A Timely Analysis of Legal Developments

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Employers should take measures to comply with new regulations implementing the Fair Credit Reporting Act concerning the obligations employers have as "furnishers" of employment history and other information. The effective date of the new regulations is July 1, 2010.

The Deadline is Fast Approaching: Effective July 1, 2010, Employers Have New Compliance Obligations Under the Federal Fair Credit Reporting Act

By Rod M. Fliegel and Jennifer L. Mora

The Fair and Accurate Credit Transactions Act of 2003 (FACTA) is best known for allowing consumers to annually request and obtain one free credit report from each of the nationwide consumer credit reporting companies (Equifax, Experian and TransUnion), as well as for creating new compliance obligations designed to reduce identity theft. However, the FACTA also amended the Fair Credit Reporting Act (FCRA) to, among other things, require federal agencies to implement new rules designed to increase the "accuracy" and "integrity" of information that "furnishers" provide to consumer reporting agencies.[1] Consistent with this directive, on July 1, 2009, the Federal Trade Commission (FTC) and several other federal agencies (including the Federal Reserve Board and the Federal Deposit Insurance Corporation) issued a joint Final Rule that imposes additional regulatory requirements on businesses, including employers, that provide consumer information to consumer reporting agencies.[2] The final rule is effective July 1, 2010.

Although a "furnisher" typically is a bank or credit card company that provides credit-related information about a customer (consumer) to one of the three major credit bureaus, there are situations where an employer will be a furnisher within the meaning of the FCRA. Recently, the FTC determined that certain companies, such as TALX (a reference checking provider), are consumer reporting agencies under the FCRA. As a result, employers that provide payroll and other employee-related information to consumer reporting agencies in connection with outsourced services, such as unemployment processing and reference checking, will be considered "furnishers" within the meaning of the FCRA and, therefore, subject to applicable federal and comparable state law regulations. In addition, employers that outsource these functions to consumer reporting agencies must comply with the new Final Rule, which requires an employer to implement and maintain policies and procedures designed to ensure the accuracy and integrity of information provided to these agencies. An employer also must investigate a "direct dispute" from a current or former employee regarding the accuracy or completeness of information the employer provided to the consumer reporting agency.

Employees Are Now Permitted to Submit a "Direct Dispute" to Employers

Under the FCRA, employers that furnish information to consumer reporting agencies already are required to investigate indirect employee disputes, *i.e.*, disputes the current or former employee presents directly to the *consumer reporting agency* to relay to the employer. In addition, if the employer discovers that inaccurate or incomplete information about an employee was furnished to a consumer reporting agency, the employer has an affirmative duty to provide any recipient with complete and accurate information.

The Final Rule expands on the FCRA and now permits "direct disputes" to the *employer* and allows an employee to challenge the accuracy or completeness of information contained in a consumer report by contacting his or her current or prior employer. It further requires employers to conduct a reasonable investigation to determine the validity of the employee's dispute. The Final Rule describes the types of relationships that trigger a furnisher's obligation to investigate a "direct dispute," which mostly apply to credit accounts or debts. However, the Final Rule requires an individual or entity to investigate a dispute if it relates to "any other information contained in a consumer report regarding an account or other relationship with the furnisher that bears on the consumer's creditworthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living." Information that employers furnish to consumer reporting agencies, such as TALX, usually consists of information about the employee's work or work history, such as the employee's current or former position, compensation, dates of employment, and the reason the employment relationship ended. This type of information appears to come squarely within the ambit of the Final Rule. As a result, if a current or former employee disputes any of this type of information, the employer must conduct an investigation.

The employee must provide the employer with sufficient information to prove that he or she has or had an employment relationship with the employer, an explanation for the employee's belief that the information is inaccurate or incomplete, and supporting documentation regarding the dispute, if any. Upon receiving the notice, the employer must conduct a reasonable investigation, which means at a minimum reviewing the submitted information and determining the validity of the employee's dispute. The employer must complete the investigation and report back to the employee within 30 days of receiving notice of the dispute (with a possible extra 15 days if the employee provides new information). If the employer determines that the employee information reported was inaccurate, the furnisher must also promptly notify each consumer reporting agency that received the information and provide any correction necessary to make the information accurate.

The Final Rule does not require an employer to investigate all disputes that a current or former employee submits. For example, if the employee only disputes identifying information in his or her file (*e.g.*, name, Social Security number, date of birth, address, or telephone number) or the identity of past or present employers, the employer is not required to conduct an investigation. In addition, an investigation is not required if the employee does not provide sufficient information to allow the employer to investigate. Under these circumstances, the Final Rule considers the dispute to be "frivolous or irrelevant," and the employer has five business days from reaching this determination to provide the employee with written notification that the dispute will not be investigated. The notice must inform the employee of the reason for the employer's determination that the dispute is frivolous or irrelevant and, therefore, will not be investigated, and should include a description of the type of information necessary to proceed with the investigation, if any.

Employers Must Establish Policies and Procedures to Ensure the Accuracy and Integrity of Employee Information it Furnishes to Consumer Reporting Agencies

The Final Rule requires employers that furnish information to consumer reporting agencies to establish and implement reasonable written policies and procedures to ensure the accuracy and integrity of information reported about its employees. In developing policies and procedures, employers must consider the Final Rule's accuracy and integrity guidelines, although not all of them must be implemented in the employer's policies. Rather, the Rule merely requires that an employer's policies and procedures be

appropriate to the nature, size, complexity and scope of its actual activities. (This aspect of the Final Rule implicitly acknowledges the difference between the exchange of information with a consumer reporting agency by a merchant or creditor, on the one hand, and an employer, on the other.) An audit requirement is not imposed expressly by the Final Rule, but employers must review their policies and procedures periodically and update them as necessary.

In formulating its policies and procedures, the employer should identify areas that potentially may compromise the accuracy or integrity of reported information, evaluate the effectiveness of existing policies and procedures, and evaluate the effectiveness of how information is provided to consumer reporting agencies, making changes as necessary. If applicable, the policies and procedures should also describe the process the employer uses to report information about employees, its procedures for investigating disputes, the manner in which records will be maintained and staff will be trained, and mechanisms for maintaining internal controls, oversight, data integrity, and complying with applicable laws and regulations.

Implications for Employers

Employers should take measures to prepare for the effective date of the Final Rule by assessing whether, when and how they are exchanging employment history and other information with any consumer reporting agencies and developing and implementing the policies and procedures mandated by the Final Rule, including but not limited to procedures for timely complying with the notice-related obligations imposed by the Final Rule. Although these requirements are not especially onerous, they are very technical and employers may benefit from bringing together various resources from within the organization, including compliance personnel, human resources personnel, and information technology staff.

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[1] Information is "accurate" when it is factually correct. 16 C.F.R. § 660.2(a). Information has "integrity" when it can be substantiated by business records and is presented to a consumer reporting agency in a form and manner that is designed to minimize the likelihood that the information may be incorrectly reflected in any report prepared by a consumer reporting agency. 16 C.F.R. § 660.(2)(e).

[2] 16 C.F.R Part 660.