

Investigating Non-Employees

The Fair Credit Reporting Act Definition of “Employment Purposes”

The Fair Credit Reporting Act (“FCRA”) regulates the use of consumer reports for “employment purposes.” According to section 603 of the Act: “The term ‘employment purposes’ when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention *as an employee.*” 15 U.S.C. § 1681a(h) (emphasis added).

It is unsettled whether use of the term “employee” by Congress in the definition of “employment purposes” implies the statute only regulates traditional *employment relationships*. In 1998, the Federal Trade Commission (“FTC”), the agency with oversight of the FCRA, rejected a restrictive interpretation of the term “employment purposes” in one of its advisory opinion letters. Relying on a decision from the Fourth Circuit Court of Appeal, the staff attorney who authored the letter concluded that the term “employment purposes” must be “interpreted liberally to effectuate the broad remedial purpose of the Act.” Thus, according to the staff attorney, the trucking company employer (who requested guidance from the FTC) had to comply with the employment-related provisions of the FCRA with respect to its independent contractor truck drivers.

The FTC’s advisory opinion letter is one source of regulatory guidance, but is not binding on federal or state courts. Nonetheless, the letter underscores the need for employers to make informed compliance decisions about how to proceed with regard to non-employment relationships, such as independent contractors and volunteers, particularly multi-state employers. Screening non-employees is also sensible, especially when they will be working on site and along side the employer’s workers, directly with or around customers, with valuable equipment or sensitive information, or with vulnerable segments of the population (for example, the elderly or disabled).

Independent Contractors

The text of the Fair Credit Reporting Act (“FCRA”) does not state whether the Act regulates independent contractor engagements as well as traditional employment relationships. The federal regulations implementing the Act are also silent on this point. The United States Supreme Court has not considered the question. In fact, no federal or state court has expressly ruled on this issue.

As mentioned in response to the previous question, however, in 1998, the Federal Trade Commission (“FTC”) opined on the issue in one of its advisory opinion letters. Relying on the Fourth Circuit Court of Appeal’s decision in *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975), which did not involve an independent contractor, the staff attorney who authored the letter concluded that the term “employment purposes” must be “interpreted liberally to effectuate the broad remedial purpose of the Act.” Thus, according to the staff attorney, the trucking

company employer (who requested guidance from the FTC) had to comply with the employment-related provisions of the FCRA with respect to its independent contractor truck drivers.

The FTC's advisory opinion letter is one source of regulatory guidance, but is not binding on federal or state courts. Nonetheless, the letter underscores the need for employers to make informed compliance decisions about how to proceed with regard to independent contractors and other non-employees, particularly multi-state employers.

Whether or not FCRA compliance is required, screening non-employees, such as independent contractors, is sensible, especially when they will be working on site and along side the employer's workers, directly with or around customers, with valuable equipment or sensitive information, or with vulnerable segments of the population (for example, the elderly or disabled).

To avoid obscuring the crucial distinction between independent contractors and employees, employers should avoid any reference to "employment" in background check authorization forms, "adverse action" letters, conditional job offers, etc.

Volunteers

The Fair Credit Reporting Act ("FCRA") does not address whether its provisions regulate volunteer services as well as traditional employment relationships. The federal regulations implementing the Act also are silent on this point. No federal or state court has ruled on this issue. The Federal Trade Commission ("FTC") has not addressed the question in any of its advisory opinion letters.

As noted in the previous two questions, in 1998, the FTC opined on a related issue in one of its advisory opinion letters: whether the FCRA regulates independent contractor engagements as well as traditional employment relationships. Relying on the Fourth Circuit Court of Appeal's decision in *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975), the staff attorney who authored the letter concluded that the term "employment purposes" must be "interpreted liberally to effectuate the broad remedial purpose of the Act." Thus, according to the staff attorney, the trucking company employer (who requested guidance from the FTC) had to comply with the employment-related provisions of the Act with respect to its independent contractor truck drivers.

It is an open question whether volunteers are analogous to independent contractors for purposes of the FCRA. Volunteers are similar to independent contractors in some ways, but different in other important ways (e.g., they are unpaid). Whether or not FCRA compliance is required, screening non-employees, such as volunteers, is sensible, especially when they will be working on site and along side the employer's workers, directly with or around customers, with valuable equipment or sensitive information, or with vulnerable segments of the population (for example, the elderly or disabled).

To avoid obscuring the distinction between volunteers and employees, employers should avoid any reference to "employment" in background check authorization forms, "adverse action" letters, volunteer applications, etc.

Organizations and businesses dealing with children, the elderly, and the disabled should be aware that they may now use national fingerprint-based criminal history checks to screen out volunteers and employees with relevant criminal records. This

is part of the Volunteers for Children Act which was signed into law by President Clinton on October 9, 1998, as Public Law 105-251. Employers should consider whether federal law affords them access to national fingerprint-based criminal history checks.

Vendors

Many businesses no longer assume that vendors – including temporary staffing agencies – are implementing an appropriate pre-employment screening process. Rather, they are taking concrete measures to ensure vendors are doing so, especially when the vendor’s employees will be working on site and along side the employer’s workers, directly with or around customers, or with valuable equipment or sensitive information. Examples include vendors who provide temporary workers, janitorial services, information technology (IT) services, security services, etc. These measures include, but are not necessarily limited to:

- researching prior or pending claims against the vendor (e.g., claims for negligent hiring);
- negotiating agreements with vendors that provide for pre-employment background checks from a reputable background check company;
- specifying the nature and extent of the background check required by the agreement (e.g., the number of counties to be searched for criminal records, checking sex offender databases, checking credit history, etc.);
- specifying protocols for the vendor with respect to background check reports (e.g., asking pertinent criminal history questions on employment applications, cross-checking background check reports against job applications, developing standards for assessing criminal history information, etc.);
- working with the vendor to craft a form authorizing the disclosure of background check reports to the company; and
- periodically auditing the vendor’s pre-employment screening practices to confirm timely and meaningful compliance by the vendor.