

# The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers

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**AUTHORS**

Rod Fliegel

Jennifer Mora

William Simmons

### **IMPORTANT NOTICE**

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

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## **ROD M. FLIEGEL, ESQ.**

Rod Fliegel, Co-Chair of Littler Mendelson's Hiring and Background Checks Practice Group, has been practicing exclusively in the area of labor and employment law since he graduated from law school in 1993. Rod joined Littler's San Francisco office in 1997 and was elevated to shareholder in 2001.

Rod has broad subject matter experience and significant expertise in class action defense, the intersection of the federal and state background check laws (e.g., Title VII and the Fair Credit Reporting Act and their state law equivalents), and the intersection of the federal and state disability discrimination and family medical leave laws (e.g., the ADA, FMLA and California Fair Employment & Housing Act).

Rod also has extensive experience defending employers in state, federal and administrative litigation, including matters with the Equal Employment Opportunity Commission, the Federal Trade Commission, and the New York Office of the Attorney General. As the national coordinating counsel for a large nationwide retailer and a large nationwide background check company, Rod handles and oversees civil and administrative matters throughout the country.

## **JENNIFER L. MORA, ESQ.**

Jennifer Mora focuses her practice on representing and advising employers on a wide range of labor and employment issues, and has been doing so since graduating from law school in 2001. In particular, Jennifer has developed a special expertise in and advises employers and consumer reporting agencies on the intersection of federal and state background check laws (e.g., Title VII and the Fair Credit Reporting Act and their state law equivalents). Jennifer also defends employers and consumer reporting agencies in federal and state courts against claims brought under the Fair Credit Reporting Act and its state law equivalents.

Jennifer also represents and counsels employers in all aspects of traditional labor law, including investigating and responding to unfair labor practice charges filed with the National Labor Relations Board, assisting employers with collective bargaining negotiations and union campaigns, and arbitrating grievances involving employee discharges and contract interpretation issues.

## **WILLIAM J. SIMMONS, ESQ.**

William Simmons has been practicing exclusively in the area of labor and employment law since he graduated from law school in 2007. He regularly defends class action and individual litigation filed against employers and alleged pursuant to a variety of state and federal laws, including Title VII, the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Family and Medical Leave Act and the Fair Credit and Reporting Act. William advises employers in a variety of industries on employment policies and procedures including compliance with the array of state and federal laws governing hiring and background check practices.

The swelling tide of class action litigation against employers under the Fair Credit Reporting Act (FCRA)<sup>1</sup> is unmistakable. It cuts across all industries, including retailers, restaurant chains, theatre chains, manufacturers, financial institutions and transportation companies. To illustrate how the threat to employers is concrete, not merely hypothetical, close to a dozen nationwide class actions were filed in plaintiff-friendly venues during just June and July 2014. Three suits were filed by one firm on the same day in July.

These lawsuits can be frustrating for employers because typically they allege hyper-technical non-compliance with the FCRA (e.g., supposed defects in the employer's pre-employment forms and template notices). That is, the lawsuits appear to be lawyer-contrived cash grabs because no job applicant or employee possibly could have suffered any real harm. Nonetheless, prudent employers should be mindful of recent developments, including: (1) wide-spread publication of several significant seven-figure class action settlements; (2) the entry into the market of firms versed in wage and hour class actions; (3) pro-plaintiff outcomes in some federal courts; and (4) the lure of statutory damages awards to the plaintiff's bar when the U.S. Supreme Court has demonstrated a healthy measure of hostility towards class actions.

To be clear, the FCRA is widely known as the federal law that regulates the exchange of consumer *credit* information between the credit bureaus (e.g., Experian, Trans Union and Equifax) and creditors in connection with mortgage lending and other consumer credit transactions (e.g., credit reports). By its terms, however, the FCRA regulates also the exchange of information between *employers* and "consumer reporting agencies" (CRAs) that provide "consumer reports"<sup>2</sup> (i.e., background reports).<sup>3</sup> Further, the obligations that the FCRA imposes on employers are not only triggered when an employer orders a *credit* report from a CRA. Generally speaking, employers must comply with the FCRA when they order virtually *any* type of report from a CRA, including criminal and motor vehicle records checks.

For decades, it was uncommon to see lawsuits or government enforcement actions against employers under the FCRA. The plaintiff's bar and Federal Trade Commission (FTC) instead targeted the credit bureaus.<sup>4</sup> Now, times have changed. Compliance with the FCRA is indispensable for all employers that use background reports to make hiring and employment decisions. This Littler Report summarizes litigation trends and provides practical insights for mitigating class action risk.

## SUMMARY OF FCRA OBLIGATIONS ON EMPLOYERS THAT USE CONSUMER REPORTS

The FCRA imposes requirements on employers who use "consumer reports" or "investigative consumer reports" for employment purposes.<sup>5</sup> A consumer report is known as a credit report or a background 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).<sup>6</sup>

Broadly speaking, the FCRA's requirements on employers may be divided into two categories: (1) requirements that employers must follow *before* they obtain a consumer report from a CRA, and (2) requirements that employers must follow *if* they take "adverse action" against an individual based even in part on information contained in the consumer report.

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1 15 U.S.C. § 1681 *et seq.*

2 15 U.S.C. § 1681 a(d) ("Consumer reports are any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for ... employment purposes."). "The term 'employment purposes' ... means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee." 15 U.S.C. § 1681a(h).

3 In 1996, Congress passed the Consumer Credit Reporting Reform Act, an amendment that augmented the FCRA's specific protections for job applicants and employees. Appendix A sets out the primary employment-related provision.

4 The controversial Consumer Financial Protection Bureau (CFPB) now shares oversight of the FCRA with the FTC. 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>.

5 For a detailed discussion of the FCRA's requirements, see Rod Fliegel and Jennifer 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>.

6 15 U.S.C. §§ 1681a(d) and (e).

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 that consists “solely” of the disclosure that a consumer report may be obtained.<sup>7</sup> The applicant or employee must provide written permission for the employer to obtain a consumer report.<sup>8</sup>

The employer must also 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 laws.<sup>9</sup>

If the employer procures an “investigative consumer report,” additional disclosures are necessary, the employer must allow the employee 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.<sup>10</sup>

After the employer obtains the consumer report or investigative consumer report on an employee or applicant for employment, the employer must follow certain requirements *if* it intends to take “adverse action” against the applicant or employee based even in part on the contents of the report. An adverse action broadly includes “a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.”<sup>11</sup>

First, *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 include a copy of the consumer report and the statutory Summary of Rights.<sup>12</sup> This requirement affords the applicant or employee with an opportunity to discuss the report with the employer before the employer takes adverse action.<sup>13</sup>

If the employer ultimately intends to take the adverse action against the applicant or employee, it must then provide an adverse action notice to the individual.<sup>14</sup> The adverse action notice, which can be made in writing, orally or by electronic means, must contain the following information:

- The name, address and telephone number of the CRA that provided the report;
- A statement the CRA did not make the adverse decision and is not able to explain why the decision was made;
- 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
- 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.<sup>15</sup>

7 15 U.S.C. § 1681b(b). *But see* 15 U.S.C. § 1681a(y) (related rules for misconduct investigations). For employers regulated by the federal Department of Transportation (DOT), and where the applicant applies for employment by mail, telephone, computer or other similar means, the employer may provide the disclosure, along with a Summary of Rights under the FCRA, to the applicant or employee orally, in writing or by electronic means. 15 U.S.C. § 1681b(b)(2)(B)(i).

8 15 U.S.C. §§ 1681b(a)(3)(B) and 1681b(b). For DOT-regulated motor carriers, and where the applicant applies for employment by mail, telephone, computer or other similar means, consent may be oral, written or electronic. 15 U.S.C. § 1681b(b)(2)(B)(ii). In addition, the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. § 7001, generally gives legal force to electronic signatures, contracts, and other records. The FTC issued an opinion letter in 2001 indicating that it believed that a “consumer’s consent is not invalid merely because it is communicated in electronic form” under the FCRA as a result of ESIGN. *See* FTC Opinion Letter May 24, 2001 (Brinckerhoff). Nevertheless, employers should consult with their counsel before making any changes to their FCRA procedures, including any contemplated transition to electronic records.

9 15 U.S.C. § 1681b.

10 15 U.S.C. § 1681d.

11 15 U.S.C. § 1681a(k)(1)(B)(ii).

12 15 U.S.C. § 1681b(b). If an individual contacts the employer in response to the pre-adverse action notice to say there was a mistake (inaccuracy or incompleteness) in the consumer report, the employer may exercise its discretion whether to move forward with the hiring decision or engagement; the FCRA does not dictate a course of action. However, by law, the CRA must, within 30 days, promptly investigate any dispute about the accuracy or completeness of the report from the individual. 15 U.S.C. § 1681i. If the CRA updates the consumer report, both the individual and the employer will receive notice. Please note, however, that related state and local laws may differ.

13 *Obabueki v. IBM and Choicepoint, Inc.*, 145 F. Supp. 2d 371, 392 (S.D.N.Y. 2001).

14 15 U.S.C. § 1681m(a).

15 *Id.* DOT-regulated motor carriers are not required to provide a “pre-adverse action” notice to applicants or employees if the applicant applied for employment by mail, telephone, computer or other similar means. 15 U.S.C. § 1681b(b)(3)(B). Rather, motor carriers must provide to the individual, within three days of taking adverse action, an oral, written or electronic notification that adverse action has been taken, which must include the same disclosures required in “adverse action” notices for non-trucking employers. *Id.*

The text of the FCRA does not dictate the minimum amount of time an employer must wait between mailing the pre-adverse action and adverse action notices. One fairly accepted standard is five business days.<sup>16</sup>

## POTENTIAL LIABILITY FOR FCRA NON-COMPLIANCE

The FCRA allows an applicant or an employee to pursue a private right of action against an employer for “negligently” or “willfully” failing to comply with any of the FCRA’s requirements.<sup>17</sup> A lawsuit must be brought by the earlier of two years after the date of the plaintiff’s discovery of the violation, or five years after the date on which the violation occurred.<sup>18</sup>

The remedies vary in important ways. A negligent employer is liable for actual damages and reasonable attorneys’ fees and costs.<sup>19</sup> An employer found to have willfully failed to comply with the FCRA is liable for actual damages *or* statutory damages (ranging between \$100 and \$1,000), punitive damages and attorneys’ fees and costs.<sup>20</sup>

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. The Court noted also that “a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute’s terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless.”<sup>21</sup> Thus, the Supreme Court has ruled that where the defendant acted consistent with a “reasonable interpretation” of the FCRA (for instance, where the FCRA’s statutory language is ambiguous), the plaintiff will not be able to prove a “willful” violation of the FCRA – even if the court disagrees with the defendant’s interpretation.<sup>22</sup>

## THE SWELLING TIDE OF CLASS ACTION FILINGS

The stark increase in class action filings against employers under the FCRA is best explained as the result of the four factors noted above: (1) widespread publication of several significant seven-figure class action settlements; (2) the entry into the market of firms versed in wage and hour class actions; (3) pro-plaintiff outcomes in some federal courts; and (4) the lure of statutory damages awards to the plaintiff’s bar when the U.S. Supreme Court has demonstrated a healthy measure of hostility towards class actions.<sup>23</sup>

16 See, e.g., *Beverly v. Wal-Mart Stores, Inc.*, 2008 U.S. Dist. LEXIS 2266 (E.D. Va. 2008); see also *Johnson v. ADP Screening and Selection Services*, 768 F. Supp. 2d 979, 983-984 (D. Minn. 2011) (rejecting the plaintiff’s argument the employer must wait at least as long as the CRA has to reinvestigate a consumer dispute, per — § 611, because the plaintiff’s interpretation “would create untenable constraints on employers. If adopted, each time an employer wanted to hire, it would be prevented from acting if the consumer report of any applicant – even one that it had no intention of hiring – contained information that reduced that applicant’s competitiveness. The employer would then have to place the entire process on hold and leave the position unfilled until the reporting agency had 30 days to investigate.”).

17 15 U.S.C. §§ 1681n and 1681o.

18 15 U.S.C. § 1681p.

19 15 U.S.C. § 1681o.

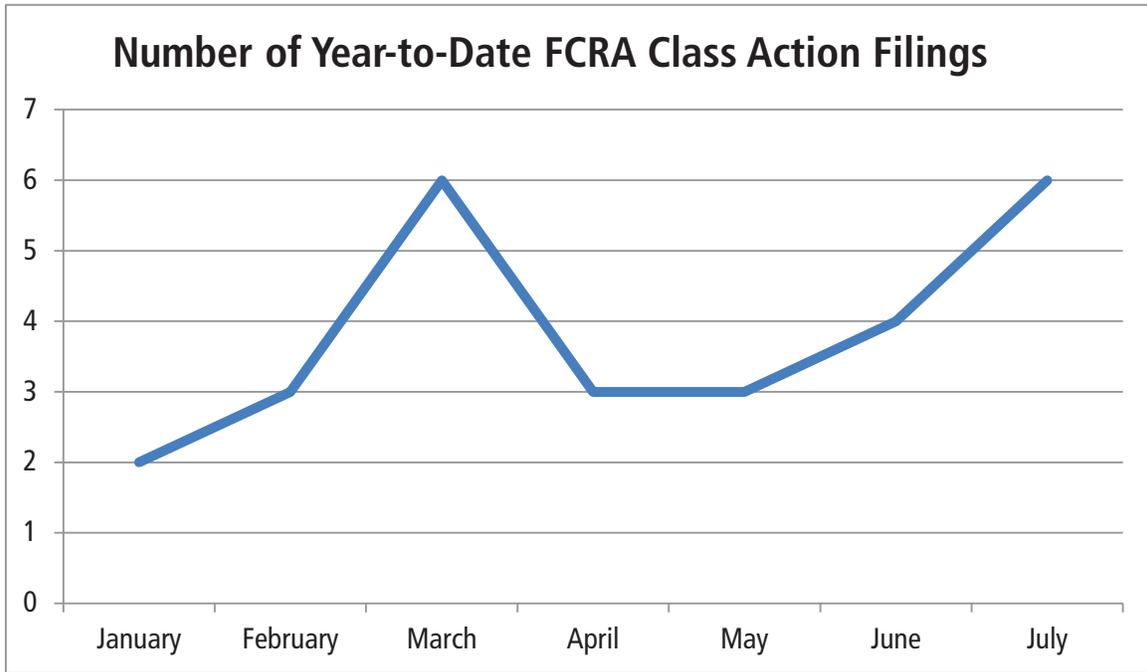
20 15 U.S.C. § 1681n. Some courts have ruled that statutory damages may be recovered notwithstanding the absence of any actual damages. See, e.g., *Bateman v. Am. Multi-Cinema, Inc.*, 623 F.3d 708, 719 (9th Cir. 2010). Some courts have also ruled that the lack of any actual harm does not defeat the plaintiff’s standing to proceed in federal court. See, e.g., *Robins v. Spokeo, Inc.*, 742 F.3d 409, 412 (9th Cir. 2014).

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

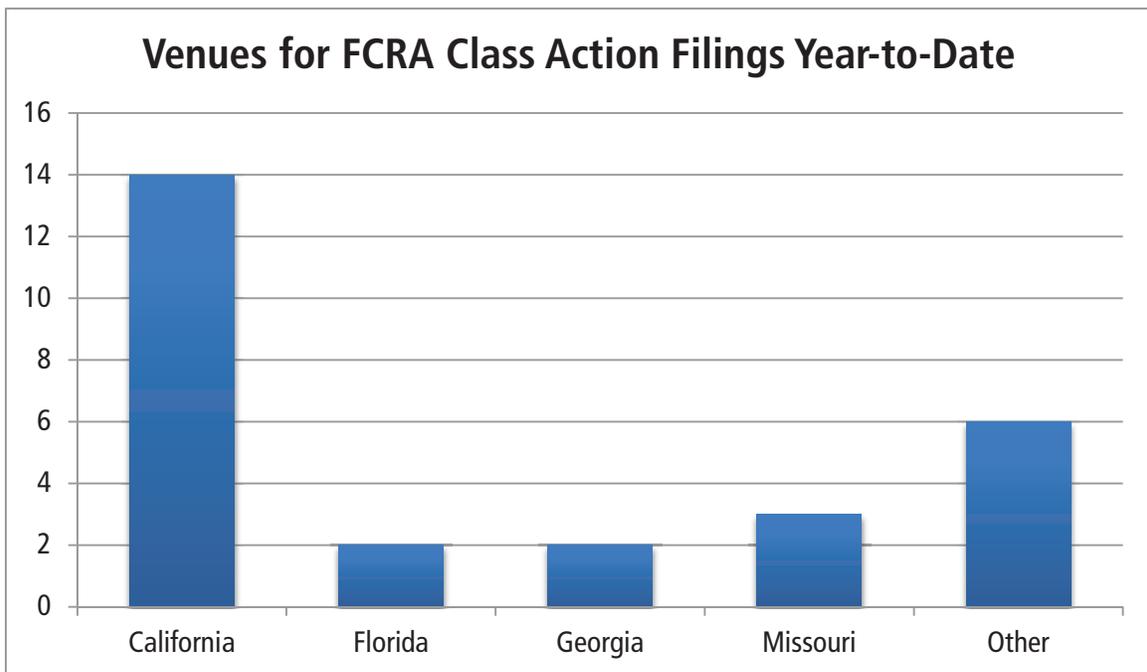
22 See *id.*; see also *Fuges v. Southwest Fin. Servs., Ltd.*, 707 F.3d 241, 250-255 (3d Cir. 2012) (the defendant’s interpretation of the terms “consumer reporting agency” and “consumer report” in § 1681a of the FCRA were not objectively unreasonable because the terms are ambiguous as applied to its real property-related reports, the defendant’s reading had a foundation in the statutory text, and no circuit court or federal agency previously had opined on the issue); *Long v. Tommy Hilfiger, U.S.A., Inc.*, 671 F.3d 371, 376-377 (3d Cir. 2012) (merchant’s interpretation of the term “expiration date” in § 1681c(g)(1) of the FCRA was erroneous, but the violation was not willful, because the merchant’s interpretation had a foundation in the statutory text and no circuit court previously had ruled on the issue); *Shlahtichman v. 1-800 Contacts, Inc.*, 615 F.3d 794 (7th Cir. 2010) (merchant’s interpretation of the term “print” in § 1681c(g)(1) of the FCRA was correct, but even if erroneous, would not support a willful violation because no circuit court or federal agency previously had opined on the issue); *Levine v. World Fin. Network Nat’l Bank*, 554 F.3d 1314, 1318-1319 (11th Cir. 2009) (the defendant credit bureau’s interpretation of its obligations under § 1681e(b) of the FCRA was correct, but even if erroneous, would not support a willful violation because the text was “far from pellucid” and the defendant had followed one of two lines of case law opinions).

23 *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013); *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304 (2013); *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

Regardless of the reasons, the trend is unmistakable. For instance, this year to date, no fewer than 27 nationwide FCRA class actions have been filed against employers in various industries, including retailers, restaurant chains, theatre chains, manufacturers, financial institutions and transportation companies.<sup>24</sup>



Even a cursory review of recent filings confirms they are highly concentrated in plaintiff-friendly venues such as California.



<sup>24</sup> Littler is defending and also monitors FCRA filings across the country, and based on our litigation experience, the number of class action filings in 2014 has approximately tripled as compared to 2013, and greatly exceeds the number of such filings before 2013. Special thanks to Littler research librarians Joanne Block and Nora Sawyer for assisting with this project.

A review of recent filings further demonstrates how law firms that have not traditionally litigated FCRA cases are now expanding their practice to include FCRA class actions. Examples include Cohelan Khoury & Singer, Nichols Kaster, Capstone Law, and Righetti Glugoski P.C.<sup>25</sup>

Noteworthy settlements, among other things, likely have attracted these and other law firms to this practice area. One of the more recent 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 employer violations of the FCRA:

- a national retailer reached a \$3 million settlement
- a national pizza delivery chain reached a \$2.5 million settlement
- a transportation company reached a \$2.75 million settlement
- a different transportation company reached a \$4.4 million settlement

These settlements are dwarfed by several high-profile settlements in cases brought against CRAs, which have run into the tens of millions of dollars, but clearly have galvanized the interest of the plaintiff's bar in pursuing class FCRA claims against employers. The most popular claims against employers are that:

- the employer's background check disclosure form contains language that is "extraneous" (*i.e.*, is not limited to just *the* disclosure required by the statute itself); and
- the employer fails to provide any pre-adverse action notice, or if notice has been provided, to *wait* an appropriate amount of time before taking final adverse action against an individual (holding the job open in the meantime).<sup>26</sup>

The class action suits challenging the employer's background check disclosures tend to target disclosures that are included *within* the employer's job application, or if separate from the job application, that include alleged impermissible text, such as a release of liability. At least two district courts have upheld these theories, one in a certified class action.<sup>27</sup>

However, consensus is lacking – that is, courts have reached conflicting results.<sup>28</sup> And for good reason. What exact phrasing satisfies the statute is arguably uncertain. In various FCRA provisions, Congress or the FTC has literally spelled out the *exact* text of the required disclosure by statute or regulation. Section 604 does not provide the same certainty as to what notice is required. Section 604 merely prescribes the consumer be given "[a] clear and conspicuous disclosure ... in writing ... in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes[.]" Unlike other FCRA provisions and regulations, Section 604 requires a "disclosure" without spelling out the exact text of that disclosure. No specific language, and no model form, specifies what exact phrasing satisfies (or substantially satisfies) the statute.

To compound the uncertainty, the FCRA does not specify what, if anything, can be combined with the disclosure. The text of Section 604 itself reveals how the answer to this question is more elusive than obvious. Section 604(b)(2)(A)(i) refers to a document consisting "solely" of the disclosure, but at the same time, Section 604(b)(2)(A)(ii) states that the "authorization may be made on the document

25 Before the surge in class action filings, most FCRA cases seemingly were filed by a handful of firms, including but not limited to Consumer Litigation Associates (based in Virginia) and Francis & Mailman (based in Philadelphia), and more recently O'Toole, McLaughlin, Dooley & Pecora (based in Ohio).

26 Based on amendments to the FCRA, most courts now refuse to recognize a private right of action for claims based on violations of the adverse action (rather than *pre-adverse action*) notice requirement.

27 *Reardon v. ClosetMaid Corp.*, 2013 U.S. Dist. LEXIS 169821 (W.D. Pa. Dec. 2, 2013) (granting in part and denying in part summary judgment motions in certified class action); *Singleton v. Domino's Pizza, LLC*, 2012 U.S. Dist. LEXIS 8636 (D. Md. Jan. 25, 2012) (certified as a class action for settlement purposes).

28 In *Smith v. Waverly Partners, LLC*, 2012 U.S. Dist. LEXIS 119403 (W.D.N.C. Aug. 12, 2011), the employer's disclosure form included the following liability release in the middle of the paragraph describing the scope of the authorization:

I hereby indemnify, release, and hold harmless the Company, any agents or contractors of the Company, or others reporting to or for the Company, any investigators, all former employees, reporting agencies, and all those supplying references and character references, from any and all claims, demands, or liabilities arising out of, or related to, such investigations, disclosures, or admissions.

In granting summary judgment for the employer, the court ruled the waiver was invalid, but apparently taking its cue from a prior FTC advisory letter, held that this clause "was not so great a distraction as to discount the effectiveness of the disclosure and authorization statements." *Smith*, 2012 U.S. Dist. LEXIS 119403, at \*6.

referred to in clause (i).” “Authorization” is another undefined term. Since the authorization may be combined with the disclosure, subpart (ii) of Section 604 compounds the uncertainty regarding what is meant by a “document that consists solely of the disclosure” as required by subpart (i).

The advisory regulatory guidance only adds to the uncertainty. In one fashion or another, the FTC has over the years declared that the statutory disclosure may include not just an “authorization,” but several other items of information. The FTC has also summarized its view of the governing legal standard in different ways and only sometimes using terms actually found in the text of the FCRA itself.

Based on the U.S. Supreme Court’s opinion in *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 69 (2007), this uncertainty should foreclose willful violation claims against employers in a wide variety of circumstances. At present, though, the most recent case law favors plaintiffs, and thus the risk remains and should not be dismissed as entirely hypothetical.<sup>29</sup>

## MITIGATING MEASURES

There are several practical steps employers can take to mitigate class action risk, including the following:

1. Employers should consider convening a working group comprising internal subject matter experts, including representatives from human resources, operations, IT, security or loss prevention, procurement and legal. Particularly if an audit or program changes are needed, coordination within the company is recommended.
2. Employers should consider arranging for a privileged review of their background check forms and notices, including disclosure and consent forms and template FCRA notices. If this review has been planned but is languishing on the “to-do” list, it is time to give it some or even high priority. Employers should also consider whether background check program-related language is included in any other personnel documents, such as employment applications, proprietary information agreements, offer letters, non-compete agreements, etc.
3. Employers should consider implementing procedures to help ensure that adverse action notices are not sent to applicants or employees before the minimum waiting period (e.g., five business days). Enclosures with the notices should be up-to-date and complete. Training for field personnel also is recommended.<sup>30</sup>
4. Employers should also consider how to best record personnel decisions in their human resources information systems such that, if necessary, the employer can establish 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 the background report.

Employers will also want to consider having written background check policies documenting, among other things, the purposes of their background checks and proper handling of same, including confidential destruction. An exemption to the FCRA’s coverage added a decade ago in the Fair and Accurate Credit Transactions Act of 2003 (FACTA) provides that if a communication from a CRA is made to an employer in connection with an investigation of either “suspected misconduct” or compliance with “Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer,” the communication is not a “consumer report.”<sup>31</sup> The upshot is an argument, at least, that the other “technical” requirements targeted by plaintiff’s lawyers in class actions would not apply to such communications.<sup>32</sup>

29 *Reardon v. ClosetMaid Corp.*, 2013 U.S. Dist. LEXIS 169821 (W.D. Pa. Dec. 2, 2013) (class certification granted); *Singleton v. Domino’s Pizza, LLC*, 2012 U.S. Dist. LEXIS 8636 (D. Md. Jan. 25, 2012) (certified as a class action for settlement purposes). See also *EEOC v. Video Only, Inc.*, 2008 WL 2433841 (D. Or. June 11, 2008) (finding for the plaintiffs but not in a class action).

30 The standard for an adverse action is expansive but not necessarily unlimited. See, e.g., *Javid v. SOS Int’l, Ltd.*, 2013 U.S. Dist. LEXIS 73470 (E.D. Va. May 23, 2013) (finding delay in making final hiring decision was not an adverse action where the employer gave the plaintiff time to resolve pending problems with his application). Nonetheless, employers that use background reports with regard to employees, not just job applicants, should be mindful of the potential need for FCRA notices.

31 15 U.S.C. § 1681a(y). For a detailed discussion of the FACTA, see Rod Fliegel, Jennifer Mora and William Simmons, *Fair 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>.

32 FACTA still requires that employers provide a “summary containing the nature and substance of the communication” after taking an adverse action against an individual based on the communication. 15 U.S.C. § 1681a(y).

Of course, employers who already are subject to a recently filed individual or class action under the FCRA should thoroughly evaluate litigation strategy at the outset, which likely includes at minimum gathering information about whether the challenged practice has varied during the alleged class period (by department, supervisor, position, or over time), whether any of the challenged background checks may fit within FACTA's exceptions to the consumer report definition, and whether any employees may have agreed to arbitration. Furthermore, because the case law on many of the issues is in its relative infancy and courts may disagree on the relevant standards, employers may want to evaluate whether there is a basis to transfer the litigation to a more hospitable venue.

## **CONCLUSION**

The swelling tide of class action litigation against employers under the FCRA is unmistakable and cuts across all industries. These lawsuits can be frustrating for employers, even offensive, because typically they allege hyper-technical non-compliance with the FCRA. Nonetheless, prudent employers should be mindful of recent developments, and should consider taking measures to fortify against class action risk.

## APPENDIX A – RELEVANT PORTIONS OF SECTION 604 OF THE FCRA

§ 604. Permissible purposes of consumer reports [15 U.S.C. § 1681b]

(b) Conditions for Furnishing and Using Consumer Reports for Employment Purposes.

(1) Certification from user. A consumer reporting agency may furnish a consumer report for employment purposes only if

(A) the person who obtains such report from the agency certifies to the agency that

(i) the person has complied with paragraph (2) with respect to the consumer report, and the person will comply with paragraph (3) with respect to the consumer report if paragraph (3) becomes applicable; and

(ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation; and

(B) the consumer reporting agency provides with the report, or has previously provided, a summary of the consumer's rights under this title, as prescribed by the Bureau under section 609(c)(3) [§ 1681g].

(2) Disclosure to Consumer.

(A) In general. Except as provided in subparagraph (B), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless –

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and

(ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

(B) Application by mail, telephone, computer, or other similar means. If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application –

(i) the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3); and

- (ii) the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.
- (C) Scope. Subparagraph (B) shall apply to a person procuring a consumer report on a consumer in connection with the consumer's application for employment only if –
- (i) the consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency; and
  - (ii) as of the time at which the person procures the report or causes the report to be procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.
- (3) Conditions on use for adverse actions.
- (A) In general. Except as provided in subparagraph (B), in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates –
- (i) a copy of the report; and
  - (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Bureau under section 609(c)(3).3
- (B) Application by mail, telephone, computer, or other similar means.
- (i) If a consumer described in subparagraph (C) applies for employment by mail, telephone, computer, or other similar means, and if a person who has procured a consumer report on the consumer for employment purposes takes adverse action on the employment application based in whole or in part on the report, then the person must provide to the consumer to whom the report relates, in lieu of the notices required under subparagraph (A) of this section and under section 615(a), within 3 business days of taking such action, an oral, written or electronic notification–
    - (I) that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency;
    - (II) of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis);
    - (III) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and

- (IV) that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report.
  
- (ii) If, under clause (B)(i)(IV), the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Bureau under section 609(c)(3).<sup>33</sup>

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<sup>33</sup> The references in §§ 604(b)(3)(A) and 604(b)(3)(B) should be to § 609(c)(1), not (c)(3) that no longer exists as the result of Congress' re-organization of § 609(c) in 2003 (FACTA).

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973.848.4700

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703.442.8425

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479.582.6100

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206.623.3300

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925.932.2468

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58.241.824.4322

