decision.

In general, a consumer report is a summary of a person's credit standing, credit capacity, or credit worthiness. Under the amendments, before an employer may obtain a consumer report or cause one to be prepared on an individual, the employer must:

1. Provide the individual with a "clear and conspicuous disclosure ... in a document that consists solely of the disclosure" that such a report may be obtained for employment purposes; and
2. Have the individual's written authorization to obtain the report.

In addition, before a consumer reporting agency may provide or prepare a consumer report for an employer, the employer must certify to the agency that:

1. It has provided the required "clear and conspicuous disclosure" to the subject of the report;
2. It has received written authorization to obtain the report;

3. It will not use the information in violation of any applicable federal or state Equal Employment Opportunity Law or regulation; and
4. The employer will abide by the requirements of the law if any adverse action is taken wholly or partially as a result of the report. (An adverse action includes denying employment or any other decision for employment purposes that adversely affects any current or prospective employee.)

Once the employer has the consumer report, it may decide to take an action based entirely or partially on the report. However, before taking any adverse employment action against someone based in whole or in part on the consumer report, the employer must provide the affected individual with a pre-adverse action disclosure that includes a copy of the consumer report and a written description of that individual's rights under the FCRA. In other words, when the employer receives the consumer report, he or she must immediately send a copy of the report and the individual's rights statement to the applicant. Consumer reporting agencies are required to provide a form to employers that outlines the rights of the individual. The form can be distributed to applicants and employees.

If the employer takes adverse action based upon the report, the employer must by oral, written, or electronic means:

1. Provide notice of the adverse action to the affected individual;
2. Supply the name, address, and telephone number of the consumer reporting agency (the telephone number must be the toll-free number where the individual can reach the agency if it maintains files on consumers nationwide) that provided the report to the employer, along with a statement that the agency did not make the decision to take adverse action and cannot tell the applicant or employee the specific reason for the action;
3. Give notice of the individual's right to obtain a free copy of the report on which the adverse action was based within 60 days of notice of the action;
4. Provide notice of the individual's right to dispute the accuracy or completeness of any information in the report with the consumer reporting agency.

What does this mean for cities?

Example 1:

You advertise vacancies for cashiers and receive 100 applications. You want credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

You can get credit reports if you notify each applicant in writing that a credit report may be requested and you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre-adverse action disclosure that includes a copy of the credit report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

Example 2:

You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave you written permission in the past, you need only make sure that they receive or have received a "separate document" notice that reports may be obtained during the course of their employment — no more notice or permission is required. If your employees have not received notice and given you permission, you must notify them and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre-adverse action disclosure. The employee also must receive an adverse action notice once you have selected another individual for the job.

Example 3:

A job applicant gives you the OK to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

In any case where information in a consumer report is a factor in your decision — even if the report information is not a major consideration — you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you must provide an adverse action notice.

Example 4:

The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant whose credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another whose credit report shows only one credit account because you want someone who has displayed more financial responsibility. Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report adversely influences a decision, the applicant is entitled to the notices — even when the information isn't negative.

FCRA violations can lead to court

There are legal consequences for employers who don't get an applicant's permission before requesting a consumer report or who don't provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and win civil penalties.

If your city routinely runs credit checks on applicants or employees, you may want to consider only conducting them on people in positions involving money, such as Finance Department employees, police officers, etc. Then be sure to provide notice and follow the guidelines when an adverse decision is made.

For more information about the Fair Credit Reporting Act, contact Richard Stokes, MTAS municipal human resources consultant, at (615) 532-6827, or call your area's municipal management consultant in the Knoxville, Jackson, Martin, Nashville, or Johnson City offices.

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