

community BANKER

May/June, 2014

Welcome to the May/June, 2014 issue of the COMMUNITY BANKERS' ADVISOR.

The ADVISOR is prepared by attorneys at Olson & Burns P.C. to provide information pertaining to legal developments affecting the field of banking. In order to accomplish this objective, we welcome any comments our readers have regarding the content and format of this publication. Please address your comments to:

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The attorneys at Olson & Burns represent a wide range of clients in the financial and commercial areas. Our attorneys represent more than 30 banks throughout North Dakota.

YOU ARE ASKING . . .

Q: How do we handle an account when a sole proprietor dies? The owner of a hair salon passed away, and her husband wants to continue running the business with the same staff. Can we turn the account over to him?

A: Ownership of a sole proprietorship account is just an account owned by an individual. Generally, it doesn't have any qualities that require you or let you treat it any differently than any other individual account - you can't just turn it over to another person based solely on his or her status as a surviving spouse. Like any other account, you can pay it to the husband if he is the POD beneficiary. If there are no survivorship provisions for the account, it belongs to the decedent's estate and would be handled by the personal representative.

Q: Mr. R passed away six months ago; when Mrs. R recently ordered new checks, she did not remove his name, so they continue to show Audrey and William R. Is this "legal"?

A: It is not "illegal" in that there is nothing in the statutes to forbid this. We believe that people may do this both because it is emotionally difficult to remove the name and because a widow may not like to announce to the world that she is now living alone. From a business standpoint, assuming a right of survivorship to the account, the account belongs only to Mrs. R now. Any checks payable to Mr. R that may come in must be handled by his estate.



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Q: Stella is 16 years old and stopped in the bank to inquire about the balance on her account. Because her father is the custodian of her UTMA account, can we inform Stella as to the balance of her account?

A: The law doesn't explicitly address the issue of a bank providing information such as the account balance to the minor. Moreover, while the minor is the owner of the property, she doesn't have access to the funds until she is 18 or 21, depending on the circumstances. *See* N.D.C.C. § 47-24.1-20. Nevertheless, N.D.C.C. § 47-24.1-12 provides in relevant part that:

A custodian shall keep records of all transactions with respect to custodial property, including information necessary for the preparation of the minor's tax returns, and *shall make them available for inspection at reasonable intervals* by a parent or legal representative of the minor or *by the minor if the minor has attained the age of fourteen years.*

N.D.C.C. § 47-24.1-12(5) (*emphasis added*) The Bank should advise Stella that she has a right to obtain this information from her father, the custodian.

THE DEPOSITION

You have been either noticed or subpoenaed to give a deposition in a case involving your bank. It happens - we've attended many of them over the years. Your attorney will prep you; however, it doesn't hurt to hear the advice again, so we have reprinted here a number of things to keep in mind when it happens to you.

Across the table: 10 tips for preparing for a deposition

A deposition is the sworn testimony of a witness taken before trial held out of court with no judge present. The witness is placed under oath to tell the truth and lawyers for each party may ask questions. The questions and answers are recorded. When a person is unavailable to testify at trial, the deposition of that person may be used. It is part of the pretrial discovery (fact-finding) process.

Because very few cases get to trial, the deposition is the event during which the key players have their opportunity to tell their stories. A deposition may feel like a simple conversation between the parties in a lawsuit, but it isn't. It is a tool used by a highly skilled practitioner to lock-in your side of the story, build his or her case through our admissions and evaluate you as a trial witness.

As there is a skill in taking a deposition, there is also a skill in testifying at a deposition. To minimize the chances of your words being used against you. The following are the top 10 things to think about as you prepare to give testimony in a deposition:

- 1. Tell the truth.** Enough said.
- 2. Answer the specific question asked.** Do not volunteer other information. Do not explain your thought process. You are only required to answer the question that is asked. The lawyer on the other side is being paid to ask specific questions to elicit specific information being sought. Do not do his job for him by unnecessarily offering other information.
- 3. Do not answer the question** if you do not understand it. Simply say that you do not understand. It is the lawyer's job to formulate understandable questions.
- 4. Do not guess.** If you cannot remember something, your answer should simply be "I do not remember." If you have a vague memory, give that vague memory with a qualification.
- 5. Give an approximation** if you are asked for a time or date and you cannot recall the specifics. That's OK. Just qualify the answer by saying that it is an approximation or an estimate. A deposition isn't a memory test.
- 6. Beware leading questions.** An examiner is usually allowed to try to put words in your mouth with leading questions. Do not agree to inaccurate statements contained within the question. To that same end, do not automatically accept the questioner's summary of your prior testimony unless it is 100% accurate.

7. Give complete answers, and then stop. Always finish your answer. If you are interrupted, let the lawyer finish the first question, and then go back and finish your prior answer. If you are finished with an answer and it is complete, accurate and truthful, stop talking. Do not add to your answer because you feel a need to fill the silence.

8. Ask for documents. If you think you need a document to help you truthfully and accurately answer a question, ask for it. But, do not agree to supply any documents requested by the questioner. All such requests should go through your lawyer.

9. Understand objections. Even if your lawyer objects, you usually still have to answer the question. The only time not to answer is if your lawyer expressly instructs you not to (usually because the other lawyer is asking about attorney-client communications).

10. Humor doesn't work. Sarcasm and humor do not translate well on the written page. Also, never express anger or argue with the questioner, or use even the mildest of off-color language. A deposition is a professional event, and you should act professionally.

(Jon Hyman, Esq., *reprinted with permission by BusinessManagementDaily.com, at*
<http://e.bUSDly.com/index.php?action=social&c=4bac3882938ce191ce0436d7bf533c62.26046>)

EMPLOYEE BACKGROUND CHECKS

Background checks and the legal pitfalls faced when doing them (or not doing them) cause much confusion. Last month the EEOC issued an assistance document explaining how employers can legally conduct background checks. This document doesn't present new requirements, but it does offer compliance tips and "best practices."

We have reprinted the document below - you can check out the original at http://www.eeoc.gov/eeoc/publications/background_checks_employers.cfm

Background Checks What Employers Need to Know

A joint publication of the Equal Employment Opportunity Commission and the Federal Trade Commission

When making personnel decisions - including hiring, retention, promotion, and reassignment - employers sometimes want to consider the backgrounds of applicants and employees. For example, some employers might try to find out about the person's work history, education, criminal record, financial history, medical history, or use of social media. Except for certain restrictions related to medical and genetic information (see below), it's not illegal for an employer to ask questions about an applicant's or employee's background, or to require a background check.

However, any time you use an applicant's or employee's background information to make an employment decision, regardless of how you got the information, you must comply with federal laws that protect applicants and employees from discrimination. That includes discrimination based on race, color, national origin, sex, or religion; disability; genetic information (including family medical history); and age (40 or older). These laws are enforced by the Equal Employment Opportunity Commission (EEOC).

In addition, when you run background checks through a company in the business of compiling background information, you must comply with the Fair Credit Reporting Act (FCRA). The Federal Trade Commission (FTC) enforces the FCRA. This publication explains how to comply with both the federal nondiscrimination laws and the FCRA. It's also a good idea to review the laws of your state and municipality regarding background reports or information because some states and municipalities regulate the use of that information for employment purposes.

Before You Get Background Information

EEOC

In all cases, make sure that you're treating everyone equally. It's illegal to check the background of applicants and employees when that decision is based on a person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, asking only people of a certain race about their financial histories or criminal records is evidence of discrimination.

Except in rare circumstances, don't try to get an applicant's or employee's genetic information, which includes family medical history. Even if you have that information, don't use it to make an employment decision. (For more information about this law, see the EEOC's publications explaining the Genetic Information Nondiscrimination Act, or GINA.) Don't ask any medical questions before a conditional job offer has been made. If the person has already started the job, don't ask medical questions unless you have objective evidence that he or she is unable to do the job or poses a safety risk because of a medical condition.

FTC

If you get background information (for example, a credit or criminal background report) from a company in the business of compiling background information, there are additional procedures the FCRA requires beforehand:

- Tell the applicant or employee you might use the information for decisions about his or her employment. This notice must be in writing and in a stand-alone format. The notice can't be in an employment application. You can include some minor additional information in the notice (like a brief description of the nature of consumer reports), but only if it doesn't confuse or detract from the notice.
- If you are asking a company to provide an "investigative report" - a report based on personal interviews concerning a person's character, general reputation, personal characteristics, and lifestyle - you must also tell the applicant or employee of his or her right to a description of the nature and scope of the investigation.
- Get the applicant's or employee's written permission to do the background check. This can be part of the document you use to notify the person that you will get the report. If you want the authorization to allow you to get background reports throughout the person's employment, make sure you say so clearly and conspicuously.
- Certify to the company from which you are getting the report that you:
 - notified the applicant and got their permission to get a background report;
 - complied with all of the FCRA requirements; and
 - won't discriminate against the applicant or employee, or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

Using Background Information

EEOC

Any background information you receive from any source must not be used to discriminate in violation of federal law. This means that you should:

- Apply the same standards to everyone, regardless of their race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). For example, if you don't reject applicants of one ethnicity with certain financial histories or criminal records, you can't reject applicants of other ethnicities because they have the same or similar financial histories or criminal records.
- Take special care when basing employment decisions on background problems that may be more common among people of a certain race, color, national origin, sex, or religion; among people who have a disability; or among people age 40 or older. For example, employers should not use a policy or practice that excludes people with certain criminal records if the policy or practice significantly disadvantages individuals of a particular race, national origin, or another protected characteristic, and does not accurately predict who will be a responsible, reliable, or safe employee. In legal terms, the policy or practice has a "disparate impact" and is not "job related and consistent with business necessity."
- Be prepared to make exceptions for problems revealed during a background check that were caused by a disability. For example, if you are inclined not to hire a person because of a problem caused by a disability, you should allow the person to demonstrate his or her ability to do the job - despite the negative background information

- unless doing so would cause significant financial or operational difficulty.

FTC

When taking an adverse action (for example, not hiring an applicant or firing an employee) **based on background information obtained through a company in the business of compiling background information**, the FCRA has additional requirements:

- Before you take an adverse employment action, you must give the applicant or employee:
 - a notice that includes a copy of the consumer report you relied on to make your decision; and
 - a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which you should have received from the company that sold you the report.

By giving the person the notice in advance, the person has an opportunity to review the report and explain any negative information.

- After you take an adverse employment action, you must tell the applicant or employee (orally, in writing, or electronically):
 - that he or she was rejected because of information in the report;
 - the name, address, and phone number of the company that sold the report;
 - that the company selling the report didn't make the hiring decision, and can't give specific reasons for it; and
 - that he or she has a right to dispute the accuracy or completeness of the report, and to get an additional free report from the reporting company within 60 days.

Disposing of Background Information

EEOC

Any personnel or employment records you make or keep (including all application forms, regardless of whether the applicant was hired, and other records related to hiring) must be preserved for one year after the records were made, or after a personnel action was taken, whichever comes later. (The EEOC extends this requirement to two years for educational institutions and for state and local governments. The Department of Labor also extends this requirement to two years for federal contractors that have at least 150 employees and a government contract of at least \$150,000.) If the applicant or employee files a charge of discrimination, you must maintain the records until the case is concluded.

FTC

Once you've satisfied all applicable record-keeping requirements, you may dispose of any background reports you received. However, the law requires that you dispose of the reports - and any information gathered from them - securely. That can include burning, pulverizing, or shredding paper documents and disposing of electronic information so that it can't be read or reconstructed. For more information, see "*Disposing of Consumer Report Information? Rule Tells How*" at <http://www.business.ftc.gov/documents/alt152-disposing-consumer-report-information-rule-tells-how>

Further Information

EEOC

To find out more about federal antidiscrimination laws, visit www.eeoc.gov, or call the EEOC toll-free, 800-669-4000 (voice); TTY: 800-669-6820. The EEOC is responsible for enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability, or genetic information. The EEOC investigates, conciliates, and mediates charges of employment discrimination, and also files lawsuits in the public interest. For specific information on:

- **Preemployment medical inquiries:** see *Preemployment Disability-Related Questions and Medical Examinations* at www.eeoc.gov/policy/docs/preemp.html.
- **Medical inquiries during employment:** see *Questions and Answers: Enforcement Guidance on Disability-Related Inquiries and Medical Examinations of Employees Under the Americans with Disabilities Act (ADA)* at www.eeoc.gov/policy/docs/qanda-inquiries.html.
- **Genetic inquiries, including inquiries about family medical history:** see *Background Information for EEOC Final Rule on Title II of the Genetic Information Nondiscrimination Act of 2008* at www.eeoc.gov/laws/regulations/gina-background.cfm.
- **EEOC recordkeeping requirements:** see *Summary of Selected Recordkeeping Obligations in 29 C.F.R. Part 1602* at www.eeoc.gov/employers/recordkeeping_obligations.cfm.
- **Using arrest and conviction records to make employment decisions:** see *Questions and Answers about EEOC's Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII* at www.eeoc.gov/laws/guidance/qa_arrest_conviction.cfm.
- **Whether arrest and conviction records act as an automatic bar to all employment:** see *Reentry Myth Buster: On Hiring/Criminal Records Guidance* at csgjusticecenter.org/wp-content/uploads/2012/11/Reentry_Council_Mythbuster_Employment.pdf.
- **Background on the EEOC for small businesses:** see *Get the Facts Series: Small Business Information*, www.eeoc.gov/eeoc/publications/smallbusiness.cfm.

FTC

To find out more about federal laws relating to background reports, visit www.business.ftc.gov, or call the FTC toll-free, 1-877-FTC-HELP (1-877-382-4357); TTY: 1-866-653-4261. For specific information on employment background reports, see:

- **Using Consumer Reports: What Employers Need to Know** at www.business.ftc.gov/documents/bus08-using-consumer-reports-what-employers-need-know
- **The Fair Credit Reporting Act & social media: What businesses should know** at www.business.ftc.gov/blog/2011/06/fair-credit-reporting-act-social-media-what-businesses-should-know
- **Background screening reports and the FCRA: Just saying you're not a consumer reporting agency isn't enough** at www.business.ftc.gov/blog/2013/01/background-screening-reports-and-fcra-just-saying-youre-not-consumer-reporting-agency-i
- **Reentry Myth Buster: Criminal Histories and Employment Background Checks** at csgjusticecenter.org/wpcontent/uploads/2012/11/Reentry_Council_Mythbuster_FCRA_Employment.pdf.

The FTC works to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to businesses to help them comply with the law.

DISCLAIMER

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