FCRA Class Actions

Insights
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Hyping The "Hyper-technical"

The slowly rising waves of Fair Credit Reporting Act (FCRA) class-action litigation are beginning to crash against employers. And if you thought that the FCRA only applied to credit bureaus and creditors, it's time to think again.

The FCRA applies to any business, large or small, that uses a consumer report for employment purposes. For instance, maybe you recently obtained a consumer report about a job applicant. Or, maybe you used one to decide whether to promote or terminate an employee. If any of those situations sound familiar to you, maybe now is the time for you to check whether you are in compliance with the FCRA – or you could find yourself on the receiving end of the next FCRA class actions in which recent settlements have exceeded $1 million.

FCRA class actions can be a compliance nightmare for employers because they tend to focus on hyper-technical noncompliance with the FCRA. Indeed, the vast majority of recent lawsuits have alleged deficiencies in an employer's pre-employment FCRA notice and disclosure forms. These deficiencies have ranged from including extraneous information to combining them with an employment application itself. Others have alleged failures to provide job applicants or current employees with certain post-adverse action disclosures.

Here is a sampling of some of the violations alleged in FCRA class actions from the past 12 months:

- *Hathaway v. Whole Foods Market California, Inc.* alleging that Whole Foods Market's disclosure violated the FCRA because it contained a waiver;
- *Ford v. Chuck E. Cheese's*, alleging that Chuck E. Cheese's practice of including the notice and authorization as part of a multipage printed employment application violated the FCRA;
- *Camacho v. ESA Management LLC*, alleging that inclusion of disclosure in an at-will job application violated the FCRA;
- *Cox Jr. v. Teletech@home Inc.*, alleging Teletech violated the FCRA's pre-adverse action notice requirements;
- *White v. Century 21 Department Stores*, alleging that Century 21 violated the FCRA by obtaining consumer reports without the requisite notice to and authorization from the applicant or

employee;

- *Cox v. Ozburn-Hessey Logistics, LLC*, alleging a violation of the FCRA's standalone disclosure requirement where the employment application contained sections regarding the applicant's background and equal employment opportunity status;
- *Poole v. Check 'N Go*, alleging violation of the FCRA's standalone 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;
- *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,* alleging that Panera violated the FCRA's standalone disclosure requirement because it contained at-will language, hours of work, and a disclaimer;
- *Mack v. American Multi-Cinema (AMC)*, alleging that AMC violated the FCRA because its notice and authorization did not contain the term "consumer report" and because they did not stand alone since they included additional language regarding at-will employment, information regarding hours of work, and a disclaimer; and
- *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.

In most of these instances, even though these are hyper-technical errors that often result in no actual damages to the plaintiffs, they can nearly financially cripple an employer. For instance, towards the end of 2014, a major food retailer sought approval of a $6.8 million deal to resolve an alleged violation of the FCRA's standalone document requirement and in March, another large grocery operation sought approval of a $2.99 million deal to settle similar allegations.

Using Consumer Reports The Safe Way

This is not meant to scare you away from using consumer reports for employment purposes. There is nothing wrong with it, and in some instances it makes perfect sense. But the lesson from the recent wave of FCRA class action litigation is clear: make sure that you do it correctly.

One of the main things to keep in mind about the FCRA when you use a consumer report for employment purposes is timing. In this regard, the 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; and 3) after you take adverse action based upon the contents of a consumer report.

First, prior to obtaining a consumer report on a job applicant or an employee, you must notify them in writing that you may obtain a consumer report for employment purposes and you must obtain

their written consent to obtain the report. These are commonly referred to as the "notice" or "disclosure" and "authorization" requirements.

One of the most important things in this regard is that your notice or disclosure must be clear and conspicuous and contained in a document that consists *solely* of it. This is commonly known as the "standalone document" requirement and, as you can see from some of the cases mentioned above, has been a central focus of some of the FCRA class-action litigation out there.

Second, before taking an adverse employment action based upon the contents of a consumer report, you must provide the job applicant or employee a copy of the consumer report and a description of their rights under the FCRA. Although it is not expressly required by the FCRA, courts have held that you should provide the applicant or employee with a reasonable opportunity to provide you with any information that disputes the contents of the consumer report.

Last, after taking an adverse employment action based upon the contents of a consumer report, you must provide the job applicant or employee 1) a notice of the adverse employment action; 2) certain statutorily mandated information regarding the disclosure of credit scores; 3) the contact information for the consumer reporting agency that provided the consumer report as well as a statement that the reporting agency did not make the adverse action decision and therefore cannot provide specific reasons as to why the adverse action was taken; and 4) a notice of their rights to obtain a free copy of the consumer report from the consumer reporting agency within 60 days and to dispute with the consumer reporting agency the accuracy or completeness of the contents of the consumer report. This section of the FCRA cannot be enforced by way of private civil actions; its enforcement rests exclusively with the Federal Trade Commission or other authorized federal agencies.

The Bottom Line

Maybe this all sounds a little confusing and overwhelming. It is daunting to hear day after day about multi-million dollar lawsuits being filed over what appear to be issues of hyper-technical compliance with the FCRA. Our advice? Let us work with you to review your current policies and craft a conservative approach. This will go a long way to minimize your risk of a violation of the FCRA, and lessen the chances of a class-action lawsuit.

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