

UNITED STATES OF AMERICA
FEDERAL TRADE COMMISSION
WASHINGTON, D.C. 20580

Division of Credit Practices
Bureau of Consumer Protection

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Ronald G. Isaac
Attorney

February 23, 1998

Re: Section 603(h) of the Fair Credit Reporting Act

Dear Mr. Allison:

This will respond to your letter inquiring whether an employer that enters into a bona fide independent contractor relationship with an individual must comply with the applicable provisions of the Fair Credit Reporting Act ("FCRA") pertaining to consumer reports obtained for employment purposes.

You state that it is quite common for trucking operations to engage as drivers individuals who own and operate their own equipment and who themselves may hire drivers to operate their equipment. You read the FCRA to not apply to a trucking operation as it relates to such an independent contractor because you consider the independent contractor relationship to be a "business relationship" as opposed to an "employment relationship," and, you maintain, the independent contractor is not being hired "as an employee." You assert that a party who hires independent contractors should be treated like a homeowner who obtains a credit and criminal background check on an electrical contractor before hiring that individual to rewire the house, who you assert "is surely not required to comply with the provisions of the FCRA." For the reasons explained below, we view the trucking operation's hiring, or consideration for hiring, of independent drivers in the situation you describe to be for "employment purposes," as defined by Section 603(h) of the FCRA.

Section 603(h) provides, "[t]he term 'employment purposes' when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." The Commission staff subscribes to the view, enunciated by the United States Court of Appeals for the Fourth Circuit in *Hoke v. Retail Credit Corporation*,⁽¹⁾ that the term "employment purposes," as used in the FCRA, should be interpreted liberally to effectuate the broad remedial purpose of the Act. The court therein ruled that information furnished by a consumer reporting agency to the Texas Board of Medical Examiners, which had requested the information to aid its assessment of a physician's application for a license to practice medicine, was furnished for "employment purposes" within the meaning of the FCRA, and thus was a "consumer report" subject to the provisions of the Act. The court reasoned:⁽²⁾

If we were to apply the common-law concept of employee, we would undoubtedly conclude that a physician who practiced his profession as a sole practitioner or as a

member of a medical partnership was an independent contractor, and not an employee, because of the absence of control over the manner in which he afforded expert medical services. But in construing FCRA, we are cognizant of its broad remedial purposes . . . and we are not constrained to limit its applicability by the common-law concept of master and servant.

The court opined further that the term "employment" is not limited, as you suggest, to situations in which the consumer is being evaluated "as an employee," because the ending phrase "as an employee" in the definition of "employment purposes" modifies only "retention," and not the words "employment, promotion, reassignment" preceding it.⁽³⁾

Therefore, we conclude that a trucking operation that uses consumer reports to evaluate whether to engage individuals as drivers must comply with the applicable provisions of the FCRA pertaining to consumer reports obtained for employment purposes, including the disclosure and authorization provisions of Section 604(b), Section 606, and Section 615. If the trucking operation were not to obtain consumer reports on prospective drivers for "employment purposes," it would appear to have no permissible purpose under the FCRA for obtaining such reports, absent the drivers' written authorizations. Incidentally, a homeowner who is considering hiring an individual to perform services for the homeowner is indeed required to comply with the FCRA when obtaining a "consumer report" on that individual (which includes either the credit report or criminal background check you mentioned), and thus must abide by the applicable disclosure and authorization provisions of Section 604(b), Section 606, and Section 615 like any other employer.

This is an informal staff opinion and is not binding on the Commission.

Sincerely,

Ronald G. Isaac

1. 521 F.2d 1079, 1082 (4th Cir. 1975), *cert. denied*, 423 U.S. 1087 (1976).

2. *Id.*, at 1082 n.7.

3. *Id.*, at 1082.