Insight

IN-DEPTH DISCUSSION

JULY 17, 2017

California Court Certifies FCRA Class of Over 40,000 Applicants

BY ROD FLIEGEL AND JENNIFER MORA

As Littler has reported, the number of class action lawsuits against employers alleging violations of the Fair Credit Reporting Act (FCRA) has continued to spike. Most lawsuits proceed in federal court, but the FCRA allows plaintiffs to file in either federal or state court. On July 13, 2017, a class action was certified in state court in Los Angeles. The suit alleges violations of the FCRA's disclosure and notice provisions. The state court judge did not decide any issues of liability, but rather that those questions can be decided in one proceeding on behalf of the class members. The court's opinion serves as another reminder of the importance of vigilance with regard to FCRA compliance.

The FCRA

The FCRA is the federal law that regulates employer use of "consumer reports," more commonly known as "background checks" or "background reports." Before an employer may obtain a consumer report from a consumer reporting agency, typically the employer must make a "clear and conspicuous" written disclosure to the consumer (which could be a job applicant or employee), in a document consisting "solely" of the disclosure, that a consumer report may be obtained. The consumer must provide written authorization before the employer may obtain a consumer report for employment purposes. If the employer takes adverse action against the consumer based in whole or in part on information contained in the report, the employer must provide the consumer with a pre-adverse action notice, which must include a copy of the report and any necessary disclosures (e.g., the FCRA Summary of Rights).

During the last few years, the number of federal class action lawsuits against employers alleging hyper-technical non-compliance with the FCRA has skyrocketed. 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 ("extraneous") text, such as a release of liability in favor of the employer, the background company, or both. In the context of the pre-adverse action notice, the lawsuits tend to allege that the employer never provided the consumer with a copy of the report or made the final employment decision before allowing the consumer a meaningful opportunity to consider the information in the report.

The Decision

The named plaintiff was convicted of battery in 1998. That conviction ultimately was expunged from his record in 2010. According to the plaintiff, although the employer hired him in 2011 and scheduled him for orientation, the employer reversed course and told him not to report for orientation after the background report it obtained inaccurately reported a 2010 battery conviction. The employer allegedly placed a "no-hire recommendation" in the plaintiff's file one day after receiving the inaccurate background report from its background check vendor. The plaintiff did not learn about the issue until he called the employer to check the status of his application. He then submitted a dispute with the background check vendor. Although the employer learned about the corrected report, it no longer had a need for the plaintiff's services as a seasonal worker. The plaintiff sued, alleging violations of the FCRA and sought certification of two separate classes.

First, the plaintiff claimed that the employer's background check disclosure violated the FCRA because it included a statement that the applicant "fully understand[s] that all employment decisions are based on legitimate non-discriminatory reasons." This class consisted of approximately 42,000 putative class members. According to the plaintiff, this language is an "implied liability waiver," which is the type of language that plaintiffs' attorneys have railed against, with success, for the last few years.[1]

The plaintiff also claimed the employer failed to provide pre-adverse action notices before taking adverse action against job applicants. This class consisted of approximately 715 putative class members. According to the court, the plaintiff had presented evidence that the employer had a "uniform practice of sending" the pre-adverse action notice after rendering a "no hire" adjudication. In fact, one employer witness testified that this was "normal protocol" for the company. In granting class certification on this issue, the court noted that the primary common question at issue could easily be answered for each class member: did he or she receive a pre-adverse action notice and summary of rights before the employer made its final decision?

Next Steps for Employers

Given that the FCRA allows for statutory damages ranging between $100 and $1,000 per violation, the court's decision to grant certification in this case should serve as a wake-up call for all employers. There has been an uptick of courts granting certification in similar cases. Thus, 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 an employer's inclusion of text beyond the minimum necessary for FCRA disclosures.[2]

In addition to the disclosure and authorization requirements, the FCRA requires employers to 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.[3] Employers should implement procedures to help ensure that adverse action notices are timely sent. Employers should also consider how to best record personnel decisions such

1 *See* Jennifer Mora and Rod Fliegel, *Ninth Circuit is the First Appellate Court to Rule on "Extraneous Text" in a FCRA Background Check Disclosure*, Littler Insight (Jan. 25, 2017).

2 *See* Rod Fliegel and Jennifer Mora, *Weathering the Sea Change in Fair Credit Reporting Act Litigation in 2014*, Littler Insight (Jan. 6, 2014); Rod Fliegel, Jennifer Mora and William Simmons, *The Swelling Tide of Fair Credit Reporting Act (FCRA) Class Actions: Practical Risk-Mitigating Measures for Employers*, Littler Report (Aug. 1, 2014).

3 *See* Jennifer Mora, *Federal Courts Increase Scrutiny of Employer Compliance with the FCRA's Adverse Action Requirements*, Littler Insight (Jan. 4, 2016).

that, if necessary, the employer can prove that the reason an applicant was rejected was entirely because of a poor interview, failure to provide requested follow-up information, a positive drug test, dishonesty in the application process, etc., rather than based—even in part—on the background report itself.

Employers also should continue to be mindful of their obligations under state and local ban the box laws.[4]

4 *See* Jennifer Mora, Rod Fliegel and Christina Cila, *City of Los Angeles Mayor to Sign Long-Awaited "Ban the Box" Law*, Littler Insight (Dec. 9, 2016); Philip Gordon and Jennifer Mora, *Austin Becomes the First City in Texas to "Ban the Box"*, Littler Insight (Mar. 25, 2016); Jennifer Mora and Stephen Fuchs, *Proposed Regulations Issued by the New York City Commission on Human Rights Clarify and Expand the Citywide "Ban-the-Box" Law*, Littler Insight (Feb. 25, 2016); Jennifer Warberg and Philip Gordon, *Portland, Oregon Bans the Box*, Littler Insight (Dec. 3, 2015); Jennifer Mora, David Warner, and Rod Fliegel, *New York City Council Bans the Box*, Littler Insight (Jun. 12, 2015) (among others which can be found in these Insights).