Sometimes Less Is More: Background Check Disclosures Can Go Too Far and Lead to FCRA Violations

Insights
9.16.21

Under federal law, an employer that conducts a background check for an applicant or employee must first provide written notice, also known as a disclosure, to that individual – but recent court decisions demonstrate how ill-advised attempts to provide that disclosure can lead to legal exposure. What have been the most common errors made by employers in this regard, and what can you do to avoid these pitfalls?

Understanding the Basics: What Does FCRA Require?

The Fair Credit Reporting Act (FCRA) is a federal law that requires you to make a disclosure to employees or applicants informing them that you will obtain a consumer report about them for employment consideration purposes. The form of the disclosure must meet very specific criteria set forth in the statute. Specifically, the FCRA requires that you must provide a "clear and conspicuous" written notice that consists "solely of the disclosure." In other words, the disclosure must be (1) clear and conspicuous; and (2) exist as a standalone document.

Ripe for Litigation

In recent years, FCRA lawsuits have become a cottage industry for savvy plaintiffs' attorneys. Oftentimes, FCRA claims take the form of class action lawsuits, which allow plaintiffs to collect a windful of penalties for ultimately "ticky tack" violations. In class action lawsuits, a plaintiff can sue and seek recovery on behalf of all individuals who received the faulty disclosure and for whom a background check was ran. Under the FCRA, an employer can be liable for either actual or statutory damages between $100 and $1,000 per disclosure and background check obtained per individual. These statutory penalties can quickly add up to seven-figure exposure, depending on the number of individuals who were issued the violating disclosure. Along with statutory penalties, a plaintiff who succeeds in proving that FCRA violations occurred will also be entitled to collect attorneys' fees and costs.

FCRA disclosure lawsuits are very appealing to plaintiffs' attorneys because of the straight-forward nature in establishing that a FCRA violation occurred. Unlike other consumer and employment law actions, where both sides must engage in voluminous discovery and where facts are oftentimes based on refutable he-said-she-said testimony, the facts of a FCRA disclosure lawsuit are relatively easy to establish. The disclosure either complies with the FCRA or it does not. To that end, a plaintiff

need only prove that a FCRA disclosure violation occurred – not necessarily that it resulted in any actual, calculable harm.

Troubling New Trend in FCRA Litigation

Unfortunately, developing case law interpreting the FCRA's disclosure requirements have only created more potential liability and pitfalls for unsuspecting employers. On many occasions, employers are not even aware of the potential disclosure issues because they assume that the template disclosures and notices provided by third-party background check companies are compliant with the ever-evolving FCRA disclosure requirements. This assumption is unfortunately not reality.

Recent case law from the Ninth Circuit's jurisdiction (covering nearly all the west coast, from Washington to Arizona, California to Montana, Alaska to Hawaii, and all places in between) has created harsh results for employers that utilized disclosures that contained seemingly common-place and otherwise well-intentioned terms. Indeed, courts have recently held that the FCRA was violated where a disclosure contained one of the following:

- **Liability waivers** (included in an attempt to absolve the employer of liability);
- **Notice and acknowledgment of the FCRA Summary of Rights** (which the Bureau of Consumer Financial Protection published and requires all employers to issue where background checks are obtained);
- **Multiple state-specific background check notices** not deemed relevant to that particular individual; and
- **Specific instructions** about how an individual can request and inspect the consumer reporting agency's files related to the background check.

It may seem counterintuitive to punish an employer for apprising individuals of all their rights related to the background check process. However, the "clear and conspicuous" and "standalone" disclosure requirements of the FCRA were implemented to ensure that the information required to be communicated in the disclosure is not muddied or obfuscated by any other information – even if that information is equally important.

What Have Courts Said?

For instance, in the seminal case *Gilberg v. California Check Cashing Stores, LLC* (2019), the Ninth Circuit Court of Appeals held that the operative disclosure violated the "standalone" requirement of the FCRA because the disclosure included additional information related to other non-California state background check laws, including requirements under Minnesota, Oklahoma, and New York, which were inapplicable to the plaintiff.

Similarly, in *Walker v. Fred Meyer, Inc.* (2020), the Ninth Circuit held that a FCRA violation occurred where the disclosure contained specific instructions and a recitation of rights regarding how an individual could request and obtain their background check from the third-party consumer reporting agency. In that case, the court even mentioned that such a provision was likely "included in good faith." Nevertheless, the Ninth Circuit found the employer liable because the disclosure no longer met the "standalone" requirement.

What Should You Do?

It is not uncommon for a template disclosure to contain at least one of the above violating elements – especially if it was not drafted in the past year. We highly recommend having counsel review your current background check disclosure, as well as any other notices issued during the background check process, since the court's interpretation of the FCRA disclosure requirements are frequently evolving. While this Insight focuses on west coast litigation, it is not uncommon for litigation trends to spread eastward – so employers across the country should be on guard about this troubling new trend. One simple misstep could potentially leave your organization dead-to-rights and open to substantial class action exposure for otherwise minor violations.

We will monitor these developments and provide updates as events warrant. Make sure you are subscribed to Fisher Phillips' Insight system to get the most up-to-date information. If you have questions, contact your Fisher Phillips attorney, the author of this Insight, or any attorney in our FCRA & Background Screening Practice Group.

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