

Background Check Backlash: Employers Should Take Note of Recent FCRA Class Action Litigation

The rise of consumer class action litigation has grown over the past several years with plaintiffs' counsel finding a new home in the Fair Credit Reporting Act ("FCRA"). While the FCRA's requirements can be simple and straightforward when properly followed, employers are finding themselves trapped in class action litigation simply because they overlooked the FCRA's requirements or cut corners in order to save on time and cost. With the number of FCRA-related cases on the rise, employers should conduct a review of their policies and procedures to ensure they are in compliance.

The FCRA governs a third party's use of "consumer reports." While a consumer report is traditionally thought of as a person's credit report received from a credit reporting agency, the definition of a consumer report is much broader under the FCRA and includes any information compiled in regard to a consumer's personal history (e.g., investigative reports). Under the FCRA, employers are allowed to obtain a consumer report provided it is for an "employment purpose." An "employment purpose" is not limited to the hiring process, but can also include post-hiring employment decisions (e.g., promotions). As employers have traditionally found, consumer reports provide an important tool in making hiring and management decisions.

While some employers use the more thorough investigative report in reviewing an applicant's candidacy, a credit report is more readily available to the employer and cost effective. The credit report supplements the consumer's resume, employment application, and employment file, and provides the employer with an unbiased review of the consumer's past. The report provides insight into whether the consumer has filed for bankruptcy, has any delinquent accounts, or has any judgments or tax liens entered against him or her. While the consumer's credit score is not disclosed to the employer, the information that is provided is valuable to those employers seeking to fill positions that require good credit. Traditionally, credit reports are used when an employer is filling a position that handles a significant amount of cash (e.g. bookkeeper) or for positions that require a certain security clearance (e.g. TSA agent). With the use of credit reports, employers are better able to mitigate the risk of loss by broadening their insight into an applicant or employee.

Employers have three key areas for which they must ensure compliance: notice and disclosure to the consumer; authorization from the consumer; and adverse action notices.

First, before procuring the report, the employer must notify the consumer in writing that it may procure the report for employment purposes. Such notice must be "clear and conspicuous" and be a standalone document. Employers have found themselves in litigation when they have combined the disclosure with other information, such as state-required disclosures for consumer reports and other portions of the employer's job application. In combining the disclosure with other parts of the job application, the disclosure is no longer a standalone document, and thus results in an FCRA violation. Employers should review their FCRA disclosure form to ensure that it is a standalone document and free of extraneous information.

Second, in addition to notifying the consumer, the employer must obtain the consumer's authorization. Such approval must be in writing; however, it can be combined with the notice and disclosure (i.e. the notice will remain a standalone document even if it contains a signature line for the consumer). Consumers have the right to refuse authorization to the employer. In such instances, the FTC has issued an advisory opinion stating the employer is not prohibited under the FCRA from taking an adverse action against the employee or applicant. Nonetheless, the employer should consult with their legal counsel prior to taking such action to ensure compliance with other state or federal employment statutes.

Third, if, after reviewing the consumer report, the employer intends to take an adverse action against the consumer, the employer must deliver a "pre-adverse action" notice to the consumer. An adverse action is defined as a "denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee." For example, if an employer denies a current employee a promotion based in part upon information contained in the employee's credit report, the employer must provide the employee with a pre-adverse action notice advising the consumer that the information within the report may cause the employer to take an adverse action against the consumer based upon, at least in part, the information contained within the report. The pre-adverse action notice must include a copy of the report along with a copy of the FCRA "Summary of Rights". While the title is self-explanatory, the "Summary of Rights" notice provides the consumer with a summary of the consumer's rights under the FCRA including, most importantly, the consumer's right to dispute incomplete or inaccurate information and the procedure a consumer reporting agency must follow in order to comply with the FCRA. A copy of the "Summary of Rights" notice is available through the CFPB's website.¹ The pre-adverse action must be provided to the consumer before a final decision is made and must allow the consumer "sufficient amount of time to respond" after receiving the report. Traditionally, employers wait five business days before taking the adverse action. However, as the FCRA does not specify a "sufficient amount of time", employers should consider waiting even longer in order to further insulate themselves from potential FCRA litigation.

If, after a sufficient amount of time has elapsed, the employer moves forward in taking the adverse action, the employer must provide the consumer with an adverse action notice within three business days of taking the action. The adverse action notice must include the following: a statement that an adverse action has been taken in whole or in part based upon the consumer report received from the credit reporting agency ("CRA"); the name, address and telephone number of the CRA that furnished the report; a statement that the CRA did not make the decision to take the adverse action and is unable to provide the consumer with specific reasons as to why the adverse action was taken; and a statement that that the consumer may request a free copy of a report and may dispute with the CRA the accuracy of completeness of any information within the report.

If an employer fails to comply with the requirements of the FCRA, a consumer does have a right to bring a private cause of action, and the damages could be substantial if the action is

¹ Available at: <http://www.consumerfinance.gov/learnmore>

brought as a class action. The FCRA provides that an employer can be held liable for willful or negligent noncompliance. Under the statute, an employer who is found in willful noncompliance of the FCRA is liable for the consumer's actual damages in an amount of at least \$100 but no more than \$1,000, attorney's fees, and, most importantly, punitive damages. If an employer is only found to be negligent, the employer is still required to pay the consumer's actual damages and attorney's fees; however, it is not liable for punitive damages. Unlike willful violations, the FCRA does not establish minimum and maximum amounts for a consumer's actual damages. The consumer must establish what damages, if any, they incurred as a result of the violator's actions. Clearly, when a case can be made, plaintiffs' counsel are eager to file suit for an employer's willful violation of the FCRA, in order to tap into the treasure trove made available through statutory and punitive damages.

In order to be found in "willful" violation of the FCRA, the U.S. Supreme Court in *Safeco Ins. v. Burr* held that the violator must have acted with an intentional or reckless disregard of its statutory duty. The defendant in *Safeco* had adopted procedures relating to its adverse action notices, which were based upon the defendant's erroneous interpretation of the FCRA. The Supreme Court held the defendant's interpretation of the statute was not "objectively unreasonable" and therefore fell short of reckless disregard. District courts have adopted this "objectively unreasonable" standard in evaluating whether an employer's actions comply with the FCRA. For example, district courts have analyzed alleged violations of the requirement that the notice and authorization be set forth in a standalone document. A New York district court denied an employer's motion to dismiss a willfulness claim after finding that the employer's inclusion of a liability waiver within the notice was an "objectively unreasonable" interpretation of the FCRA. Conversely, in another opinion addressing the standalone requirement, a Minnesota district court found the employer's inclusion of a state-required disclosure on the notice was an objectively reasonable interpretation of the FCRA. Accordingly, the court granted the employer's motion to dismiss.

To summarize these recent developments in FCRA litigation, although an employer can certainly hang its hat on the "objectively reasonable" standard if it finds itself in litigation, the more cautious approach would be to ensure its policies and procedures comply with the FCRA under a strict interpretation of the statute.

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