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ALERTING MANAGEMENT TO BREAKING LABOR AND EMPLOYMENT LAW DEVELOPMENTS

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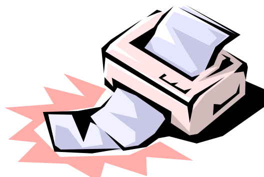

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Seaton Beck Peters Bowen Feuss

the lawyers for employers

Alec J. Beck
John F. Bowen
Marc T. Chrismer
Charles E. Feuss
Suzanne V. Hansen
Robin N. Kelleher
Kyle T. Kustermann
Shareen R. Luze
Gregory L. Peters
Thomas R. Revnew
Douglas P. Seaton
Robert Grossman, of counsel

7300 Metro Blvd
Suite 500
Minneapolis, MN 55439
Tel 952-896-1700
Fax 952-896-1704
www.seatonlaw.com

The Upper Midwest's premier management labor and employment law firm.

EMPLOYER ALERT – FTC Publishes Final Notice Rules For Employer's Use Of Consumer Reports

By Kyle T. Kustermann

New Notice Requirements

Employers who use credit report data for applicant or employee background checks are subject to new requirements and exceptions from the Federal Trade Commission ("FTC"). The final FTC model notices define the rights and responsibilities of employers and employees when consumer reports are used in any employment setting. The new "Summary of Rights" document incorporates these notices and includes updated summaries of employees' rights and employer responsibilities that employers should immediately incorporate into their hiring and employment procedures. The updated notices can be accessed at www.ftc.gov/credit (click on the "Fair Credit Reporting Act" topic under "Summaries of Rights").

Under the Fair Credit Reporting Act ("FCRA"), employers must provide written notice to employees and obtain their written authorization before obtaining a consumer report. The new notice rules affect employers who intend to take an adverse employment action (such as refusing to hire or promote or to discharge) based, at least in part, on the information contained in a consumer report. Before taking the adverse action, the employer must furnish the employee with a copy of the consumer report and a copy of the above-referenced "Summary of Rights" notices. After taking the adverse action, employers are required to notify the employee of the name and address of the Consumer Reporting Agency that provided the report, and a statement that the Agency did not make the adverse action, and that the employee has a right to dispute inaccurate information contained in the consumer report.

Notices Not Required In Certain Employment Investigations

Congress recently amended the FCRA to overturn the FTC's prior interpretation of the statute to restrict the use of consumer reports in investigations of employment misconduct, discrimination, or sexual harassment claims by third parties such as attorneys and accountants. Prior to this amendment, the FTC's interpretation effectively precluded an employer's use of such outside investigators. The law now specifically allows third-party investigations as long as they are not "for the purpose of investigating [an employee's] credit worthiness, credit standing or credit capacity." To be lawful, the third-party investigation must pertain to either suspected employment misconduct or compliance with federal, state or local laws and regulations.

As long as employers limit use of credit reports internally to misconduct situations, they are not required to provide advance notice to the employee under investigation nor obtain the employee's consent before initiating the investigation. Further, employers need only provide a summary of the investigator's report to the employee without including any references to specific names or witnesses used in the investigation. This is a major victory for employers' right to promptly investigate and take action against employee misconduct.

Summary

Before obtaining a consumer report, which may result in taking an adverse employment action based on the report, the employer must provide written notice to the applicant or employee and obtain the employee's written authorization. If the employer then takes adverse employment action based on any information contained in the consumer report, the employer must provide the "Summary of Rights" notice to the employee along with a copy of the report, **before taking the adverse action**. A third-party investigation of alleged employee misconduct, however, such as an outside attorney's investigation of alleged sexual harassment, theft, benefit claim fraud, or other misconduct by an employee, is exempt from the notice rules.

Please call Seaton, Beck, Peters, Bowen & Feuss (952-896-1700) and ask for any available attorney if you have any questions about the new FCRA/FTC Notices, or compliance with the FCRA generally.

HOT ISSUE: Minnesota Handgun Permit Act Overturned by Minnesota Court of Appeals

On April 12, 2005, the Minnesota Court of Appeals, in Unity Church of St. Paul, affirmed the decision of a Ramsey County District Court Judge overruling the 2003 Minnesota Personnel Protection Act (the Handgun "Must Issue" Permit Law) on the grounds that it is unrelated to the other provisions of the omnibus legislation in which it was included when passed, which the Court found violated the Minnesota Constitution's single subject requirement for legislation. Our law firm's case on behalf of MnABC, ABC v. Ventura, which overturned prevailing wage legislation improperly included in a "garbage bill," was cited 20 times in the decision as the leading recent case overturning a statute on the same grounds. The Unity Church decision by the Court of Appeals means (subject to possible appeal to the Minnesota Supreme Court) that employers no longer must post signs at workplaces to bar all weapons in the workplace and are now authorized to bar all weapons in employee vehicles in the employers' parking lots, as well, which was not permitted under the 2003 legislation.

Fax, E-mail or "None of the Above?"

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This communication is intended for general informational purposes only and is not intended to constitute legal advice with respect to any individual facts or circumstances. You are urged to consult with one of our attorneys regarding your own situation and your specific question. We would be happy to help! 2005 Seaton, Beck, Peters, Bowen & Feuss, P.A.