Please be advised that this document is not intended to provide legal advice or opinion. Such advice may only be given when related to specific fact situations. Consultation with employment law counsel is strongly recommended prior to using such documents. Should you decide to retain Littler Mendelson to advise you with regard to these issues, any such engagement would be subject to our usual procedures regarding conflict clearance and intake.

MEMORANDUM DISCUSSING FAIR CREDIT REPORTING ACT COMPLIANCE

Note: This memorandum discusses general federal law requirements. For a discussion of state and local requirements, please contact Littler Mendelson.

The federal Fair Credit Reporting Act ("FCRA") imposes requirements on employers who use "consumer reports" (more commonly known as "background reports") for employment purposes. Broadly speaking, the FCRA's requirements on employers may be divided into two categories: (1) requirements that employers must follow before they obtain a background report from a third-party background screening company, and (2) requirements that employers must follow if they take "adverse action" against an individual based, in whole or in part, on information contained in the background report.

Before an employer may obtain a background report, generally it must make a written disclosure to the job applicant or employee that a background report may be obtained. The applicant or employee must provide written permission for the employer to obtain the background report.

After the employer obtains the background report on an employee or applicant for employment, the employer must follow certain requirements if it intends to take "adverse action" (e.g., denial of employment, termination, etc.) against the applicant or employee based even in part on the contents of the report.

First, before the employer implements the adverse action against the applicant or employee, the employer must provide a "pre-adverse action" notice to the individual, which must include a copy of the background report and the statutory Summary of Rights. This requirement affords the applicant or employee an opportunity to discuss the report with the employer before the employer takes adverse action. We recommend that employers wait seven or eight business days after sending the pre-adverse action notice to proceed to the next step.

If the employer ultimately intends to take the adverse action against the applicant or employee, it must then provide an "adverse action" notice to the individual. The adverse action notice must contain the following information:

- The name, address and telephone number of the background screening company that provided the report;
- A statement the background screening company did not make the adverse decision and is not able to explain why the decision was made;
- A statement setting forth the applicant's or employee's right to obtain a free disclosure of his or her report from the background screening company if the applicant or employee makes a request for such a disclosure within 60 days; and

- A statement setting forth the applicant's or employee's right to dispute directly with the background screening company the accuracy or completeness of any information contained in the report.

In addition to the FCRA, there are a variety of state and local employment laws that require certain notices with the pre-adverse action notice and also restrict when an employer can order the background report from the background screening company. New York City's ordinance is the most onerous in the nation because it requires FCRA compliance but also requires the employer to disclose its "job related" analysis to the applicant and afford the individual an opportunity to respond or provide additional information. State and local laws also restrict what criminal information can be considered for employment purposes. These are not addressed in this memorandum. To further discuss the above, state law requirements, or any other background screening issue, please contact Littler.