Egbbl Legal Report

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Employers conducting background checks might face liability under credit report law

by Douglas E. Lee

Many employers seeking to minimize liability, improve the quality of their work force and reduce the risk of theft and other losses are conducting background checks on applicants and employees. Recent amendments to the Fair Credit Reporting Act (FCRA), however, may subject these employers to unanticipated liabilities.

On its face, the FCRA appears to apply only to employers who obtain consumer and credit reports about employees and applicants. In the FCRA, however, "consumer report" is defined broadly to include any information about a person's character or reputation. As a result, investigations that include compiling driving records, criminal histories and bankruptcies may trigger the FCRA.

The FCRA does not restrict the ability of employers to perform their own background checks. Only employers that use third parties to conduct all or part of background checks are subject to the FCRA's disclosure and notification requirements.

Amendments to the FCRA adopted on November 2, 1998, clarified these requirements. An employer that intends to use background checks prepared in whole or in part by third parties must satisfy the following obligations:

- Disclose in writing to the applicant or employee that the employer will be performing a background check and obtain the applicant's or employee's consent to the background check. This disclosure must be clear, conspicuous and provided in a document that contains only the disclosure and the consent.

- Within three business days of taking any adverse action against an applicant or employee as a result of information obtained through a background check, the employer must give the applicant or employee notice (oral, written or electronic) (1) disclosing that the adverse action

Fair Credit continued on page 2

Inside

Visitation rights for grandparents 2

Ensuring co-signer liability 3

Standard mileage rate is lowered by IRS 3

Passing a stopped school bus 4

In Print & At the Podium. . . 4

Corporations should use corporate names

by Gary R. Gehlbach

One of the primary reasons that business owners incorporate is to insulate their personal assets from corporate debt and liability. If business owners fail to use the exact name of the corporation, however, they risk losing that insulation.

The Illinois Appellate Court recently affirmed the principle that personal liability arises for individual business owners, even if the business is incorporated, when the corporation does not use its actual corporate name. The exact corporate name, including the "Inc." or other corporate designation, should be used whenever and wherever the business is identified, particularly in advertising and on signs.

Liability continued on page 3

Illinois now recognizing grandparents' visitation rights

by Rolfe Ehrmann

Grandparents' rights to visitation with their grandchildren are being increasingly recognized in Illinois. In cases in which adult children are divorced or separated, grandparents usually can assert visitation rights unless both parents object.

Grandparent visitation cases usually arise when the custodial parent wants to deny or restrict the visitation of not only the former spouse but also the former spouse's parents. These cases can be even further complicated if the former spouse dies or moves away, which prevents the grandparents from seeing the grandchildren during regular parental visitation.

Grandparent visitation used to be limited and granted by courts only in unusual circumstances. In recent years, however, lawyers, judges and legislators have recognized that a relationship between a grandparent and a grandchild is an important aspect of a child's healthy development. Such a relationship also is part of the joy of life both for the child and the grandparent.

Legislators already have changed the statutes covering this aspect of visitation law six times this decade. On countless other occasions, Illinois courts have modified and re-modified the rules governing grandparent visitation.

As the law stands now, a grandparent can obtain independent visitation rights if:

- one of the parents is deceased;
- one of the parents joins in the grandparents' request for visitation;
- the parents are not living together on a permanent basis; or
- one of the parents has been absent from the marital home for more than one month without the other spouse knowing his or her whereabouts.

As the law continues to develop, it appears that grandparent visitation rights will be allowed in all cases except in those few in which both parents object or in which visitation is not in the best interest of the grandchildren, such as in cases involving proven abuse.

Fair Credit . . .

Continued from page 1

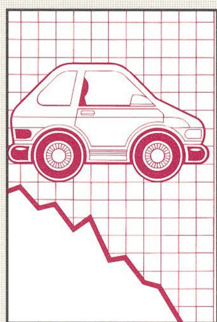
is based in whole or in part on a consumer report, (2) providing the applicant or employee with the name, address and telephone number of the consumer reporting agency that prepared the report, (3) informing the applicant or employee that the consumer reporting agency did not make the adverse decision and cannot explain it, and (4) notifying the applicant or employee that he or she may request a free copy of the report and dispute the accuracy or completeness of the report with the consumer reporting agency.

- If the applicant or employee requests a copy of the report, the employer must provide the copy within three business days, together with a statement of the applicant's or employee's rights as prescribed by the Federal Trade Commission.

The FCRA contains slightly more lenient provisions for employers seeking to obtain background information on applicants for commercial driving positions. The FCRA also contains more restrictive provisions when employers seek to use investigative consumer reports, which are reports compiled from interviews with an applicant's or employee's neighbors, friends, associates or other acquaintances. Whether employers are using background checks provided by third parties or are performing such checks themselves, they should be familiar with FCRA's requirements.

IRS drops mileage rate

by Gary R. Gehlbach



On April 1, 1999, the business standard mileage rate was reduced from 32.5 cents per mile to 31 cents per mile. The standard mileage rate is the amount provided by the IRS for use by employees or self-employed individuals in computing the deductible costs of operating automobiles owned or leased for business purposes.

The IRS first announced this reduction on December 16, 1998, to be effective January 1, 1999. The IRS's announcement was significant because it marked the first time that the IRS had lowered the standard mileage rate.

Shortly thereafter, the IRS postponed the effective date of the new rate for business travel until April 1, 1999. This postponement was in response to concern by employers that additional time was needed to implement the new rate. The mileage reimbursement rate therefore remained at 32.5 cents per mile until April 1, 1999.

Businesses should not provide reimbursement to employees in excess of this amount. Payments made to an employee or a self-employed individual in excess of the standard mileage rate are considered taxable compensation to the individual.

The standard mileage rate for using a car for charitable purposes remains 14 cents per mile for 1999, and the standard mileage rate for using a car to obtain medical care or in connection with relocating for job purposes remains 10 cents per mile.

Retailers should review co-signer liability rules

by Megan G. Heeg

One way that retailers frequently attempt to protect themselves when financing customer purchases is by requiring the customer to provide a co-signer. Customers typically offer parents, grandparents, spouses and friends as co-signers. Retailers who accept grandparents and friends as co-signers, however, may not be protecting themselves at all.

Under the Motor Vehicle Retail Installment Sales Act (governing the retail installment sale of cars) and its companion, the Retail Installment Sales Act (governing the retail installment sale of consumer goods and services), a co-signer can be held primarily liable under a retail installment contract only if the co-signer actually receives the good or service that is being financed. Each Act provides an exception for parents and spouses, but grandparents or friends who co-sign but do not receive the good or service cannot be liable as a co-signer.

If a customer fails to pay a debt, a retailer can sue a legally recognized co-signer without first exhausting all avenues of recourse against the customer. If a grandparent or friend is permitted to sign as a co-signer, however, the retailer can sue the grandparent or friend only if the language of the financing agreement establishes that the grandparent or friend actually is a guarantor of the debt, as that term is defined in the Acts.

To be a guarantor under the Acts, the guarantor must sign a statement guaranteeing the collection of the debt and must sign a separate Explanation of Guarantor's Obligation in a form as provided in each Act. Although the Acts do not clearly address this issue, it appears that retailers may not have any recourse against a co-signing grandparent or friend if the guarantor provisions are not satisfied.

Liability . . .

Continued from page 1

When a business is incorporated in Illinois, the exact corporate name is registered with the Secretary of State. The same is true when a limited liability company, limited liability partnership or limited partnership is created in Illinois. The name as approved by the Secretary of State is thus available for use, subject to trademark or service mark rights of other entities previously using that name or a deceptively similar name.

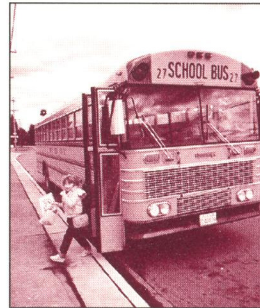
A corporation may adopt an assumed business name, provided that it properly registers and publishes the assumed name. A corporation also may use the name of a division if the corporation clearly discloses its corporate name (e.g., Abracadabra, a division of Magic, Inc.). However, if the business uses a name that has not been approved by the Secretary of State and that does not include its corporate name, then the owner of the business may lose the all-important limited liability. If the corporation does not have sufficient means to pay its bills, creditors may pursue the individual business owners and their personal assets, even if the business was incorporated.

Passing a stopped school bus is legal in some situations

by Rolfe Ehrmann

The rules regarding passing a stopped school bus are important for both safety and legal reasons. The safety reasons are obvious. The legal reasons are significant because passing a stopped and signaling school bus results in an automatic suspension of the offending driver's license for a minimum of three months.

This area of traffic safety has been effectively followed by the public, which appreciates the dangers and understands the basic rule not to pass a signaling bus. This basic rule, however, only applies to a two-lane street. Any confusion for the public involves four-lane highways. Under prior law, all vehicles on a four-lane highway were required to stop for a signaling school bus unless the highway was divided, as by a strip of grass. This has changed. Now only vehicles moving in the same direction as the bus must stop on a highway of four or more lanes.



Vehicles moving in the opposite direction do not have to stop even if the highway is not divided. All traffic traveling in the same direction as the bus must stop no matter the number of lanes of the highway. A vehicle on a one-way highway, even if it contains multiple lanes must stop for a signaling bus on that road because all vehicles will be traveling in the same direction.

In Print and At the Podium

Mr. Gehlbach recently presented an in-service to the Dixon Fire Department paramedics on living wills and health care powers of attorney ... In his April commentaries for the website of The Freedom Forum First Amendment Center (www.freedomforum.org/first/welcome.asp), **Mr. Lee** discussed the American Civil Liberties Union's lawsuit against the Boy Scouts of America and a psychiatric hospital's attempt to stop "60 Minutes II" from broadcasting a report about the hospital ... **Mr. Gehlbach** completed teaching a nine-week course to eighth graders at Reagan Middle School as part of Junior Achievement's Project Business ... **Mr. Beckman** recently was elected to the Board of Directors of the Kreider Services Foundation ... **Mr. Lee** has been elected to a second three-year term to the Board of Directors of the Dixon Area Chamber of Commerce and Industry ... As part of his work for the Illinois State Bar Association, **Mr. Gehlbach** has drafted a proposed amendment to the Illinois tenancy by the entirety statute to simplify the process of creating a tenancy by the entirety ... **Mr. Lee** is working with the group of Dixon residents seeking to establish a local public access cable television station.

Deals and Decisions

Mr. Beckman recently obtained a wrongful death settlement for a client. The settlement was for the full amount of the available insurance proceeds ... **Mr. Lee** is representing four business partners in the formation of an Illinois limited liability company and the acquisition of almost 20 business locations ... **Mr. Gehlbach** is representing a client involved in a corporate reorganization and recapitalization ... **Mrs. Heeg** has advised a number of local businesses about the requirements of the amended wage garnishment law ... **Mr. Lee** successfully represented a landfill operator seeking local siting approval in Rock Island County. **Mr. Lee** presently is co-counsel for a landfill operator that has applied for siting approval in Coles County ... In recent months, **Mr. Gehlbach** has represented several clients in real estate tax-deferred exchanges, both as simultaneous exchanges and as delayed exchanges.