

QUESTION

Can my bank perform a credit check on employees after they have been hired?

ANSWER

Yes, if you comply with certain obligations.

The federal Fair Credit Reporting Act (“FCRA”) allows employers to use “consumer reports” (such as credit checks) not only to evaluate a job applicant, but also to determine an employee’s eligibility for promotion, reassignment, or retention. When using a consumer report for employment purposes, employers must comply with the following obligations: 1) before requesting a report, 2) before taking any adverse action based in whole or in part on the report, and 3) after taking any adverse action.

1. ***Before requesting a report.*** An employer must do the following *before* it requests a consumer report for a job applicant or current employee:

- a. Make a clear and conspicuous written disclosure to the applicant or employee, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes;
- b. Obtain written authorization from the applicant or employee; and
- c. Certify to the consumer reporting agency that:
 - i. The employer made proper disclosure to the applicant or employee;
 - ii. The employer will comply with the adverse action requirements (if applicable);
 - iii. The report will be used only for permitted purposes under the FCRA; and
 - iv. The employer will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

If you want to use a consumer report for an existing employee and the employee gave you written permission in the past, you need only make sure that the employee receives or has received a “separate document” notice stating that reports may be obtained during the course of his or her employment (*i.e.*, that the employee’s written authorization clearly states that the authorization continues throughout employment). No more notice or permission is required. (On the other hand, if the authorization states only that it is for the purpose of considering the individual’s application for employment, a new authorization will be required because the authorization was for a limited time and purpose. So make sure your authorization has the broad

during-the-course-of-employment language.) If the employee has not received notice and given you permission, you must notify the employee and get his or her written permission before obtaining the report.

2. ***Before taking adverse action based in whole or in part on the report.*** When information in the report influences the employer's decision to pass over an applicant, deny a promotion or transfer, or terminate an employee, the employer must do the following *before* taking the adverse action:

- a. Provide a copy of the report to the applicant or employee; and
- b. Provide the applicant or employee with a written description of the applicant's or employee's rights.

3. ***After taking adverse action based in whole or in part on the report.*** Within three business days of taking adverse action, the employer must provide notification to the applicant or employee either orally, in writing, or electronically of the following:

- a. That adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;
- b. The name, address, and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);
- c. That the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the applicant or employee the specific reasons why the adverse action was taken; and
- d. That the applicant or employee may, upon providing proper identification, request a free copy of a report within 60 days and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.

About the author: Mark L. Shapiro is a partner in the Chicago office of Holland & Knight LLP, an IBA Associate Member. He has represented management in employment-related litigation and counseling for 34 years. For more information, contact Shapiro at 312-578-6521 or mark.shapiro@hklaw.com. He was assisted by his associate Laura C. Garofalo.