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Blog Post

Background Checks and the Fair Credit Reporting Act: Keep It Simple!

September 22, 2020

Employers who conduct background checks, beware! It might be time to revisit your standard documents and screening processes to ensure they comply with the Fair Credit Reporting Act (FCRA). The number of lawsuits brought under the FCRA has more than doubled since 2009. FRCA litigation was the highest on record at the close of 2019, and continues to rise. Many of these cases have been brought on a class basis for purely procedural violations and resulted in multi-million dollar settlements.

The good news for employers is that in the context of FCRA compliance, less is more, and a quick review of current forms and practices can alleviate any concerns regarding potential exposure.

The FCRA For "Employment Purposes"

The FCRA was enacted to protect consumers by promoting the accuracy, fairness, and privacy of information maintained by consumer reporting agencies. Anytime an employer requests a "consumer report" on an applicant or employee, obligations under the FCRA are triggered. Consumer reports can include a broad range of categories, including driving records, criminal records, credit reports, and other reports from third parties, such as drug tests.

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Employers are required to both disclose their intention to obtain a consumer report *and* obtain written consent from applicants or current employees prior to requesting a consumer report. Upon receiving the consumer report, if the employer intends to take an adverse action, such as disqualifying the applicant or firing an employee, there are specific notice requirements the employer must follow. These two employer actions present the greatest risk for falling into noncompliance.

The Stand-Alone Disclosure and Authorization Form

Employers who wish to conduct background checks or obtain consumer reports of either job applicants or current employees must disclose to the applicant/employee that the employer may obtain a consumer report for employment purposes. The disclosure can be presented at the time of an employment application, but *should be a separate document*. The disclosure must be "clear and conspicuous" and must be in a "document that consists solely of the disclosure." In the case of the disclosure, less really is more. In an article on its website, the Federal Trade Commission (FTC) recommends avoiding complicated legal jargon or adding extra acknowledgements or waivers. The article also gives the following examples of what *not* to include in the disclosure form:

- Don't include language that claims to release you from liability for conducting, obtaining, or using the background screening report;
- Don't include a certification by the prospective employee that all information in his or her job application is accurate;
- Delete any wording that purports to require the prospective employee to acknowledge that your hiring decisions are based on legitimate, nondiscriminatory reasons; and
- Get rid of overly broad authorizations that permit the release of information that the FCRA doesn't

allow to be included in a background screening report – for example, bankruptcies that are more than 10 years old.

In addition to the disclosure form and the FTC form summary of rights, the employer must also receive written authorization from the applicant/employee to obtain the consumer report. The authorization can be included on the disclosure form, but employers should consider providing both a standalone disclosure form with a space for the applicant/employee to acknowledge having received the disclosure as well as a separate form that expressly authorizes the background check. While not exhaustive, the authorization should describe the types of consumer reports that might be sought. Employers routinely obtain consumer reports that include the verification of the applicant/employee's Social Security number; current and previous residences; employment history, including all personnel files; education; references; credit history and reports; criminal history, including records from any criminal justice agency in any or all federal, state, or county jurisdictions; birth records; motor vehicle records, including traffic citations and registration; and any other public records. The employer might also consider including language indicating that the applicant/employee understands that if any adverse action will be taken based upon the consumer report, then the applicant/employee will receive a copy of the report and a summary of their rights.

Note that employers who wish to use "investigative consumer reports" – which include information concerning a person's character, general reputation, personal characteristics, or lifestyle which is obtained through personal interviews – have additional obligations under the FCRA, including a separate disclosure form.

Adverse Action Notices: Preliminary and Final

Importantly, an employer who decides to disqualify an applicant or terminate an employee based partly or wholly on a consumer report obtained under the FCRA is taking an adverse action and therefore must provide ***two*** adverse action notices to the applicant/employee. The first notice is a preliminary adverse action notice, to be provided *prior* to taking the adverse action involving employment. The second notice is a final adverse action notice.

The preliminary notice of adverse action should do two things: (1) provide the applicant/employee with a copy of the report; and (2) provide or enclose a copy of a summary of the applicant/employee's rights under the FCRA.

The final notice of adverse action should advise the applicant/employee that an adverse action is being taken as a result of the consumer report that was previously provided to him/her. As part of the summary of rights under the FCRA, the applicant/employee has the right to dispute the accuracy or completeness of any information in the consumer report by contacting the agency directly. The applicant/employee can also request an additional free report from the agency if done within 60 days.

Alleged Violations Of The FCRA

In 2018, both a ride-share company and an internet retailer settled multi-million dollar class action lawsuits relating to allegedly improper notices and authorizations prior to conducting background reports. The plaintiffs in the ride-share class action alleged that the company failed to (i) provide proper notice that complied with the FCRA regarding its intention to procure background check reports; (ii) obtain proper authorization from the plaintiffs and other class members allowing the company to procure background check reports; and (iii) provide required information and copies of the reports to the plaintiffs and other class members before taking

adverse employment actions against them. The case was settled for $7.5 million.

In the internet retailer case, the plaintiffs alleged that the company violated the FCRA by lumping the stand-alone disclosure and authorization with other provisions on the last page of the company's online employment application. The disclosure form, according to plaintiffs, violated the "clear and conspicuous" requirement of the FCRA. While the company maintained that its disclosures complied with the FCRA, it ultimately agreed to a $5 million settlement and to changing its disclosure form.

State Considerations

While compliance with the FCRA appears relatively straightforward, employers should be cognizant that some states have their own laws which, while appearing to be substantially similar (and even identical) to the FCRA, both the FCRA and identical state law may necessitate *separate* standalone disclosure forms. For example, both the FCRA and California's Investigative Consumer Reporting Agencies Act (CICRAA) require employers who use consumer reports as part of the hiring process to provide the "clear and conspicuous" disclosure in a document that consists *solely* of the disclosure. The language used in both Acts is *identical*, which might lead an employer to reasonably believe that it could provide *one* standalone disclosure form, alerting the applicant that a consumer report would be sought. Nonetheless, the Ninth Circuit in the 2019 case *Gilberg v. California Check Cashing Stores, LLC*, Case No. 17-16263 (9th Cir. Jan. 29, 2019) concluded that combining FCRA and state disclosures into one disclosure notice violated the FCRA because it contained extraneous and irrelevant information that went beyond what the FCRA itself requires. For the same reason, the disclosure violated the CICRAA.

Conclusion

Employers need not risk potential exposure to class action lawsuits on the basis of violating the

disclosure, authorization, and adverse action notice requirements under the FCRA. Employers already conducting background checks or using consumer reports as part of pre-screening or routine employment process may want to contact their Akerman attorney to help review their practices to ensure they are not unwittingly violating any provision of the FCRA or similar state laws.
