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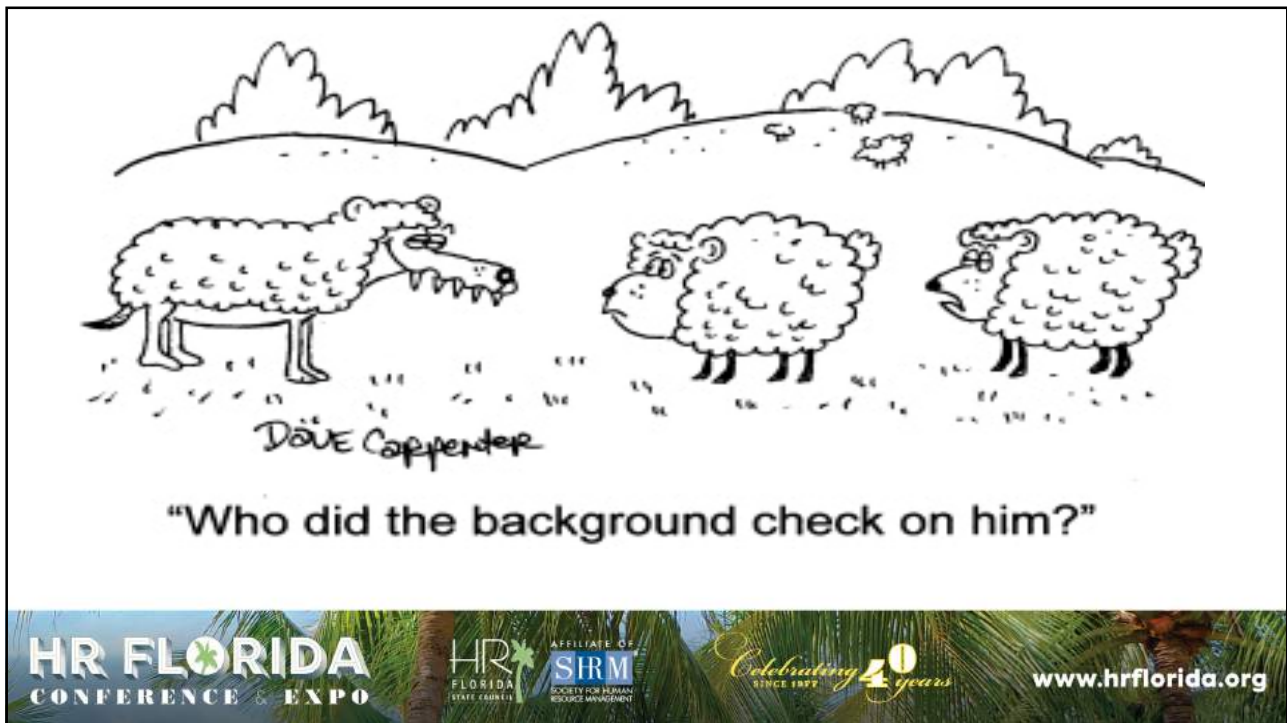
FCRA Class Actions Still the Cash Cow

August 29, 2018

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Potential Liability Relating to Background Checks

- Fair Credit Reporting Act (FCRA)
- Restrictions on Criminal Background Checks
- Use of Credit Reports





FAIR CREDIT REPORTING ACT

When Does the FCRA Apply to Background Checks?

- An employer uses a third party to verify
 - Educational background
 - Job history
 - Criminal record
 - Credit history
 - Driving record
 - Other information
- Could include paid third-party social media search

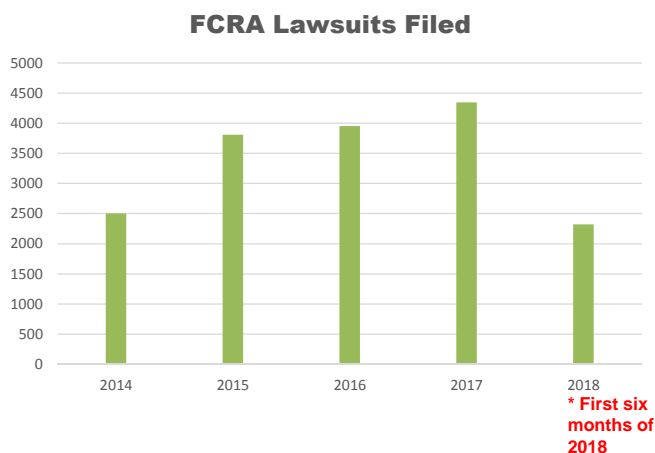
Litigation Explosion

- FCRA lawsuits are the latest trend in employment litigation
- Class Action Suits
- Multi-Million Dollar Settlements



Litigation Explosion

- Number of lawsuits filed has risen by more than 50 percent in 5 years



Significant Financial Exposure

- FCRA statutory penalties range from \$100.00 to \$1,000.00 per consumer report
- No harm required to secure judgment, but actual damages (money) also are available for lost employment, lost income, emotional distress **(punitive damages for willful violations)*
- Attorneys Fees shift **(for plaintiffs' lawyers, this is the golden ticket)*



Big Settlements Spur More Litigation

- Publix \$6.8 million (March, 2014)
 - 90,000 potential class members
 - Single Line FCRA Release
- Food Lion \$3 million (March, 2015)
 - No “Stand-Alone” Disclosure
 - No pre-adverse action notice



Big Settlements Spur More Litigation

- Home Depot \$1.8 million (April, 2014)
 - FCRA Disclosure and release of liability on one form
- Chuck E. Cheese \$1.75 million (July 2015)
 - Checks to class members \$38 - \$63. Attorneys fees \$577,000.00



FCRA General Rules

FCRA is primarily concerned about three specific time periods:

1. Before you obtain a consumer report
2. Before you take adverse action based upon the contents of a consumer report
3. After you take adverse action based upon the contents of a consumer report



Before You Obtain a Consumer Report

- “Notice” or “disclosure and authorization” requirements:
 - Written notification to applicant or employee that employer may obtain a consumer report for employment purposes
 - Obtain written consent to obtain the report
- Stand alone Document:
 - Notice or disclosure must be “clear and conspicuous” and contained in a document that consists solely of itself.

Before You Take Adverse Employment Action

- Provide a copy of the consumer report and State FCRA law to applicant or employee.
- Provide “Summary of Rights Under the Fair Credit Reporting Act.”
- Wait a “reasonable amount of time” before taking adverse action.

After Taking Adverse Employment Action

- Provide notice of the adverse employment action
- If applicable, provide credit score disclosures
- Provide contact information for the consumer reporting agency and advise that the agency did not make the adverse action decision and cannot provide specific reasons for it
- Advise of rights with respect to the consumer reporting agency:
 - to obtain a free copy of the consumer report within 60 days
 - to dispute accuracy or completeness of the information in report

Sampling of Recent Lawsuits

- Hargrett v. Amazon Fulfillment Center – Consolidation of two 2015 claims at newly opened fulfillment center in Ruskin, Fla., that Amazon failed to provide applicants with stand-alone disclosure or authorization forms, and disclosure form contained “extraneous” information concerning state laws and a release of claims.
- Amazon moved to dismiss, which was denied. Claim settled in March 2018, details were confidential.

Sampling of Lawsuits

- Kenneth Blair v. Mapco Express, Inc. 2017 claim in U.S. District Court, Tennessee, a class action, after Mapco rejected his job application but failed to provide him a copy of the adverse background check, thus denying him opportunity to explain or correct the adverse information.
- Mapco had retained Sterling Infosystems, Inc. to conduct background checks.
- Case remains pending.

Sampling of Lawsuits

- Culbertson v. Disneyland – 2017 lawsuit filed in California Superior Court, which court certified as a class action, alleged Disneyland did not provide applications copies of an adverse background check report before rejecting their application, thereby depriving them of an opportunity to contest an inaccurate report.
- Court tentatively granted Disneyland summary judgment in February 2018, case still pending.

Sampling of Recent Lawsuits

- Poole v. Check 'N Go, alleging violation of the FCRA's stand-alone document requirement where the employer used an online authorization form that contained nine paragraphs spanning two pages and requested certain information from the applicant regarding criminal history, equal employment opportunity status, and other information
- Castro v. Michaels Stores, alleging a violation of the FCRA in that Michaels Stores, Inc.'s notice was embedded in an online web page application and because it included a liability release

Sampling of Recent Lawsuits

- Rumph v. Nine West Holdings, Inc., alleging a violation of the FCRA where Nine West's notice did not use the term "consumer report" and contained extraneous language including shipping information, privacy policies, philanthropy opportunities, and other unrelated store information
- Mack v. Panera Bread, alleging that Panera violated the FCRA's stand-alone disclosure requirement because it contained at-will language, hours of work, and a disclaimer
- Mack v. American Multi-Cinema (AMC), same as *Panera*, plus notice and authorization did not contain the term "consumer report"



CRIMINAL BACKGROUND CHECKS

“Ban the Box” Or “Fair Chance” Movement

- Legislation limiting criminal background check information
- Passed in 31 states, the District of Columbia and 150 cities/counties
- 11 states and 17 cities and counties apply to private employees (As of April 2018)



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Ban-the-Box Private Employers

- Various Restrictions on Timing of Inquiries:
 - Completion of initial screening (Seattle, WA)
 - When selected for interview (Illinois and Minnesota)
 - First interview (Massachusetts, Oregon, Rhode Island)
 - After first interview (Buffalo, NY; Montgomery County, MD; New Jersey; Rochester, NY; Philadelphia, PA; San Francisco)
 - After a conditional offer (Baltimore, MD; Columbia, MO; District of Columbia; Hawaii; Utah; New York City)

Ban-the-Box Private Employers

- Examples of Restrictions on Nature of Inquiry:
 - Youthful offender status
 - Arrests
 - Charges that did not result in conviction
 - Petty misdemeanor charges
 - Conviction or completion of sentence more than 5 years earlier

Ban-the-Box Private Employers

- Unique Requirements
 - Notice of Rights
 - San Francisco; District of Columbia
 - Notification requirements and delay in rescinding offer
 - Montgomery and Prince George Counties, MD; New York City; San Francisco
 - Provide copy of documents upon request
 - District of Columbia

Non-Ban-the-Box State Restrictions

Some states limit inquiries that may be made of applicants, but do not ban-the-box

- California
- Georgia
- Indiana
- Michigan
- Montana
- Nevada
- New York
- Ohio

EEOC and Arrest and Conviction Records

- EEOC initiated an investigative strategy targeting pre-hire selection criteria that impacts minorities
- National data suggests that criminal background checks have disproportionate impact on minorities because they have higher conviction rates
- Pepsi reached a \$3 million settlement with EEOC for using criminal background checks to screen applicants

Complying with the EEOC Guidance

- Do not ask about arrest records on the application
- Do not consider convictions that were sealed, eradicated, erased, annulled by a court, or expunged, or convictions that resulted in referral to a diversion program

Complying with the EEOC Guidance

- Include disclaimer on application:
 - Answering “yes” to these questions does not constitute an automatic bar to employment.
 - Company will consider various factors, including but not limited to the nature and gravity of the offense and the position for which you are applying.



Complying with the EEOC Guidance

- Conduct an individualized assessment of each conviction:
 - Nature/seriousness of the crime
 - Relation to the position's functions and qualifications
 - Number of occurrences
 - Applicant's age at the time of the conviction
 - Time elapsed since the crime
 - Applicant's entire work and educational history
 - Employment references and recommendations
 - Business necessity

To Check or Not to Check?

- Some reasons to check:
 - Provide safe work environment
 - Protect public assets and property
 - Avoid negligence claims for work-related misconduct by employees
 - Avoid attracting applicant pool of people with higher percentage of criminal records
- Consider limits on background checks:
 - After a conditional offer of employment is made
 - Checks for certain positions – safety sensitive, position of trust, unsupervised access to property, customers, vulnerable members of the public



CREDIT CHECKS

Credit Checks and EEOC

- “Inquiry into an applicant's current or past assets, liabilities, or credit rating, including bankruptcy or garnishment, refusal or cancellation of bonding, car ownership, rental or ownership of a house, length of residence at an address, charge accounts, furniture ownership, or bank accounts generally should be avoided because they tend to impact more adversely on minorities and females.”
- “[A]n employer must not have a financial requirement if it does not help the employer to accurately identify responsible and reliable employees, and if, at the same time, the requirement significantly disadvantages people of a particular race, color, national origin, religion, or sex.”

Credit Checks – Issues to Consider

- Can you show that such information is essential to the particular job in question (the “credit sensitive” position):
 - Fiduciary and financial responsibilities involving handling money
 - Job involves significant discretion regarding money:
 - Obvious example – CFO, High level manager
 - Accounts payable clerk, Billing
 - Cashier – closer case
- 11 states restrict use of credit checks
- Make sure you comply with the FCRA



ACTION ITEMS

Establish and Follow a FCRA Compliant Process

- ✓ Determine what “consumer reports” you use
- ✓ Notice and Authorization
- ✓ Pre-Adverse Action Notice
- ✓ Adverse Action (after a reasonable amount of time)
- ✓ Don’t rely on what you find on the internet – or even what other employers do
- ✓ Consider having an expert do a privilege audit

Review Your FCRA Documents!

- ✓ Stand-alone Document – ensure that notice is a separate document that consists solely of the disclosure:
 - Be careful if you GO GREEN!
 - And forget the staples too!
- ✓ Ensure that the notice is “clear and conspicuous”
- ✓ Comply with state law requirements
- ✓ Consult your Lawyer to obtain FCRA compliance assistance

Criminal Background Checks

- ✓ Review application
- ✓ Train recruiters and supervisors
- ✓ Comply with FCRA
- ✓ Document all “no hire” decisions based on criminal records
- ✓ Describe the individualized assessment

Credit Checks

- ✓ Review applicable state laws
- ✓ Consider limited use based upon job responsibilities
- ✓ Consider periodic checks for current employees
- ✓ Comply with FCRA
- ✓ Document all “no hire” decisions based on credit checks

EEOC Enforcement Focus

- Arrest and Conviction records
- “Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964.”
- Issued on April 25, 2012 . . . and still on the screen radar

EEOC Strategic Enforcement Plan

- Unknown what changes might be made by Trump Administration
- There are reasons to believe the focus will change in 2018 and 2019
- As of now, six national priority areas have been identified, including:
- Eliminating systemic barriers in recruitment and hiring

Eliminating Barriers

- Focus on class-based recruitment and hiring practices
- Systemic barriers which have disparate impact on protected groups
- EEOC will look closely at exclusionary policies or practices
- Dates of birth inquiries
- Channeling of applicants into specific jobs
- Screening tools – criminal and credit checks, pre-employment tests

Eliminating Barriers

- EEOC notes that it is “better situated” to pursue these subjects than individuals or the private bar — due to its greater access to data, documents and potential evidence



Arrest and Conviction Records

- EEOC initiated an investigative strategy targeting pre-hire selection criteria that impacts minorities
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- Pepsi reached a \$3 million settlement with EEOC for using criminal background checks to screen applicants

EEOC Systemic Investigations

- “Strategic law enforcement”
- Can begin as a single charge
- Requires significant resources to reply
- Can result in a large monetary settlement and changes in policies
- Criminal background/credit checks – one of targeted areas

Practical Implications

- “Garden-variety” individual charges grow into systemic investigations of overall application and hiring process
- Employer’s response to Charge is often “trigger” for systemic investigation
- “We treated Charging Party just like all other applicants pursuant to our policy” defense can open the door to a systemic focus

How Do You Know You're on Their Systemic Radar?

- Look for requests/subpoena from EEOC on:
 - Applicability of policies or selection criteria to sites beyond the one referenced in Charge
 - Applicant trend data involving other applicants, positions or locations beyond that specified in Charge
 - How selection criterion is relevant to job performance
 - HR database information

“Ban the Box” Movement

- Legislation limiting criminal background check information
- 29 states as of today have a “ban the box” law of some kind and more than 150 cities and counties do as well
- 11 states, 31 cities and counties have private sector “ban the box laws, and or extend their public sector laws to private employers who contract with a government entity

To Check or Not to Check?

- Studies show that the majority of employers conduct background checks on all potential new hires
- Some reasons to check:
 - Provide safe work environment
 - Protect employees and the public
 - Protect assets and property
 - Avoid negligence claims for work-related misconduct by employees
 - Avoid attracting applicant pool of people with higher percentage of criminal records

To Check or Not to Check?

- Consider limits on background checks:
 - After a conditional offer of employment is made
 - Checks for a limited number of positions – safety sensitive, position of trust, unsupervised access to property, customers, vulnerable members of the public

To Check or Not to Check?

- According to recent testimony of a Justice Department official – one in three Americans has some sort of criminal record.
- Employers must strike a balance – protecting the public, employees and assets and maintaining a legally defensible criminal background policy.
- Tallying up the population of states and localities with a “fair chance” law or policy – 236 million people in the U.S. live in a jurisdiction with some form of ban the box or fair-chance policy

Are There Down Sides to Checks?

- According to inmate advocates, yes, including:
- 70 million U.S. adults with arrests or convictions, left out of the workforce despite skills and qualifications;
- Reduced national economic output of \$78 to \$87 billion by denying those workers access to employment;
- Employment is a significant factor in reducing re-offending.

What Is a Fair Chance Policy?

- A policy that either eliminates the “criminal conviction” question on job applications, or;
- Delays background checks until later in the hiring process;
- Considers the type of offense, time lapsed since offense, evidence of restitution to victim(s)



Complying with the EEOC Guidance

- Assure compliance with the Fair Credit Reporting Act and comparable state laws
- Provide proper disclosures
- Get required authorizations
- Provide proper adverse action notices



Complying with the EEOC Guidance

- **Do not** ask about arrest records on the application
- When considering arrests:
 - Independent investigation
 - Underlying conduct
- **Do not** consider convictions that were sealed, eradicated, erased, annulled by a court, or expunged, or convictions that resulted in referral to a diversion program.

Complying with the EEOC Guidance

- Conduct an **individualized assessment** of each conviction:
 - Nature/seriousness of the crime
 - Relation to the position's functions and qualifications
 - Number of occurrences
 - Applicant's age at the time of the conviction
 - Time elapsed since the crime
 - Applicant's entire work and educational history
 - Employment references and recommendations
 - Business necessity

Complying with the EEOC Guidance

- Maintain a policy that requires job-relatedness and business and necessity for such inquiries
- Tailor it to the EEOC's Guidance – for each position consider:
 - The nature and gravity of the offense or conduct, including the harm caused, the specific elements of the crime, and whether it was a felony or misdemeanor;
 - The time that has passed since the offense or conduct and/or completion of the sentence; and
 - The nature of the job held or sought.

Complying with the EEOC Guidance

- Do not maintain a blanket “no conviction” policy
- Train hiring managers
- Carefully prepare application questions
- Include disclaimer on application:
 - Answering “yes” to these questions does not constitute an automatic bar to employment.
 - Company will consider various factors, including but not limited to the nature and gravity of the offense and the position for which you are applying.

Document Your Decision

- Document all “no hire” decisions based on criminal records
- Describe the individualized assessment



Revised Criminal Background Check Policy

- Consider running criminal background reports after interviewees have been identified or after extending contingent offer of employment
- Consider running criminal background checks on particular jobs supported by studies or statistical evidence, and consider requesting information for specific offenses:
 - **Bouncer** Felony conviction involving violence in the past five years
 - **Bartender** Felony conviction involving theft in the past five years
- Make an individualized assessment

To-Do List

- Review your current policy and job classifications to determine job relatedness
- Revise policy and document your considerations and supporting information
- Create a process to allow applicants to submit individual information
- Perform legal review of revised policy
- Train hiring managers and decision makers



FINAL QUESTIONS



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