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FCRA Class Actions in Employment

Class actions against employers under the Fair Credit Reporting Act (FCRA) are on the rise. In July 2014 Publix settled a class action lawsuit for $6.8 million. Swift Transportation settled a similar class action lawsuit for $4.4 in April 2014 and in October 2014 Dollar General settled a $4 million class action lawsuit.

The FCRA is a federal consumer protection statute that applies to reports obtained from a consumer reporting agency (CRA). Briefly, a "consumer report" is written, oral or other communication of information concerning a consumer's (prospective employee's) credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living which is used or collected for the purpose of serving as a factor to establish eligibility for employment purposes.

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This is important for employers because most utilize background screening (including credit reports, criminal records, driving records and references) in some form during the application, hiring, and employment process. Importantly, employers who use this information have legal duties with which they must comply. There must be (1) a permissible purpose, (2) disclosure and authorization, (3) pre-adverse action and adverse action, and (4) certification to the CRA.

In recent years, there has been increased litigation (and settlements) focused on the disclosure/ authorization and the pre-adverse action/adverse action requirement. Under 15 U.S.C. § 1681b(b)(2)(A), a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes unless: (1) a clear and conspicuous disclosure has been made in writing to the consumer in a document that "consists solely of the disclosure, that a consumer report may be obtained for employment purposes"; and (2) the consumer has authorized in writing the procurement of the report by that person.

The disclosure/authorization requirement was at issue when supermarket chain Publix agreed to pay $6.8 million to settle a class action lawsuit that alleged it violated the FCRA by failing to provide legally required disclosures prior to obtaining background reports. In particular, the plaintiffs alleged Publix conducted background checks on employees and job applicants without providing a "standalone" disclosure informing them a background check would be performed.

Action Items

(1) Employers should review their disclosure forms to ensure that: the disclosure and authorization forms are separate documents; liability waivers, if any, are included on a separate document; and any state law information is included on a separate form/document.

(2) Employers must follow the FCRA's two-step adverse action process: Before taking any adverse action, the employer must first engage in "pre-adverse action" by sending the applicant a copy of the report, a copy of the summary of rights, and waiting a reasonable period of time before taking adverse action so the applicant has an opportunity to dispute any inaccurate information. Only then can the employer continue on to the second step by taking some "adverse action," e.g., refusing to hire. Other common pitfalls at this stage include contacting the applicant before pre-adverse action is provided; failing to provide a waiting period; not having a centralized process for sending a pre-adverse action notice; failing to timely send notice; and failing to provide state law notice and timing requirements.

Failing to comply with the FCRA may mean big money because:

- There is no cap on damages under the FCRA
- Reasonable attorneys' fees are available for the "successful plaintiff"
- Individual class members are easily identifiable from the employer's records

Indeed, the cumulative effect of damages to class members can exceed millions. For example, in *Ellis v. Swift Transportation Co. of Arizona*, 3:13-cv-00473, Swift agreed to settle a dispute with 161,000 class members because its disclosure statement was not part of a standalone document. Many of the 161,000 class members received only $50, but the cumulative effect was a $4.4 million settlement payment.

Best Practice Tips

- Do business with a reputable CRA
- Put the disclosure in a document with nothing else on it
- Provide **written** notice of adverse action and summary of rights
- Understand and comply with state screening laws, not just the FCRA
- Immediately address any potential or alleged violations