

HIDDEN HIRING LANDMINE: FAIR CREDIT REPORTING ACT OBLIGATIONS

Publication
Sep 5, 2017

Every year, an increasing number of states and localities clamp down on an employer's ability to ask about applicants' criminal histories (our [update from earlier this year](#) provides a good primer). The good news is that employers in the hospitality industry have been adapting to ever-evolving "ban-the-box" laws for years now, and even those in jurisdictions without such laws are generally aware of the [EEOC Guidance](#) on the subject.

However, a recent flood of litigation indicates that employers are often less educated about their obligations under the Fair Credit Reporting Act (FCRA), an older and more complicated federal statute. This law requires employers to follow specific notice and disclosure procedures when obtaining and using consumer reports, such as background checks, from third-party consumer reporting agencies.

"BUT WE DON'T USE REPORTS FROM CONSUMER REPORTING AGENCIES... DO WE?"

Don't be fooled by the FCRA's name. The Fair Credit Reporting Act reaches well beyond mere "credit reports" from "credit reporting agencies," as most might initially understand the statute's terms. Instead, a consumer report may include information related to an employee or applicant's criminal background check, drug tests, driving records like DMV reports, employment history, credit checks, educational history, and general reputation or character.

Related People



Corey J. Goerd

Director of Pro Bono &
Community Engagement

404.240.4212

Service Focus

FCRA and Background
Screening

Industry Focus

Hospitality

Moreover, although an employer's obligations under the FCRA are only triggered when it requests such a report from a "consumer reporting agency," that term is broader than one might think. Under the FCRA, not only are the traditional credit score companies included, but also any person or company that regularly engages in the practice of assembling or evaluating consumer information – including information about employees or applicants – for the purpose of furnishing consumer reports to third parties, including employers. Because of these broad definitions, the FCRA covers many of the reports on which employers routinely rely to make employment decisions.

THE STEEP COSTS OF NON-COMPLIANCE WITH THE FCRA

Although Congress passed the law in 1970, FCRA litigation has more than doubled in just the last six years. According to [one source](#), nearly 4,000 litigants brought FCRA claims in 2016 *alone*. One reason for the recent surge in FCRA litigation is the law's provision that now awards damages between \$100 and \$1,000 for each individual violation. Because these cases are nearly always brought as class actions on behalf of large groups of employees or applicants, the damages can add up quickly. In addition, the law requires violators to pay successful plaintiffs' attorneys' fees.

The hospitality industry – which often sees high employee turnover, and places a special focus on protecting customer privacy and security – has seen its fair share of FCRA claims. For instance, courts have recently approved high-value settlements for alleged FCRA violations, and a number of hotel operators and holding companies are currently battling high-stakes FCRA claims.

THREE KEYS TO COMPLIANCE

In order to avoid costly litigation and classwide damages, you should keep three things in mind when using reports such as background checks, driving records, or credit checks in employment decisions: the FCRA requires employers who use covered reports to give applicants and employees specific disclosures and notices *before, during, and after* requesting or using a covered report.

Before requesting a consumer report, you must give the applicant or employee a clear and conspicuous notice of

your intent to do so. Crucially, the notice must be a standalone document without any other notices or unrelated information. A well-drafted notice will apply to your use of consumer reports in any employment-related context, including hiring, retention, promotion, and reassignment. The applicant or employee should acknowledge receiving this initial notice by signing and returning the original standalone document to your HR team.

Next, if you plan to take adverse action based on the information in a consumer report – like turning down an applicant or terminating an employee – you will need to provide a notice to the individual before finalizing your decision. The notice must be in writing, and it must include a copy of the consumer report and a description of the individual's rights under the FCRA. This requirement is meant to give individuals a reasonable period (generally at least five business days) to contest the accuracy or legitimacy of the report's contents.

Assuming you decide to go ahead with your decision, you will need to provide the applicant or employee a final notice of the adverse action once the reasonable notice period has passed. This notice should advise the individual of the intended action, provide the name, address, and phone number of the reporting agency, and inform the individual that they are entitled to obtain a free copy of the report from the consumer reporting agency within 60 days, and may dispute with the agency the accuracy and completeness of the information contained therein. The notice should also state that the consumer reporting agency did not make the employment decision and cannot provide the reason for the adverse decision.

Finally, compliance with the FCRA alone may not be sufficient by itself. Your company may also be subject to certain state and local laws relating to employers' use of consumer reports. Many states have passed laws that strengthen the FCRA's requirements, so you may have additional obligations, depending on where your company operates.

CONCLUSION

The FCRA disclosure and notice process can be confusing and difficult to administer. However, many employers don't realize the costly implications of seemingly minor violations

of the FCRA until it is too late. If you use any kind of background, credit, driving, or criminal reports to inform your employment decisions, you should review your policies and procedures to make sure your company is not unwittingly exposing itself to an FCRA class action lawsuit.

For more information, contact the author at CGoerdt@fisherphillips.com or 404.240.4212.