

confirming the need for an accommodation if you reasonably need such documentation to determine whether the employee has a condition covered by the PFWA, and/or whether an accommodation is needed. If the condition and the need for an accommodation are obvious, no documentation should be requested. Further, if the employee has already provided you with sufficient information to substantiate the known limitation and need for accommodation at work, it's unreasonable to require documentation.

Don't forget about other laws, too. The PFWA final regulations specifically remind employers that facts triggering PFWA coverage may also implicate other statutes, such as the FMLA and the ADA. Thus, when evaluating reasonable accommodations under the PFWA, you must assess whether you are subject to, and whether the underlying facts have triggered obligations under, other statutes as well.

Don't go it alone. As the above demonstrates, providing reasonable accommodations under the PFWA is likely to be a territory filled with landmines. You need to ask for enough information to assess what accommodations are needed but cannot ask for private medical information. You will also inevitably want to require medical documentation to avoid abuse of the PFWA regulations, but at the same time, the circumstances under which documentation can be obtained are limited. Since each circumstance is unique, it's important to consult with employment counsel to navigate the application of this new law and the protections it affords.

Editor's note: This is an updated version of "EEOC's pregnancy accommodation regulations are broader than you think" from the February 2024 issue of West Employment Law Letter.

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BACKGROUND CHECKS

Taking adverse employment actions based on background checks

AK AZ HI NV OR WA

by Jodi R. Bohr, Tiffany & Bosco, P.A.

The Fair Credit Reporting Act (FCRA) was enacted to promote accuracy, fairness, and privacy of consumer information contained in the files of consumer reporting agencies (CRA). Employment background checks are a form of consumer report, so employers that conduct background checks on job applicants or employees must follow the procedures outlined in the FCRA. Failure to comply with the FCRA could result in

penalties issued by the Federal Trade Commission (FTC) or civil liability for damages. Although Arizona doesn't have a state counterpart to the FCRA, some states do, so employers should confirm whether a state counterpart requires additional action.

Important considerations

What steps must be taken before running a background check? You must provide job applicants with written notice that a consumer report may be used for employment decisions. The notice must be in a stand-alone format, meaning it can't be combined with other forms such as an employment application. It should include a written authorization, which must be signed by the applicant, before pulling the consumer report.

What constitutes an adverse employment action under the FCRA? An adverse action under the FCRA encompasses any decision made by an employer that adversely affects a current or prospective employee based on information gleaned from a consumer report (e.g., denial of employment, demotion, termination, or denial of a promotion).

What steps must an employer take when considering adverse action? When considering adverse action based on information obtained from a background check, you must follow specific steps outlined by the FCRA.

The pre-adverse action notification must notify the applicant of your intent to take adverse action because of the consumer report. It must include a copy of the consumer report and a summary of rights under the FCRA. You must allow the individual a reasonable amount of time to review the report, dispute any inaccuracies, and respond to the notification. The FCRA doesn't give a specific timeframe for this, but it's generally considered reasonable to provide at least five business days for the individual to respond.

If the applicant provides a response within the timeframe allowed, you must review any information provided and investigate any disputed information in the consumer report. If you decide to proceed with adverse action based on the information in the consumer report, you must provide the applicant with a final adverse action notification, which:

- Notifies the applicant of the adverse action that has been taken;
- Includes the name, address, and phone number of the CRA that provided the report;
- Informs the applicant of their right to obtain a free copy of the consumer report within 60 days; and
- Informs the applicant of their right to dispute the accuracy or completeness of the information in the report with the CRA.

You must maintain FCRA records for at least five years.



Most baby boomers think age is a factor in hiring decisions. A study from the American Staffing Association released in March shows that 78% of Baby Boomers (age 60 to 78) believe their age would be a contributing factor when being considered for a new position. By comparison, 55% of Gen Z (age 18 to 27) feel that way, along with 51% of Gen X (age 44 to 59), and 39% of Millennials (age 28 to 43). The survey found that 68% of Boomers believe their age puts them at a disadvantage when finding a new job, compared with 53% of Gen X, 29% of Millennials, and 48% of Gen Z. Overall, the study found a majority of Boomers say their age limits their career opportunities, and employed Boomers are less likely than others to ask for a raise in 2024. Boomers also were found to be far less likely to search for a new job in 2024 than their younger counterparts.

Research finds a lack of training on flexible work arrangements. A new report shows that most employers have not adapted their practices to support their shift to flexible work. “The 2024 Workplace Flexibility Trends Report” surveyed 900 U.S. leaders in HR, real estate, IT, and product roles. The report notes that just five years ago, less than 5% of employees had the option to work remotely on a regular basis. Today, the report finds 58% now have that option at least some of the time. But while a majority of employers have embraced flexibility in where people work, many have not adopted the new practices they need to do it well, according to the report. Nearly three out of four respondents indicated their employer hasn’t trained managers to lead a distributed team, established team or meeting norms, or adopted best practices to support working across distance.

Survey shows one in three workers regularly nap during work hours. Sleep Doctor, a provider of at-home sleep tests, reports that its survey of 1,250 full-time workers finds that one in three nap every week during work hours. The survey also found that one in three miss meetings or deadlines because they are napping, and one in four remote workers have fallen asleep during a meeting. The survey found that remote and hybrid workers are more likely to take naps during the workday than in-person workers. Younger workers and men were found to be more likely to nap. The most common location for in-person workers to nap is their car (50%), but 33% nap at their desk, 20% in a company-designated napping place, 14% return home, and 9% nap in a bathroom. Remote workers were found to take the longest naps. Of the workers who nap, 34% of remote workers and 31% of hybrid workers nap for more than an hour on average. Just 15% of in-person workers who nap do so for more than an hour. ■

What are the consequences of failing to comply with FCRA requirements for adverse actions? Individuals who believe their rights under the FCRA have been violated can file a lawsuit against the employer seeking damages. Additionally, regulatory agencies such as the FTC and the Consumer Financial Protection Bureau (CFPB) have the authority to enforce FCRA compliance and can impose penalties for violations.

Plan to be prepared

It’s important to be prepared for an unfavorable consumer report because it isn’t a matter of if, but when you will be confronted with a report that necessitates an adverse action against an applicant.

To ensure FCRA compliance, you should develop written policies and procedures for conducting background checks and taking adverse actions. Having these procedures in place will guide decision-makers with the necessary steps before taking adverse action. Providing employees involved in the hiring process with necessary training is key to following the FCRA requirements.

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LITIGATION

Court finds sufficient claims of willful FMLA violations, individual liability

AK AZ HI NV OR WA

by Jill Chasson, Coppersmith Brockelman PLC

A recent ruling from the federal district court in Arizona provides a good reminder to employers about several important aspects of the Family and Medical Leave Act (FMLA)—that employers must inform employees of their leave rights, that individual supervisors can sometimes be sued under the Act, and that a longer statute of limitations applies to willful violations.

Multiple medical issues lead to time off

Julie Thurston worked for Western Alliance Bank as a senior product manager. In June 2020, she informed her supervisor, Michelle Lance, that she needed time off to see her physician to address an ongoing medical issue. She was diagnosed with a second condition in July 2020.

At the time, Thurston wasn’t eligible for FMLA leave, so she used paid time off (PTO) time to cover her absences. She also requested the ability to work from home, which the bank initially accommodated.