

The Fair and Accurate Credit Transactions Act

DECEMBER 23, 2008

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Congress hopes that the Fair and Accurate Credit Transactions Act (“FACTA”) will provide individuals with increased protection from identity theft. Section 315 of FACTA, which is known as the Red Flag Rules, will require that all users of “consumer reports,” to adopt policies regarding discrepancies in any addresses listed on consumer reports. The Red Flag Rules will apply to employers that obtain background reports on employees or applicants and use the background reports to make employment or hiring decisions. A “Red Flag” is a pattern, practice or specific activity, including a suspicious address discrepancy, that indicates the possible existence of identity theft.

Effective May 1, 2009, the Red Flag Rules will require all employers using background checking services to have a reasonable policy to ensure that the background reports they receive pertain to the employees or applicants being checked. When mismatches arise between the addresses on background reports and the addresses employees and applicants provided, employers will have to follow their policies to determine if the information they receive is correct.

FACTA authorizes the Federal Trade Commission to bring civil actions against employers for violating the Red Flag Rules. Liable employers face penalties of up to \$2,500 for each violation. FACTA also authorizes the state attorneys general to bring similar civil actions, with penalties of up to \$1,000 per violation.

A MODEL POLICY FOR EMPLOYEE OR APPLICANT ADDRESS VERIFICATION

We are suggesting that our clients adopt a policy now that will comply with the Red Flag Rules. The following model policy complies with the Red Flag Rules and can guide employers developing their own policies.

Step 1. Compare the addresses.

When **[the employer]** receives a background report, the employee receiving the report should check to verify that the address provided by the employee or applicant matches the address on the background report. If the addresses match, no further action is required.

Step 2. If the addresses do not match, request a government-issued photo identification.

The employee receiving the report should request, check the authenticity of, and make a copy of the employee’s or applicant’s government-issued photo identification. The employee receiving the report should then compare the address on the government-issued identification to all of the addresses listed on the background report.

For an employee, if none of the addresses on the consumer report match the address on the government-issued identification, the employee receiving the report should continue trying to verify the address by cross-checking other records in the employee's file.

If the employee receiving the report is able to match the address on the government-issued photo identification to an address on the background report or, if an employee, to other records in the employee's file, no further action is required.

Step 3. If the addresses still do not match, ask the employee or applicant to explain.

If the employee receiving the report is not able to match any of the addresses listed on the background report to any of the addresses provided by the employee or applicant listed on the government-issued identification, or contained in other records, [the employer] should ask the employee or applicant to explain the discrepancy.

For an employee, if the employee receiving the report believes that the background report pertains to the employee, the employee receiving the report should draft a short memorandum regarding the efforts to resolve the discrepancy and place the memorandum in the employee's file.

For an applicant, if the employee receiving the report believes that the background report pertains to the applicant, the employee receiving the report should draft a short memorandum regarding the efforts to resolve the discrepancy and place the memorandum in the applicant's file. **[The employer]** should then proceed with the employment process.

Step 4. If the discrepancy is *not* resolved, document the efforts to resolve the discrepancy and forward all documentation to the Human Resources Department.

For an employee, the employee receiving the report should contact the Human Resources Manager and forward all documentation to the Human Resources Department. No further action should be taken toward the employee.

For an applicant, the employee receiving the report should terminate the employment process and forward all documentation to the Human Resources Department, and advise the applicant to contact the Human Resources Manager.

Step 5. Human Resources Department Investigation.

The Human Resources Department should attempt to resolve the address discrepancy by conducting a more thorough examination, including, but not limited to, verifying the employee's or applicant's identification and employment authorization. If the Human Resources Department is unable to resolve the address discrepancy satisfactorily or the investigation indicates other problems, such as the use of false identification documents, the Human Resources Department should take action consistent with **[the employer's]** policies and past practices, including but not limited to declining to further consider an applicant's application or termination of an employee's employment. **[The employer]** does not have a duty to report the discrepancy to the background checking service or to any other agency.

Additional Information

To learn more about FACTA's Red Flag Rules, please contact Joe Gross at 216.363.4163 or jgross@beneschlaw.com or one of the other attorneys in Benesch's Labor and Employment Practice Group. Biographical information for Benesch's Labor and Practice Group attorneys is available at www.beneschlaw.com.

As a reminder, this Bulletin is being sent to draw your attention to issues and is not to replace legal counseling.