

Checking Out Your Employees? Check This Out First.

By Julie R. Rubin, Esq.

Everybody's suspicious of everybody these days. It seems post-9/11 security has had a contagious effect on private business. Jeffrey Skilling didn't help matters much either. More and more, employers are using background checks to screen potential employees and to keep tabs on current employees. No one wants a thief in the midst. It's only natural that an employer would demand that a potential employee have a clean bill of criminal and fiscal health before offering that person a job – particularly one involving access to company assets. And it couldn't be easier. Google "background check" and the world is your oyster. The choices are endless. For less than forty bucks, peoplefinders.com, for example, can tell you everything from my age and address to whether I have declared bankruptcy, if the IRS has a tax lien on my assets, whether I own property and whether any judgments have been entered against me. They even know my neighbors. I don't even know my neighbors. For another ten dollars, peoplefinders.com gives you the mother load – a nationwide criminal records search. The information highway. A thing of beauty. And all for just \$49.95.

In the print at the bottom of the peoplefinders.com background report is a "Permissible Use Notice" – stating that the report you just paid fifty bucks for is not authorized for use for any reason covered by the Fair Credit Reporting Act. No problem, you think. You don't want to give the guy a loan, you only want to consider offering him a job. Wrong.

Under the FCRA, a background report is a "consumer report" – the same name given to a credit report. If you obtain background information on a person from a third party – even if it's a quasi public record like a driver's license – chances are it's a consumer report under the FCRA. So, what does this mean to those employers who just want to make sure they haven't hired a ticking time bomb? A lot. The FCRA requires an employer to disclose to employees and potential employees its intention to obtain background reports and requires that the employer obtain the subject's written authorization prior to conducting the background search. And, no, it isn't as simple as adding it to the job application form. The requisite disclosure and authorization must each appear on a separate document. But wait, there's more.

If the employer decides to take any adverse action – for example, a decision not to hire, to fire, not to promote, and even possibly to transfer to a new position – based even in part on

any information contained in the background report, the employer must give the individual a “pre-adverse action disclosure” in writing *before* taking the action. The written notice must contain a copy of the report that contained the information that formed the basis of the adverse decision and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” – available online through the Federal Trade Commission at www.ftc.gov. But wait, that’s not all.

After having taken the adverse action, the employer must then give the individual notice – orally or in writing – that the action has been taken. This is the “adverse action notice.” (As if the pink slip wouldn’t be enough of a hint.) The adverse action notice must include the name, address, and phone number of the consumer reporting agency that supplied the report; a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for the employer’s action; and a notice of the individual’s right to dispute the accuracy or completeness of information furnished by the CRA, as well as the individual’s right to a free consumer report from the CRA within 60 days.

So, what if a job applicant refuses to authorize a background check? Well, then, I suppose you’ve saved yourself a few bucks and a lot of hassle. As a matter of practicality, authorization forms can include fair warning that failure to authorize the check may result in denial of the job. Employers are entitled not to offer a job to someone who refuses to allow a background check – and that decision doesn’t require one of the FCRA’s fancy action notices.

Loopholes? (There are always loopholes.) Loophole Number 1: if the employer doesn’t use a third-party screening company and instead does the legwork itself, the background check is not subject to the notice and consent provisions of the FCRA. (But, who wants to spend three days calling the courts for judgment records, combing dusty property plats in Circuit Court and knocking on neighbors’ doors?) Loophole Number 2: if the adverse decision was not based on the contents of the background investigation, no notice has to be given. If enough interviews have been conducted, the superior applicant who lands the job may well have been the clear pick regardless of the contents of a background check of another lesser qualified applicant. But, if the decision not to go with the guy with the bankruptcy filing was even partially based on his credit history, the FCRA comes into play.

Thinking of getting by without that pesky authorization? Think again. The individual and the FTC can come after you. Damages for violation of the individual’s rights include actual damages, punitive damages, court costs, and attorneys’ fees. If the violation is found to be

“willful,” the penalty is more. And the FTC can sue employers for up to \$2,500 per FCRA violation. If background checks are important to your employment practices, create a bank of four standard documents – an authorization form, a pre-adverse action disclosure, an adverse action notice, and “A Summary of Your Rights Under the Fair Credit Reporting Act.” Wait, wait, there’s more.

Once you’ve done everything by the book to obtain and use the background report, then what? Don’t let that background report collect dust. You’ve got to dispose of it and not just any old way. The Fair and Accurate Credit Transactions Act, enacted in 2003, requires specific methods for disposal of sensitive consumer report information – including employee background reports. Remember that peoplefinders.com report? The one you downloaded and printed for the company’s personnel file? FACTA’s Disposal Rule requires proper disposal of that report to guard against “unauthorized access to or use of the information.” According to the FTC, the standard for proper disposal is flexible to allow employers (and other users) to determine what measures are reasonable in light of the sensitivity of the information, the costs and benefits of available disposal methods, and technology advancements. So, what’s “proper” disposal for you? Shredding is a good example of a proper disposal method of a background report – it’s cheap, easy and most employers have a shredder or a shredding service. And what about that downloaded file? Permanently erase it from your system.

All that for just \$49.95.