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Avoid a Lawsuit: 5 Things Employers Should Know About the FCRA

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It's not easy keeping up with the legal trends in **employment background screening**. One of those trends is the recent wave of lawsuits being filed against employers for violations of the **Fair Credit Reporting Act (FCRA)**. The FCRA is a federal consumer protection statute that regulates the screening process. It's not a new law, but the explosion of litigation and the increased scrutiny of employment background checks *is* new, and should be on every employer's radar.

Investing in some preventive FCRA compliance measures can really pay off, since recent settlements are costing employers millions of dollars. As a starting point, check out the top five things employers should know about the FCRA.

1. Beware the FCRA Class Action Lawsuit

FCRA actions have typically been brought by individuals who miss out on a job opportunity due to a problem through their background check. It doesn't help that the slow economic recovery from the Great Recession has certainly increased the competition for available jobs. When job applicants are turned down, they are looking more closely at the background check that eliminated them.

While not the norm, there has always been a steady flow of claims brought by individual applicants questioning the results of employment background checks. However, the class action lawsuit is becoming increasingly more common. If a claimant can demonstrate that she represents a "class" of litigants who have all been similarly disqualified based on an FCRA violation, employers quickly find that they are defending claims against thousands of applicants at once.

An unprecedented wave of FCRA class action claims have been filed over the past 18 months, a trend facilitated by an enthusiastic trial bar. One reason for this trend is simple…and you probably already guessed it—money. The FCRA is a perfect vehicle for class action litigation—a successful claim can recover statutory damages between $100 and $1000 per violation, attorney's fees, punitive damages and costs as well as actual damages. The bigger the class, the more lucrative the claim. Larger companies have been the obvious targets, but smaller employers are also at risk.

2. Prior Consent and Disclosure is Required

One of the fundamental requirements of the FCRA is to have written authorization and disclosure from a job applicant or employee prior to conducting an employment background check. **The authorization and disclosure must stand alone**, and should not be combined with other forms or hidden within the job application. Despite this fairly straightforward requirement, many employers are still getting this wrong.

Just last week, Whole Foods was slapped with a potential class action claim based on the authorization and disclosure form on its web based job application. I blogged on the details of that case here. Last year, Domino's Pizza paid out a $2.5 million settlement in a class action case that was based in large part on the legality of Domino's "Background Investigation and Consent Form." **The Plaintiffs in *Singleton v. Domino's Pizza LLC*** claimed that Domino's buried the disclosures on the fifth page of a multi-page job application and inserted a liability release and other extraneous information into the authorization.

The wording here is key—the authorization and disclosure forms cannot be combined with any other form or contain extraneous information. Here are a few tips:

- **DO NOT** add waivers or disclaimers of liability to authorization forms.
- **DO** set out what type of background check is being conducted, who is conducting the check, and how to contact them.
- **DO** make sure that valid signatures– including e-signatures– are obtained **before** moving forward with the background check.

3. Job Applicants Are Entitled to Receive Adverse Action Notices—No Excuses!

Another essential requirement of the FCRA is adverse action notification. Adverse Action is a **two-step process**that must be followed strictly by the book, and many employers get tripped up by skipping one or even **both** steps.

- **Step one, the "pre-adverse action" notice**, is sent to the applicant prior to making a not to hire decision based on the background check. You have to provide the applicant with a notice, send them a copy of the report, and attach a Summary of Rights under the FCRA.
- **Step two, the "adverse action" notice**, is sent *after* the final decision has been made and must contain information on how to dispute the background check.

The rational for having two steps is to give the applicant an opportunity to challenge the accuracy of the report before the final decision has been made. This is where some employers are getting it wrong. Employers will send out the pre-adverse notice, but are not routinely attaching a copy of the report or the **FCRA Summary of Rights**. Other employers are sending a pre-adverse notification, but not following up with a second notice of adverse action when a not to hire decision has been made.

CVS is currently defending a claim that it did not provide applicants with a copy of the background report, or the written copy of the Summary of Rights. In another recent case, **Kmart paid out $3 million to settle a class action** surrounding its adverse action process. The plaintiff alleged that he received a copy of his background report along with an outdated Summary of Rights under the FCRA. According to court documents, the plaintiff contacted Kmart, and a representative informed him that once a report was "in the system" nothing could be done to rectify the situation and he would not be hired.

In yet another recently filed case, **Disney is defending a class action** where the plaintiff alleges that Disney did not provide him with a copy of the background report, did not issue a pre-adverse action notice, and never sent the applicant written notice of adverse action.

Here are some tips to follow for adverse action:

- Be sure to provide the current versions of all required notices.
- Attach a copy of the background check to the pre-adverse action notice.
- Give the applicant a chance to challenge the results by sending the second adverse action notice.
- Remember that adverse action may be outsourced to your screening firm.

4. Send a Complete Copy of the Report

If the background file is incomplete or excludes information that was used in the hiring decision, the Plaintiff may have grounds for action against both the screening company and the employer. In another current class action case, **Moore v Rite Aid** the plaintiff claims that Rite Aid and the background screening company acting on Rite Aid's behalf did not provide Moore with the whole report. She claims the company left out a copy of an "admission statement" referenced in the report when it provided her with a copy of the background check.

By routinely omitting a key part of the background report, Moore claims that Rite Aid systematically prevented hundreds of applicants from receiving complete reports and thus making it impossible to challenge the accuracy of the information. Rite Aid is now fighting allegations of willful violations of the FCRA including claims for actual damages, statutory damages, punitive damages, costs and reasonable attorney's fees.

To avoid this type of claim under the FCRA, make sure you (or your background screening company) sends a complete copy of the background check report to the applicant.

5. State Laws

Last but not least—as if it weren't hard enough to keep up with the FCRA—watch out for state laws. **Some states have their own consumer protection laws that were passed before the FCRA was enacted, so federal preemption does not apply.** Many states limit the type of records an employer can consider in hiring. For example, California, Minnesota, and Oklahoma have their own requirements for employment background screening consent forms, and job applicants in those states are entitled to request copies of their reports at the time they authorize a background check. Other states limit the information employers can use in the screening process, enforcing different standards for the use or arrest information and older cases.

Given the size of some of these settlements, I expect that the number of FCRA class actions will continue to grow in 2014. Employers should keep in mind the importance of the FCRA and how quickly an isolated negative candidate experience can result in a class action. Following each of these best practices could save your company millions of dollars, not to mention the possible damage to your reputation from a lawsuit.

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