

Consumer Report Obligations

Medical Information

Under the Fair Credit Reporting Act ("FCRA"), medical information may only be included in a consumer report prepared for employment purposes if: 1) it is relevant to process or effect the employment, and 2) the applicant or employee has provided specific written consent that clearly and conspicuously describes the use for which the information may be provided.

Medical information also may be included if it pertains solely to transactions, accounts or balances relating to debts arising from the receipt of medical services, products or devices, where the information, other than account status or amounts, is restricted or reported using codes that do not identify, or do not provide information sufficient to infer, the specific provider or the nature of such services, products or devices.

A few of the state consumer reporting statutes also address the reporting of medical information. For example, Colorado and Maine prohibit a consumer reporting agency from including medical information in a consumer or investigative consumer report unless the subject of the report has consented. Texas prohibits consumer reporting agencies from including medical information in any report prepared for employment purposes.

Criminal History Information

The Fair Credit Reporting Act ("FCRA") prohibits employers from reporting records of arrest that, from the date of entry, predate the report by more than seven years or until the applicable statute of limitations has expired, whichever is longer. It is important to note, however, that the laws in several states prohibit a consumer reporting agency from reporting even a timely record of criminal activity (e.g., arrest, indictment, information, complaint, etc.) if no conviction resulted there from. These laws, which tend to have some exceptions, appear to preclude a consumer reporting agency from reporting charges that were filed but then later dismissed without a conviction.

Under the FCRA, conviction records may be disclosed without regard to their age. Some states, including California, prohibit the reporting of conviction records that predate the report by more than seven years.

Other Information That May Not Be Included In a Consumer Report

Section 605(a) of the Fair Credit Reporting Act ("FCRA") identifies certain information that a consumer reporting agency may not include in a consumer report unless the consumer is highly compensated or is applying for a highly compensated position. Specifically, if a consumer report or investigative consumer report is to be used in

connection with the employment of an individual who receives an annual salary which is less than, or is reasonably expected to be less than \$75,000, the following information may *not* be included in the report:

- Bankruptcy cases that, from the date of entry of the order for relief or the date of adjudication, as the case may be, predate the report by more than 10 years;
- Civil suits and judgments that, from the date of entry, predate the report by more than seven years or until the applicable statute of limitations has expired, whichever is longer;
- Paid tax liens which, from the date of payment, predate the report by more than seven years;
- Accounts placed for collection or charged to profit and loss which predate the report by more than seven years, except that special rules apply for student loans; and
- Any other "adverse information" which predates the report by more than seven years, but not including conviction records, which must be disclosed.

Public Record Information

Whenever a consumer reporting agency ("CRA") includes matters of public record in a consumer report that is prepared for employment purposes, and the information is likely to have an adverse effect on the consumer's ability to obtain employment, the CRA must notify the consumer of the fact that public record information is being reported, together with the name and address of any person to whom the information is being reported. Alternatively, the CRA must maintain "strict procedures" for insuring that the public record information that is reported is complete and up to date. Items of public record relating to arrests, indictments, convictions, suits, tax liens and outstanding judgments will be considered up to date of the current public record status of the item at the time of the report is reported.

Procedures to Ensure Inclusion of Permissible Information Only

Under section 604 of the Fair Credit Reporting Act ("FCRA"), a consumer reporting agency ("CRA") may furnish a consumer report only for specified purposes. Unless the report is being procured for one of the following purposes, it may not be provided:

- In response to a court order or a subpoena issued in connection with proceedings before a federal grand jury;
- In accordance with the written instructions of the consumer;
- To a person it has reason to believe intends to use the information in connection with:
 - A credit transaction,
 - For employment purposes,
 - In connection with the underwriting of insurance involving the consumer,
 - In connection with a determination of the consumer's eligibility for a license or other benefit granted by a government instrumentality, or

- An otherwise legitimate business need for the information in connection with a business transaction initiation by the consumer, or to review an account to determine whether the consumer continues to meet the terms of the account;
- In response to certain requests by the head of a state or local child support enforcement agency; or
- To an agency administering a state plan under the Social Security Act for use to set an initial or modified child support award.

In order to assure compliance with section 604, CRAs are required to implement reasonable procedures to verify that potential users are requesting information for a permissible purpose. For example, a CRA must require potential users to identify themselves and certify the purpose for which the information is being sought, and that it will not be used for any other purpose. A CRA may not furnish a report to any person if it has reasonable grounds for believing that the report will be used for a purpose that is not identified as a "permissible purpose."

Procedures to Assure Accuracy

One of the stated purposes of the Fair Credit Reporting Act ("FCRA") is "to prevent, or at least curtail, the dissemination of inaccurate information about a consumer." *Hauser v. Equifax, Inc.*, 602 F.2d 811, 816 (8th Cir. 1979). Accordingly, whenever a consumer reporting agency ("CRA") prepares a consumer report, section 607(b) of the FCRA requires it to follow reasonable procedures to assure the maximum possible accuracy of the information it reports.

Section 607(b) does not require error free consumer reports, however. See, e.g., *Cahlin v. General Motors Acceptance Corp.*, 936 F.2d 1151, 1156 (11th Cir. 1991); *Stewart v. Credit Bureau, Inc.*, 734 F.2d 47, 51 (D.C. Cir. 1984) (Section 607(b) does not impose strict liability on a consumer reporting agency for inaccurate consumer reports). In its commentary on the FCRA, the Federal Trade Commission explained:

If a consumer reporting agency accurately transcribes, stores and communicates consumer information received from a source that it reasonably believes to be reputable, and which is credible on its face, the agency does not violate this section simply by reporting an item of information that turns out to be inaccurate.

16 C.F.R. Part 607(b)(3)(A) Appendix. Thus, a CRA may avoid liability if it establishes that an inaccurate report was generated by following reasonable procedures. *Cahlin, supra*, at 1156.

The standard for evaluating the reasonableness of a CRA's procedures is "what a reasonably prudent person would do under the circumstances." *Whelan v. Trans Union Credit Reporting Agency*, 862 F. Supp. 824, 831 (E.D. N.Y. 1994); see also *Pinner v. Schmidt*, 805 F.2d 1258, 1263 (5th Cir. 1986), cert. denied, 483 U.S. 1022 (1987). In addition, "evaluating the reasonableness of a CRA's procedures involves a balancing of the potential harm from inaccuracy against the burden on the agency of safeguarding against such inaccuracy." *Whelan, supra*, at 831.

Disputes Concerning the Completeness or Accuracy of a Report

Section 611 of the Fair Credit Reporting Act ("FCRA") requires consumer reporting agencies ("CRAs") to reinvestigate information contained in a consumer report

whenever the subject of the report disputes the completeness or accuracy of the report. The CRA must document the status of the disputed information or delete the information from the report within 30 days of receiving notice of the dispute. Under certain circumstances this period may be extended for up to 15 days. In addition, within five business days of receiving notice of the dispute, a CRA must provide written notice of the dispute to any person who provided information relating to the disputed item. The notice must include all relevant information regarding the dispute.

Within five business days of completing the re-investigation, the CRA must send the consumer a notice which includes: 1) a statement that the reinvestigation is completed; 2) notice that, if requested, the CRA must provide the consumer with a description of the procedures used to determine the accuracy of the information; 3) notice that the consumer has the right to add a statement to his or her file disputing the completeness or accuracy of the information; and 4) notice that, upon request, the CRA will notify any person who has received a consumer report for employment purposes within the past two years that the item has been deleted. The CRA also must provide the consumer with a revised consumer report.

If the reinvestigation reveals that an item of information is inaccurate, incomplete or cannot be verified, the CRA must delete or modify the item as appropriate. The CRA must promptly notify the furnisher of the information of the deletion or modification. Once information has been deleted, the CRA may not reinsert it into the report unless the person furnishing the information certifies that it is accurate and complete. The CRA must notify the consumer that the information has been reinserted within five business days of the reinsertion. It also must provide the consumer with the name and address of the entity that furnished the information in connection with the reinsertion and notify the consumer that he or she has a right to add a statement to his or her consumer file.

If the reinvestigation does not resolve the dispute, the consumer may file a brief statement setting forth the nature of the dispute. The CRA must include a summary of the statement in future consumer reports addressing the issue.

A CRA may terminate a reinvestigation if it reasonably determines that the dispute is frivolous or irrelevant. If the CRA does so, it must notify the consumer within five business days of making that determination. The notice must state the reason for the determination and identify any information required to further investigate the disputed information.