



The GSH 60-Second Memo

May 28, 2009

Sponsored by the GSH Employment Group



Kerrie Murphy, Esq.

www.gshllp.com

(515) 453-8509

Want more
information on
this topic?

[CLICK HERE!](#)

Background Checks ... Four Things Every Employer Needs to Know to Stay in Compliance with the Fair Credit Reporting Act

By Kerrie Murphy, Esq.

Employers need to be careful when conducting background investigations of potential new employees. The federal Fair Credit Reporting Act (FCRA) mandates that employers notify potential employees before using material from a consumer credit report. The FCRA also requires employers to certify to the consumer reporting agency that they will follow procedures outlined in the FCRA.

The FCRA regulates communications by consumer reporting agencies about consumers' credit ratings and histories. One of the things regulated is the communications from consumer reporting agencies to employers for employment purposes, which includes background checks conducted by these agencies.

The FCRA defines a consumer report as "any written, oral, or

**GONZALEZ
SABGIO
HARLAN**

Office Locations:

Arizona
California
Illinois
Indiana

other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for ... employment."

When using consumer reporting agencies to do background checks, employers should follow the following four steps to stay in compliance with the FCRA:

Step 1: Initial Disclosure and Written Authorization. The FCRA requires an employer to make a clear and conspicuous disclosure to the job applicant that you may be requesting a consumer report about him or her. The FCRA disclosure and consent form must be a separate document from your application and other employment-related documentation. There is a very limited amount of information that you can include on this disclosure form. The disclosure may only contain a statement that says that you may be procuring a consumer report and investigative consumer report for employment purposes and a sentence stating that the person authorizes you to do so. You can also ask the applicant to provide you with the name, address, social security number, driver's license number, and a signature consenting to the investigation.

Step 2: Certification to Consumer Reporting Agency. You need to sign a certification that you will comply with the FCRA. The FCRA prohibits a consumer reporting agency from doing anything on your behalf until you have provided them with the signed certification stating that you have complied with the FCRA.

Step 3: Pre-Adverse Action Disclosure: After you receive a report back from the consumer reporting agency, if the report reveals negative information that makes the candidate undesirable as an employee, then Step 3 disclosure is triggered. At that point, you have to do three things: [1] notify the applicant that you are considering not hiring him or her because of information received from the consumer report; [2] provide the summary of the applicant's consumer rights; and [3] provide the applicant with a copy of the consumer report that contains the negative information.

Step 4: Post-Adverse Action Notification: If you decide not to hire the applicant, Step 4 is triggered and you have to send him or her another disclosure. In the Step 4 disclosure, you must provide information about the consumer reporting agency that did the background check and explain the agency's role. This notice must contain a statement that the agency did not actually make the

Iowa
Nevada
New York
Ohio
Washington D.C.
Wisconsin

www.gshllp.com

adverse employment decision. The notice must also explain that the applicant has the right to obtain a free copy of the report from the agency by making a request within 60 days and that the applicant has the right to dispute the accuracy or completeness of the report with the consumer reporting agency.

Finally, it is illegal for an employer to ask prospective employees to waive their rights under the FCRA. In addition, it is important to note that a state may have additional state laws that supplement the federal FCRA statute. In those situations, you must comply with both the FCRA and any applicable state law.

The 60-Second Memo is a publication of Gonzalez Saggio & Harlan LLP and is intended to provide general information regarding legal issues and developments to our clients and other friends. It should not be construed as legal advice or a legal opinion on any specific facts or situations. For further information on your own situation, we encourage you to contact the author of the article or any other member of the firm. Any tax information or written tax advice contained herein (including any attachments) is not intended to be and cannot be used by any taxpayer for the purpose of avoiding tax penalties that may be imposed on the taxpayer.

Copyright 2009 Gonzalez Saggio & Harlan LLP. All rights reserved.