

## New Year Brings New FCRA Forms for Employers and Possibly Additional Notification Requirements

### Out with the Old and in with the New FCRA Forms

The Consumer Financial Protection Bureau (CFPB), the primary enforcer of the Fair Credit Reporting Act (FCRA) rang in the new year by issuing new forms for users of consumer reports. Copies of the forms that went into effect as of January 1, 2013 are available [here](#). The new forms are primarily a matter of bureaucratic housekeeping that reflect the transfer of responsibility for interpreting the FCRA from the Federal Trade Commission to the CFPB. However, given recent private<sup>1</sup> and public<sup>2</sup> enforcement actions and the penalties of up to \$1,000 per violation in addition to potential punitive damages and attorneys' fees, employers should review their compliance obligations.

The FCRA regulates the collection and use of "consumer reports," which are broadly defined to include "any written, oral or 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," among other things, employment purposes.<sup>3</sup>

**Before** an employer requests a consumer report, it must do the following:

- (1) Notify the applicant or employee that it may use the information in his/her consumer report for decisions related to his/her employment. This notice must be in a stand-alone written document. The notice cannot be included in an employment application.
- (2) Obtain written permission from the applicant or employee to obtain the consumer report. This permission may be contained in the same document that is used to notify the applicant or employee that the employer will get a consumer report. If an employer wants the authorization to allow it to receive consumer reports throughout an employee's employment, the written authorization must state this clearly and conspicuously.
- (3) Give the company that will provide the consumer report a written certification that the employer: (1) notified the applicant or employee and obtained their permission to get a consumer report, as required by §604(b)(2) of the FCRA; (2) will give the applicant or employee a copy of the consumer report and a summary of

<sup>1</sup> After K-Mart Corporation withdrew an initial job offer, Eric Pitt filed a class action against the company for its alleged breach of the FCRA. *Pitt v. K-Mart Corp.*, Civ. Action No. 3:11-cv-697 (E. D. Va. filed October 17, 2011). The complaint alleged, among other things, that K-Mart did not obtain the necessary authorization to request consumer reports and that it did not give job applicants copies of the reports before taking adverse actions. On January 25, 2013, K-Mart entered into a settlement agreement in which it agreed to pay \$3 million to settle this action.

<sup>2</sup> On August 8, 2012, an enforcement action was brought against HireRight Solutions, an Oklahoma company that provides background reports on prospective and current employees to thousands of employers to assist the employers in making decisions about hiring and other employment-related issues. *United States v. Hireright Solutions, Inc.*, Civ. Action No. 12-1313 (D.D.C. filed Aug. 8, 2012). In the August 8, 2012 enforcement action, the government alleged (among other things) that HireRight failed to provide written notice to consumers of the fact that it reported public record information to employers at the time that the information was reported. The parties resolved this action by stipulating to a final judgment in which HireRight agreed to pay \$2.6 million to the government in penalties for its violations of the FCRA.

<sup>3</sup> 15 U.S.C. § 1681a(d)(1)(B).

his/her rights under the FCRA before taking adverse action based on the contents of the consumer report, as required by §604(b)(3) of the FCRA; and (3) will not discriminate against the applicant or employee or otherwise misuse the information in the consumer report, as provided by any applicable federal or state equal opportunity laws or regulations.

**After** receiving a consumer report, to the extent that the employer is considering taking *adverse action* based on the contents of the report, before taking the *adverse action* the employer must:

- (1) Give the applicant or employee notice that includes a copy of the consumer report; and
- (2) Give the applicant or employee a copy of the summary of rights under the Fair Credit Reporting Agency (which is available [here](#)).

*If the consumer report contains criminal convictions and arrest records:*

As we noted in our [May 2012 alert](#), last year the U.S. Equal Employment Opportunity Commission (EEOC) issued guidance with respect to an employer's consideration of arrest and conviction records in employment decisions. Per the EEOC's guidance, any policy excluding individuals on the basis of a past conviction must be narrowly tailored to both the position in question and business necessity. In addition, the EEOC stated that use of arrest records alone in making adverse employment decisions is a violation of Title VII of the Civil Rights Act of 1964.

For more information regarding additional restrictions on a New York employer's use of criminal conviction and arrest records, please see our [May 2012 alert](#).

### **New Jersey Employers May Soon Be Required to Post Pay Equality Notification**

On January 7, 2013, the New Jersey Department of Labor and Work Force Development proposed new rule which would require employers in New Jersey with 50 or more employees to "post notification, in a place or places accessible to all workers in each employer's workplace, detailing the right to be free of gender inequity or bias in pay, compensation, benefits or other terms and conditions of employment." This proposed rule would also require employers to distribute to each employee a copy of the notification within 30 days of the effective date of the rule; at hiring; annually on or before December 31 of each year; and at any time, upon an employee's request. The proposed rule states that an employer may satisfy the posting requirement by placing the notification on an internet or intranet site that is exclusively used by its employees and to which all employees have access. In addition, an employer may satisfy the distribution notice requirement by sending notices via e-mail to employees. A public hearing on the proposed rule was held on Wednesday, January 30, 2013.

### **REMINDER: New York Wage Theft Prevention Act Annual Notification Deadline was Feb. 1**

Notwithstanding efforts last year to repeal the New York Wage Theft Prevention Act (WTPA), which was passed in 2011, the WTPA remains in effect. (For background on the WTPA, see our previous alerts of December 2010 located [here](#), April 2011 located [here](#) and November 2011 located [here](#).) As we explained in our [December 2010 alert](#), the WTPA requires all private sector employers who have employees in New York to give their New York employees notice of the following information between January 1 and February 1 of each year:

- (1) The employees' rate or rates of pay;

- (2) The overtime rate of pay, if applicable;
- (3) The basis for wage payments (e.g. hourly, shift, day, salary, etc. . .);
- (4) The regular pay day;
- (5) Allowances, if any, claimed as part of the minimum wages (including tip, meal or lodging allowances); and
- (6) The employer's name, any "doing business as" names used, address and phone number.

Please review our [December 2010 alert](#) for more detailed information. If you have not yet distributed WTPA notices for 2013, you should do so as soon as possible.

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|--|--------------|---|
| <u><a href="#">Lisa E. Cleary</a></u>        | 212-336-2159 | <u><a href="mailto:lecleary@pbwt.com">lecleary@pbwt.com</a></u>     |
| <u><a href="#">Catherine A. Williams</a></u> | 212-336-2207 | <u><a href="mailto:cawilliams@pbwt.com">cawilliams@pbwt.com</a></u> |
| <u><a href="#">Nivritha Ketty</a></u>        | 212-336-2429 | <u><a href="mailto:nketty@pbwt.com">nketty@pbwt.com</a></u>         |
| <u><a href="#">Adam Pinto</a></u>            | 212-336-2156 | <u><a href="mailto:apinto@pbwt.com">apinto@pbwt.com</a></u>         |

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