A Timely Analysis of Legal Developments

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Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014

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In 2013, the ballooning number of employment class actions illuminated the sea change in Fair Credit Reporting Act (FCRA) litigation. The FCRA was enacted in 1970 during President Nixon's administration, and is hardly in its adolescence. FCRA claims against employers, even class action lawsuits, are far from novel. Historically, though, such employment claims were infrequent and did not distract the plaintiff's bar from the feeding frenzy provided by wage and hour laws. Now, the storm clouds undoubtedly are gathering under the FCRA, and thus the investment by employers in fortifying their FCRA compliance is likely to pay substantial dividends. Below, we summarize the FCRA and offer five recommendations for weathering the stormy seas in 2014.[1]

Summary of FCRA Obligations on Employers that use Consumer Reports for Employment Purposes

Despite the use of the term "credit" in the statute's name, the FCRA does far more than regulate the exchange of consumer credit information between the nationwide credit bureaus (*e.g.*, Experian, Equifax, and Transunion) and creditors in connection with mortgage lending and other consumer credit transactions (*e.g.*, credit reports). The FCRA also regulates the exchange of consumer information between employers that use, and consumer reporting agencies (or CRAs) that provide, screening reports that include credit history and many other types of information. Generally speaking, employers must comply with the FCRA when they order virtually any type of report from a CRA, including reports derived from public record sources (*e.g.*, criminal and motor vehicle records checks). Thus, the FCRA has for over four decades imposed requirements on employers that use "consumer reports" or "investigative consumer reports" for employment purposes. A consumer report is generally known as a "credit report" or a "background check report" prepared by a CRA, whereas an investigative consumer report is a special type of consumer report whereby the CRA obtains information through personal interviews (*e.g.*, an in-depth reference check).

1 For more detailed coverage of the FCRA's requirements on employers, *see* Rod M. Fliegel and Jennifer L. Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011), *available at* http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin; Rod M. Fliegel, Jennifer L. Mora and William Simmons, F*air Credit Reporting Act Amendment Offers Important Protections From Lawsuits Targeting Background Check Programs*, Littler Report (Sept. 10, 2013), *available at* http://www.littler.com/publication-press/publication/fair-credit-reporting-act-amendment-offers-important-protections-lawsu.

Broadly speaking, the FCRA's primary requirements on employers may be divided into two categories: requirements that employers must follow (1) *before* they obtain a consumer report from a CRA, and (2) *if* they take "adverse action" against an individual based in whole or in part on information contained in the consumer report (*e.g.*, if the job applicant interviewed poorly, but also had a history of felony convictions).

Before an employer may obtain a consumer report from a CRA, typically it must make a "clear and conspicuous" written disclosure to the consumer, in a document consisting "solely" of the disclosure, that a consumer report may be obtained. The applicant or employee must provide written permission before the employer can obtain a consumer report for employment purposes. The employer also must make a certification to the CRA regarding its "permissible purpose" for the report, and its compliance with relevant FCRA provisions and state and federal equal opportunity law. If the employer intends to obtain an "investigative consumer report" on an applicant or employee, the employer must also allow the individual to request information about the "nature and scope" of the investigation, and the employer must respond in writing to any such request within five days from either the date of the request or when the report was obtained, whichever is later.

After the employer obtains the report, the employer must follow certain requirements *if* it intends to take "adverse action" against the applicant or employee based in whole or in part on the contents of the report. In the context of a consumer report used for employment purposes, an adverse action broadly includes "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee."

Before the employer implements the adverse action against the applicant or employee, the employer must provide a "pre-adverse action" notice to the individual, which must, at a minimum, include a copy of both the consumer report and the Consumer Financial Protection Bureau's (CFPB) Summary of Rights.[2]

Once the employer is prepared to take the adverse action against the applicant or employee, it must then provide an adverse action notice to the individual. The adverse action notice, which can be made in writing, orally, or by electronic means, must, at a minimum, contain the following information:

1. The name, address and telephone number of the CRA that provided the report to the employer;
2. A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made;
3. A statement setting forth the applicant's or employee's right to obtain a free disclosure of his or her report from the CRA if the applicant or employee makes a request for such a disclosure within 60 days; and
4. A statement setting forth the applicant's or employee's right to dispute directly with the CRA the accuracy or completeness of any information contained in the report that the CRA provided to the employer.

Potential Liability for FCRA Non-Compliance

The FCRA affords a private right of action against an employer for "negligently" or "willfully" failing to comply with any of the FCRA's requirements. A civil action must be brought by the earlier of: (1) two years after the date of discovery by the plaintiff of the violation; or (2) five years after the date on which the violation that is the basis of the alleged liability occurred.

The range of available damages varies for negligent and willful violations. An employer that negligently fails to comply with any requirement of the FCRA with respect to an applicant or employee is liable for: (1) actual damages sustained by that individual; and (2) reasonable attorneys' fees and costs. An employer that is found to have willfully failed to comply with the FCRA is liable for: (1) actual damages or statutory damages ranging between $100 and $1,000; (2) punitive damages; and (3) reasonable attorneys' fees and costs.

The U.S. Supreme Court has held that, to prove a "willful" violation of the FCRA, a plaintiff must demonstrate that the company either "knowingly" or "recklessly" acted in violation of the FCRA.[3] In various contexts, businesses have asserted the lack of willfulness as a defense in class action litigation, most successfully when the particular statutory provision is susceptible to more than one reasonable interpretation.

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2 *See* Rod M. Fliegel and Jennifer Mora, *Employers Must Update FCRA Notices for Their Background Check Programs Before January 1, 2013*, Littler ASAP (Sept. 4, 2012) *available at* http://www.littler.com/publication-press/publication/employers-must-update-fcra-notices-their-background-check-programs-jan.

3 *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 69 (2007).

Class Action Illustrations

While the liability related to individual lawsuits or regulatory actions certainly is sufficient to deter non-compliance, another growing risk to employers is class action suits alleging that employers have willfully failed to comply with some of the FCRA's requirements as to all applicants or employees, such as by failing to obtain proper authorizations from, or provide a copy of the background reports to, applicants or employees *before* adverse action is taken. One of the first high-profile FCRA cases against an employer involved a settlement of over $5 million with a transit provider. Recently, however, several other multi-million dollar settlements were reached based on alleged technical violations of the FCRA by employers:

- a national retailer reached a $3 million settlement;
- a national pizza delivery chain reached a $2.5 million settlement; and
- a trucking company reached a $2.75 million settlement.

FCRA class actions typically allege that the employer has not just failed to comply with a technical requirement of FCRA, but that the employer has done so willfully. The strategic reason for invoking the willful violation provision in class action litigation is to try to minimize the impact of individualized issues regarding causation and damages, which arise in connection with negligent violation claims.

Recommendations for Employers for 2014

1. Employers should arrange for a privileged review of their background check consent forms. A thorough review of these forms may help avoid the types of claims raised in an emerging line of cases that take issue with, for example, an employer's inclusion of text beyond the minimum necessary for FCRA disclosures.
2. Employers should implement procedures to help ensure that adverse action notices are sent at least five business days after the pre-adverse action notice. Employers should also consider how to best record personnel decisions such that, if necessary, the employer can prove that the reason an applicant was rejected was because of a poor interview, failure to provide requested follow-up information, drug test failure, etc., rather than based—*even in part*—on the background report.
3. Motor carriers—who already are in the crosshairs of the plaintiff's bar—should continue to vigorously monitor ongoing class litigation addressing the nature and extent of the mandatory disclosures to applicants that submit applications remotely, rather than by physically visiting one of the employer's terminals. In one surprising federal district court opinion, the court ruled that, when trucking applicants do apply remotely, compliance with the motor carrier provisions in the FCRA is *mandatory*, not optional, which means that it is no defense for the motor carrier to say that it complied with the requirements applicable to non-motor carriers.
4. Employers should be mindful of their duties when contacted by a CRA about information they provided about a former employee, such as his or her employment history. As a so-called "furnisher" of information, employers must re-investigate any information provided to a CRA upon learning that the former employee has submitted a dispute about the accuracy of the information to the CRA.
5. Employers should carefully review which entity is designated as the "employer" on the FCRA paperwork, and ensure the reference is appropriately broad or narrow. In one recent federal district court opinion, the court allowed the plaintiff to pursue putative class action claims under the FCRA against several defendants within a corporate family because it was unclear which company in the family of companies would actually be accepting the job application and using the background check report.

Conclusion

Even a cursory review of the class action filings from 2013 reveals that the storm clouds are gathering under the FCRA. Thus, the investment by employers in fortifying their FCRA compliance is likely to pay substantial dividends.

Similarly, in 2014, employers should continue to watch for new local regulations relating to criminal records (such as the so-called "ban-the-box" laws)[4] and the Equal Employment Opportunity Commission's (EEOC) intensive systemic enforcement actions under anti-discrimination laws, such as Title VII of the Civil Rights of 1964.[5]

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4 *See* Rod Fliegel, Pam Salgado, Dan Thieme and Jennifer Mora, *Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes*, Littler ASAP (June 20, 2013) *available at* http://www.littler.com/publication-press/publication/seattle-adopts-ordinance-limiting-inquiries-and-use-criminal-records-e; Rod Fliegel and Jennifer Mora, *Rhode Island Enacts "Ban the Box" Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (July 17, 2013) *available at* http://www.littler.com/publication-press/publication/rhode-island-enacts-ban-box-law-prohibiting-employment-application-cri; Dale Deitchler, Rod Fliegel, Susan Fitzke and Jennifer Mora, *Minnesota Enacts "Ban the Box Law" Prohibiting Employment Application Criminal History Checkmark Boxes and Restricting Criminal Record Inquiries Until After Interviews or Conditional Job Offers*, Littler ASAP (May 17, 2013) *available at* http://www.littler.com/publication-press/publication/minnesota-enacts-ban-box-law-prohibiting-employment-application-crimi.

5 *See* Rod Fliegel, Barry Hartstein and Jennifer Mora, *EEOC Issues Updated Criminal Record Guidance that Highlights Important Strategic and Practical Considerations for Employers*, Littler ASAP (Apr. 30, 2012) *available at* http://www.littler.com/publication-press/publication/eeoc-issues-updated-criminal-record-guidance-highlights-important-stra.