Fair Credit Reporting Act Developments: Increase in Class Action Litigation

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Applicant background reports can be vital tools for employers, especially in the hiring process. However, amendments to the Fair Credit Reporting Act ("FCRA") significantly increase the rights of applicants and employees to receive certain disclosures and to choose whether to authorize certain background reports. Given the increase in litigation over these issues, employers (as well as their attorneys and investigators) are well-advised to pay close attention to the detailed requirements of the FCRA.

The FCRA requires that employers disclose to applicants that a background report may be obtained for employment purposes, and obtain signed authorization from applicants before procuring a background report. Further, the Act requires that employers provide applicants a copy of the background report and a summary of their rights under the FCRA before taking any adverse action (such as not hiring the applicant) based in whole or in part on information contained in the report. Finally, when an employer actually takes adverse action based in whole or in part on a background report, the employer must give the applicant written notice of the adverse action along with specific information about the consumer reporting agency which provided the background report.

While these requirements may appear straightforward, they contain subtle nuances that create a trap for employers who assume compliance. A procedural error in one instance is often exploited to allege widespread violations, which lead to costly and time-consuming class action litigation. The penalties quickly add up, as a simple $1,000 statutory penalty for a violation with respect to one applicant is multiplied by hundreds or thousands of potential class members to create millions of dollars in potential liability.

In recent years, several large companies have made headlines as they've paid out millions of dollars in settlement of FCRA class actions. The claims against most of these companies stem from an alleged failure to comply with the FCRA's authorization and disclosure requirements. Specifically, the plaintiffs alleged that their respective employer failed to provide the necessary stand-alone disclosures associated with conducting and using background checks in the employment context. [1]

While these large settlements have become more difficult to obtain in the wake of the United States Supreme Court's decision in *Spokeo, Inc. v. Robins*,[2] the threat of FCRA litigation is not going away.

According to ACA International, FCRA litigation has increased 47 percent in the last year and is expected to continue to surge.[3]

Employers should therefore be mindful of their background check procedures, and audit their forms and policies for compliance on a regular basis. As the law develops, practices that once were assumed lawful may have fallen into disfavor with the courts. Employers are therefore better served to proactively revise their procedures to conform to the most recent best practices, rather than defend them with the potential for millions in exposure if they are found unlawful.

[1] http://www.esrcheck.com/wordpress/2014/12/23/fcra-class-action-lawsuits-will-continue-increase-even-one-actually-harmed-2015/

[2] *Spokeo, Inc. v. Robins*, 578 U.S. ___; 136 S.Ct. 1540 (2016).

[3] https://www.acainternational.org/news/consumer-litigation-filings-show-universal-increase-in-january

Related People

Matthew R. Simpson
Partner
404.240.4221
Email

Service Focus

FCRA and Background Screening