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VIA WEB: <https://ftcpublic.commentworks.com/ftc/fcra-revised-notices/>

Federal Trade Commission
Office of the Secretary
Room H-135 (Annex M)
600 Pennsylvania Avenue, NW
Washington, D.C. 20580

RE: Request for public comments on FACTA Notices, Project No. P105408
(75 Fed. Reg. 52655, August 27, 2010)

To Whom It May Concern:

I am the Litigation Director at the Community Service Society, a nonprofit organization serving low-income New Yorkers for over 160 years, and write to comment on the proposed Fair Credit Reporting Act ("FCRA") notices recently published by the Federal Trade Commission ("FTC") (75 Fed. Reg. 52655, August 27, 2010). In brief, the Community Service Society believes that employment-specific notices should be created for both consumers and users of employment-related reports that address the rights and responsibilities of each when criminal record information is reported.

Background on the Community Service Society and Our Work Regarding Criminal Background Checks

Since 2009, the Community Service Society has helped over 1,000 New Yorkers request, read, and review their official criminal histories, together with reports provided by certain consumer reporting agencies. Our legal department brings affirmative litigation against private employers and public agencies that discriminate based on conviction histories and against consumer reporting agencies that willfully or negligently report erroneous or misleading criminal history information.

The majority of our clients are unaware of their FCRA rights. This is unfortunately just as true in the rare instances when they do receive the current FTC summary as when they do not. When our clients are denied jobs, we usually find that both consumer reporting agencies and our clients' potential employers have disregarded their obligations under FCRA. Our clients rarely receive an adverse action notice from the consumer reporting agency. In those very few cases where employers actually *do* furnish our clients a copy of the background check, they almost never do so in advance of that decision. Typically, the report is delivered contemporaneously. Even then, our clients often find reports replete with errors, such as convictions belonging to someone else or information – for example, arrests that did not lead to conviction – that cannot legally be reported. Sometimes the same case is reported multiple times or in a misleading way, making our clients' records look much worse than they are, which in turn makes them look

like liars when the report is compared with responses to pertinent questions on job applications.

The FTC Should Create a Model Summary of Rights for Subjects of Criminal Background Reports

We commend the FTC for simplifying the model “Summary of Rights” for consumers, but urge you to further improve the proposed FCRA notices by creating a separate notice that explicitly sets forth consumers’ rights – and employers’ and consumer reporting agencies’ obligations – related to criminal background reports.

Even when their records are accurately reported, individuals with conviction histories face significant and growing barriers to employment. A recent study of New York City entry-level jobs found that having a criminal record reduced the likelihood of a callback or job offer by half. Sixty percent are unemployed one year after release from incarceration, and the unemployment rate for people with criminal records hovers around 50%, with most not making a living wage. Employment barriers fall most heavily on Blacks and Latinos, who are, respectively, nine and four times more likely to be incarcerated than whites in New York. Blacks and Latinos are also disproportionately arrested and convicted for quality-of-life offenses: they make up 85% of those arrested for marijuana possession in New York City.

While the FTC’s proposed revisions to consumer notices reference “credit reports,” this is inadequate notice for the many people, including our clients, who do not know that a “credit report” includes their criminal history. For them to understand how FCRA applies to criminal background reports – and in fact that they have protections at all – consumers need a summary of rights specifically addressing the employment context. This notice should highlight the special FCRA rules applicable to criminal cases and reports purchased for employment purposes.

Recommendations

We recommend that the FTC prepare a customized summary of rights for criminal background reports that is focused on the employment context, which addresses at least the following key rights:

- Arrests not leading to criminal convictions that are more than seven years old should not be reported, unless the salary at issue is \$75,000 or more.
- The job applicant or employee faced with a potential adverse employment decision should get a copy of the report at least five business days before an employer takes any adverse action based upon it;
- The job applicant or employee has the right to free copies of criminal background reports and file disclosures from consumer reporting agencies, including specialized vendors of those reports; and
- State laws may provide more protections to job applicants and employees.

The model summary of rights proposed by the National Employment Law Project and Community Legal Services is a good suggestion. Alternatively, if the FTC is not willing to prepare a separate summary of rights for criminal background reports, it should at least make changes to its newly-proposed notice that will better inform the public about their rights.

- Instead of referring to “credit reports,” the notice should refer to “consumer reports” and define that term to include criminal background reports. The notice should also refer to “jobs” and “criminal background reports” throughout.
- In the first set of bullet points, add the right to get a copy of a criminal background report at least five business days before an adverse employment decision is made.
- The “Fix Mistakes” section should say that arrest, as opposed to conviction, records generally can be reported for only seven years.
- The notice should indicate that state laws may offer consumers more protection.

The FTC should also consider including state-specific information in the consumer notice. For example, New York employers must give consumers a copy of New York Correction Law Article 23-A when a background check contains criminal history information, and cannot include information about arrests that did not lead to a criminal conviction, period. N.Y. Gen. Bus. Law §§ 380-g(d), 380-j.

The FTC Should Create a Model User Notice for Criminal Background Reports

For the same reasons that we support the creation of a customized summary of rights notice for consumer subjects of criminal background reports, we believe that a notice specifically tailored to employers would help them better understand their obligations under FCRA.

The FTC should integrate all employer rules into one document to effectively inform employers of their obligations. The proposed user notice has a lengthy section devoted to employment reports, but it does not indicate that rules applying to credit reports generally also apply to employers. If all employer rules were integrated, the employer portion of the proposed user notice could be eliminated, reducing its length and complexity.

The FTC should likewise consider including state-specific information in the user notice. As noted above, some states, like New York, impose more and different requirements on employers who use background reports.

In the event that the FTC decides not to create a user notice geared to employment reports, it should make the following changes to the proposed user notice:

- At the beginning of the notice, “consumer reports” should be defined to include criminal background reports.
- The “For Employers” section should indicate that the other sections of the notice regarding credit reports also apply to employers.
- The section indicating that a copy of a report must be provided before an adverse notice must provide a time period, preferably five days, in which the job applicant can act on it.
- The notice should state that employers generally cannot consider arrests that did not lead to convictions after seven years.
- The notice should also mention that state laws may provide more and different requirements.

Criminal background checks for employment are now the norm. For this reason, revisions to the model FCRA notices published by the FTC – as outlined above – will significantly minimize routine violations of FCRA, ensure stronger compliance with the law, and protect workers and communities struggling in this economy.

Sincerely,

Judith M. Whiting
Litigation Director