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Daily Labor Report®

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Examining Wave of Employment Class Actions Under Fair Credit Reporting Act: How to Avoid Being Next Target

Brett E. Coburn and Brooks A. Suttle

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The FCRA imposes several requirements that the employer must follow at various points in the process of obtaining and taking action based on the report. Although these requirements appear at first blush to be relatively straightforward, the recent—and substantial—increase in lawsuits alleging FCRA violations by employers has highlighted a number of nuances and unanswered questions about how employers are to comply.

This article focuses on these issues and developments—through the lens of recent lawsuit filings and court opinions—in order to provide employers and their counsel with practical guidance for shoring up their FCRA compliance efforts.

 ISSN 0418-2693

1. Overview of FCRA Employment Requirements

In general, before procuring a consumer report for employment purposes,[1] an employer must make a written disclosure to the applicant or employee that it may obtain a consumer report, and it must obtain the individual's written authorization to do so. 15 U.S.C. § 1681b(b)(2)(A).

Additionally, before taking an adverse action against an applicant or employee based, in whole or in part, on the information contained in a consumer report, the employer must provide the individual with a ''pre-adverse action notice'' indicating that the company may take an adverse action based on the information in the report, and providing a copy of the report and a summary of the individual's rights under the FCRA. 15 U.S.C. § 1681b(b)(3)(A).

In addition, the employer must allow the individual a reasonable period of time to correct or dispute any information contained in the report before taking the adverse action. *See*, *e.g.*, *Reardon v. Closetmaid Corp.*, 37 IER Cases 535, 545-46 (W.D. Pa. Dec. 2, 2013) (234 DLR A-9, 12/4/13). Finally, if the employer does, in fact, take an adverse action based in whole or in part on the information in a consumer report, it must provide the applicant or employee a separate ''adverse action notice'' indicating that such action was taken and containing additional information required by the statute. 15 U.S.C. § 1681m(a).

2. Why FCRA Makes Employers Such Attractive Targets for Class Actions

The FCRA provides a private cause of action against an employer for either ''negligently'' or ''willfully'' failing to comply with any of the statute's requirements. Negligent failure to comply with the FCRA can make an employer liable to applicants or employees for actual damages, costs, and attorneys' fees. 15 U.S.C. § 1681o(a).

For willful violations, however, plaintiffs may elect to seek either actual damages *or* statutory damages of between $100 to $1,000 per violation, with no need to show any actual damages. 15 U.S.C. § 1681n(a)(1)(A). Employers that willfully violate the FCRA can also be liable for punitive damages, costs, and attorneys' fees. 15 U.S.C. § 1681n(a)(2)-(3).

The availability of statutory damages for willful FCRA violations makes the statute especially attractive to plaintiffs looking to bring large class-action lawsuits against employers that use consumer reporting agencies (CRAs) to screen applicants and employees. Because there is no requirement to prove actual damages to recover for willful violations, plaintiffs can circumvent individual assessment for class-action purposes by asserting that an employer should be held liable regardless of whether the alleged willful violations resulted in actual losses for individual plaintiffs.

Moreover, courts have set the ''willfulness'' bar relatively low for FCRA violations—an employer's FCRA violations can be considered ''willful'' if the employer repeatedly, systematically, or typically violated the statute. As such, an employer that regularly violates one or more of the technical requirements described above will most likely be found to have acted willfully and thus be liable for statutory damages, as well as punitive damages and attorneys' fees and costs.

Because the plaintiff class in a FCRA class action will often be a large group of job applicants, damages of $100 to $1,000 per violation can add up quickly.

Another reason FCRA claims against employers are gaining in popularity is the statute's limitations period, which was recently amended to extend up to five years. Specifically, actions for liability under the FCRA must be brought no later than the earlier of (1) two years after the date when a plaintiff discovers the violation; or (2) five years after the date on which the violation occurred. 15 U.S.C. § 1681p.

Such a long statute of limitations is highly unusual for a federal statute and has the potential to be devastating to employers that screen hundreds or thousands of job applicants each year.

3. Ensuring That FCRA Disclosure Consists Solely of the Disclosure

When evaluating an employer's compliance with the FCRA, the first place to start is the disclosure form. The FCRA requires that, before obtaining a consumer report for employment purposes, the party procuring the report must make ''a clear and conspicuous disclosure . . . in writing to the consumer . . . , in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes.'' 15 U.S.C. § 1681b(b)(2)(A)(i).

Many of the recent cases brought under the employment provisions of the FCRA are based on allegations that the employer failed to comply with this requirement, and in particular that the disclosure provided by the employer did not consist solely of the disclosure (the ''stand-alone disclosure requirement'').

a. Avoid Including Any Extraneous Information in the Disclosure

The FCRA expressly permits the required written authorization from the consumer to be contained in the same document as the disclosure. 15 U.S.C. § 1681b(b)(2)(A)(ii).

Other than the written authorization, however, nothing else may be included with the disclosure without potentially running afoul of the stand-alone disclosure requirement. Unfortunately, employers frequently also include other provisions along with the disclosure and

[1] The FCRA distinguishes between ''consumer reports'' and ''investigative consumer reports.'' A ''consumer report'' is ''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,'' among other things, employment purposes. 15 U.S.C. § 1681a(d)(1). An ''investigative consumer report'' is a subset of all consumer reports and is ''a consumer report or portion thereof in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, or associates of the consumer reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.'' 15 U.S.C. § 1681a(e). On top of the requirements discussed below, the FCRA imposes additional requirements on employers when they obtain or use investigative consumer reports. *See* 15 U.S.C. § 1681d. Because most employers do not obtain investigative consumer reports regarding applicants or employees, this article focuses only on the requirements that apply to all consumer reports obtained for employment purposes.

  DLR ISSN 0418-2693

authorization, and in doing so, they run the risk that the disclosure does not comply with the stand-alone disclosure requirement.

The most common claim in this regard is that the disclosure also contains language purporting to release the employer (and sometimes others) from any liability arising from obtaining the consumer report. Though some courts have refused to find a FCRA violation based on a disclosure containing a liability waiver, other courts addressing the issue have found disclosures containing such a provision to be noncompliant. *See*, *e.g.*, *Syed v. M-I LLC*, No. 1:14-742, 2014 WH Cases2d 164768, ECF No. 46 (E.D. Cal. Oct. 22, 2014) (summarizing split of authority).

Yet other, more seemingly benign provisions can also create the risk of invalidating the disclosure when they are included in the same form. The types of provisions that have been the subject of recent litigation include additional disclosures required by some state laws, at-will employment disclaimers, and certifications regarding the accuracy of the information provided by the applicant. *See*, *e.g.*, *Miller v. Quest Diagnostics*, No. 2:14-cv-04278, ECF No. 37 (W.D. Mo. Jan. 28, 2015); *Avila v. NOW Health Grp., Inc.*, No. 1:14-cv-01551, ECF No. 54 (N.D. Ill. July 17, 2014); *Peikoff v. Paramount Pictures Corp.*, No. 15-cv-00068, ECF No. 17 (N.D. Cal. Mar. 26, 2015).

In addition to being the most common type of employment-related claim brought under the FCRA, challenges to the sufficiency of an employer's FCRA disclosure can also be the most costly for the employer. This is because disclosure-related claims are typically more susceptible to class action treatment, as they often involve common factual issues.

In addition, a noncompliant disclosure will typically impact all applicants and employees about whom an employer obtained a background check or other consumer report, rather than the more limited subset of those against whom the employer took an adverse action based on information contained in the report. As a result, the potential class associated with a disclosure-related claim can sometimes be quite large.

Given the increasing litigation challenges to FCRA disclosure forms, employers should review their disclosure and authorization forms as the first step in evaluating their FCRA compliance.

The disclosure form should be as simple as possible and should contain nothing more than the explanation required by the FCRA. Anything more creates a risk that the disclosure fails to meet the stand-alone disclosure requirement.

Moreover, the more complicated the form, the greater chance that someone may try to claim that the form is not ''clear and conspicuous,'' as required by the statute.

Although it is technically permissible to combine the disclosure and the authorization in the same document, attorneys who practice in this area generally agree that it is best practice to separate the two.

As employers review their FCRA forms, they should be very cautious about relying on form documents provided by their vendors. In many cases, such forms are overly complicated, contain extraneous provisions, and are not tailored to the specific practices of the employer.[2] These forms are sometimes clearly not in compliance with the FCRA, yet it will be the employer that bears the liability for noncompliance, not the vendor.

b. Make Clear That the Disclosure is a Stand-Alone Document

In addition to taking issue with extra information included in the disclosure form, FCRA plaintiffs have also been claiming recently that a seemingly compliant disclosure form fails to meet the stand-alone disclosure requirement because it was presented at the same time as a separate document that contained extraneous information, such as a liability release.

For example, in one recent case, notwithstanding the fact that the disclosure was contained in a document that was separate from both the authorization and the allegedly offending liability waiver, the court denied the employer's motion to dismiss the disclosure claim. *Speer v. Whole Food Mkt. Grp., Inc.*, No. 8:14-cv-03035, ECF No. 35, 2015 IER Cases 180134 (M.D. Fla. Mar. 30, 2015).

Even though both documents were before the court on the motion to dismiss, the court refused simply to review both documents to determine whether they were separate from one another.

Rather, the court explained, ''Based on the allegations, with all inferences drawn in favor of Plaintiff, if both the disclosure and the consent forms combined read as one document with the waiver and release included simultaneously with the disclosure, the complaint states a claim for relief.''

The surest way to avoid a claim that the disclosure must be read together with other documents is to present the disclosure at a separate time by itself in the hiring process. This, however, is usually highly impractical and not a realistic option for most employers.

There are simple things, though, that employers can do to minimize risk in this area.[3]

The disclosure should have a clear title at the top that distinguishes it from other documents in the hiring process. The disclosure should be separately paginated from other documents presented at the same time. The disclosure should not rely on any other forms for definitions or information, and vice versa.

The disclosure should recite the statutory language regarding the stand-alone disclosure requirement, and other documents should refer to the *separate* disclosure form.

4. Ensuring Compliance with FCRA's Certification Requirements

The FCRA requires that, before furnishing a consumer report for employment purposes, a CRA must obtain from the requesting party a certification that the requesting party (i) has complied with the disclosure and

[2] For example, presumably in an effect to create a one-size-fits-all disclosure form, many vendor-provided forms contain provisions regarding the possibility that the employer may obtain an investigative consumer report, rather than just a regular consumer report. For employers that do not obtain investigative consumer reports, including this extraneous language unnecessarily complicates and confuses the document.

[3] For employers that use an online application process, it is critical that the disclosure be contained by itself on its own page in the online process. The suggestions discussed below should be adapted to the online process as appropriate.

authorization requirements; (ii) intends to comply with the pre-adverse action notification requirements, if they become applicable; and (iii) will not use information obtained from the report in violation of federal or state EEO laws or regulations. 15 U.S.C. § 1681b(b)(1)(A).

Though the plain language of the statute and court opinions make clear that this obligation falls on the CRA rather than the requesting employer, it is still important for employers to ensure their CRAs are complying with this requirement. *See*, *e.g.*, *Obabueki v. IBM*, 145 F. Supp. 2d at 371, 393-94, 86 FEP Cases 852 (S.D.N.Y. 2001); *also compare* 15 U.S.C. § 1681b(b)(1)(A) (placing burden on consumer reporting agency to obtain certification), *with* 15 U.S.C. § 1681d(a)(2) (placing burden on requesting party to make certification to consumer reporting agency).

Despite clear statutory language and case law, there is still the possibility that a class action plaintiff could try to argue that a failure to comply with this requirement creates joint liability for both the CRA and the requesting employer. Additionally, in a suit against the CRA claiming failure to comply with the certification requirement, the plaintiff would likely seek information about all employers that received consumer reports from the agency pursuant to the allegedly noncompliant certification, which could lead to possible litigation against those employers related either to this issue or to other allegations of noncompliance.

Many consumer reporting agencies attempt to comply with the certification requirement by including a one-time blanket certification purportedly covering all of the required provisions in the master services agreement with its customers. Recent cases indicate, however, that this approach may not be in compliance with the FCRA. Notably, of the three things that must be certified, the first is a certification that the requesting employer *has already* taken certain actions (i.e., complied with disclosure and authorization requirements), while the second and third are certifications that the requesting employer *will or will not* do certain things in the future (i.e., comply with the pre-adverse action notification requirement, if applicable, and not use the report in violation of application EEO laws).

At least one court has recently held that, because of the difference in wording regarding these requirements, a *prospective* certification regarding compliance with the disclosure and authorization requirements is not permissible under the statute. *See Syed*, No. 1:14-742 WBS BAM, 1q2ECF No. 46. In other words, there is recent authority that is it *not* acceptable for the receiving employer to make a one-time blanket certification regarding *prospective* compliance with the disclosure and authorization requirements, because the statute requires certification that the employer *has already* complied with these requirements.

Fortunately, this is a relatively easy problem to fix once the parties are aware of it. In addition to the certifications contained in a master services agreement, consumer reporting agencies and their employer customers need to work together to create a system—whether electronically or on paper—through which the requesting employer makes the required certification (or at least the non-prospective part of the certification) *each time* it requests a consumer report.

This can be as simple as a check box on an online form. This two-step approach to complying with the FCRA's certification requirement was very recently approved by a court examining this specific issue. *Robles v. Ampam Parks Mech.*, No. EDCV 14-02362, ECF No. 37, 2015 IER Cases 182302 (C.D. Cal. Apr. 28, 2015).

5. Be Wary of Timing Issues When Implementing Pre-Adverse Action Notice Procedures

The FCRA's pre-adverse action notice requirement is another source of trouble for employers that use consumer reports. Most likely this is because the requirement is considerably more nuanced than it may appear at first glance, particularly with regard to timing issues.

As such, employers must ensure not only that the content and form of their pre-adverse action notice is FCRA-compliant, but also that they have appropriate procedures in place so that the timing of an otherwise-compliant pre-adverse action notice does not violate the statute.

a. Timing the Pre-Adverse Action Notice

When a consumer report is used for employment purposes, the FCRA requires that, prior to taking any adverse action based in whole or in part on the report, the employer must provide the consumer with both a copy of the report and a written description of the consumer's rights under the FCRA. 15 U.S.C. § 1681b(b)(3).

Unfortunately, the statute itself does not specify how much advance notice must be given before an adverse action is taken. Moreover, the courts have generally provided only the vaguest of guidance along the lines that an employer must ''provide the consumer with a reasonable period to respond.'' *Kelchner v. Sycamore Manor Health Center*, 305 F. Supp. 2d 429, 435 (M.D. Pa. 2004) (49 DLR A-8, 3/15/05). This ''reasonable period'' has been further defined as ''a sufficient amount of time . . . so that the consumer may rectify any inaccuracies in the report,'' which again is not particularly concrete or helpful to an employer looking to implement procedures that it can be certain will comply with the FCRA. *Williams v. Telespectrum, Inc.*, Civ. No. 3:05-cv-00853, ECF No. 35 (E.D. Va. Nov. 7, 2006); *see also Reardon v. Closetmaid Corp.*, Civ. No. 2:08-1730, ECF No. 51, 37 IER Cases 535 (W.D. Pa. Apr. 27, 2011) (''the requirement is generally understood as being intended to give the person a meaningful opportunity to review the report and to address any inaccuracies or otherwise respond'').

However, the Federal Trade Commission, which was responsible for enforcing the FCRA prior to the Consumer Financial Protection Bureau (CFPB) taking over that task in 2011, issued an informal advice letter in 1997 stating that five business days' notice is a ''reasonable time'' as required by the statute. *See* Letter from Clarke W. Brinckerhoff to Eric J. Weisberg (June 27, 1997), FTC Informal Staff Letter, *available at* http://www.ftc.gov/policy/advisory-opinions/advisory-opinion-weisberg-06-27-97.

While the letter is not controlling law, at least one court has followed it as a guide, *see Reardon*, Civ. No. 2:08-1730, ECF No. 51, and today there appears to be a general consensus that five business days is a sufficient minimum amount of time between the provision of a pre-adverse action notice and a final adverse decision to satisfy the reasonable time requirement.

Moreover, while the FCRA also does not define at what point the clock begins running, it seems likely, given the purpose of the statute, that a court would interpret the ''five-day rule'' to be measured from the con-

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sumer's *receipt* of the notice, rather than the date on which the notice was sent. *See Reardon v. ClosetMaid Corp.*, 37 IER Cases 535, 545-46 (W.D. Pa. Dec. 2, 2013) (discussing congressional House committee report stating that a ''reasonable period for the employee to respond to disputed information is not required to exceed 5 business days following the consumer's *receipt* of the consumer report from the employer'') (quoting H.R. Rep. No. 103-486, 103d Cong., 2d Sess. 40 (1994)).

Accordingly, employers must be sure to implement policies and procedures to ensure that any applicant or employee against whom the employer intends to take an adverse action based on information in a consumer report will *receive* a FCRA-compliant pre-adverse action notice at least five business days prior to the adverse action being taken.

When determining how best to accomplish this goal, employers need to consider, among other things, the speed, predictability, and reliability of the delivery method or methods to be used; how weekends and holidays may factor into delivery times; and how best to document when the notice was both sent and received. *See*, *e.g.*, *Beverly v. Wal-Mart Stores, Inc.*, No. 3:07-cv-00469, ECF No. 35 (E.D. Va. Jan. 11, 2008) (pre-adverse action notice mailed five days prior to adverse action letter may not have been early enough where the pre-adverse action notice was sent just prior to Labor Day weekend and plaintiff allegedly received both notices on the same day).

Given all of these considerations, employers should seriously consider using secure e-mail and/or reliable and trackable paper delivery methods for sending the notices. Employers that continue to use regular mail should wait a sufficient period of time after sending the notice before taking the contemplated adverse action—perhaps as long as 10 calendar days.

While implementing such a procedure may create a not-insignificant burden on an employer and cause some unwanted delays in the application and hiring process, the risk of large statutory damages liability for violations of the FCRA's pre-adverse action notice timing requirements is also not insignificant, and likely too large for many employers to ignore.

b. When Does an Adverse Action Take Place?

The requirement that an applicant or employee receive notice a reasonable amount of time before his or her employer takes an adverse employment action naturally prompts the question of when an adverse action actually takes place.

The FCRA defines an ''adverse action'' as, among other things, the ''denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.'' 15 U.S.C. § 1681(k)(1)(B)(ii).

As several courts have found, ''[a]n internal decision to rescind an offer is not an adverse action,'' because the applicant is adversely impacted only when an offer is actually withdrawn. *Miller v. Johnson & Johnson*, No. 6:13-cv-1016, ECF No. 85, 2015 IER Cases 174446 (M.D. Fla. Jan. 14, 2015). Similarly, the decision to place an applicant ''on hold'' as a result of information in a consumer report is not an adverse action in the view of at least one federal district court. *See Javid v. SOS Int'l, Ltd.*, 35 IER Cases 1404, 1407-08 (E.D. Va. May 23, 2013).

That said, if a final adverse decision has, in fact, already been made, even only internally, then merely sending a notice letter to the applicant stating that an adverse action is ''intended,'' inviting the person to submit additional information, and setting some future ''final'' decision date may not bar a claim that the notice was sent after the adverse action already had occurred. *See*, *e.g.*, *Moore v. Rite Aid Hdqtrs Corp.*, 33 F. Supp. 3d 569, 575, 2014 IER Cases 164975 (E.D. Pa. 2014).

A letter sent as a mere formality, in other words, will not suffice. Rather, the FCRA requires an employer to provide a ''real opportunity'' for applicants ''to contest the adjudication or change its outcome thereafter.'' *Id.* (quoting *Goode v. LexisNexis Risk & Info. Analytics Grp., Inc.*, 848 F. Supp. 2d 532, 540, 34 IER Cases 951, 941 (E.D. Pa. 2012)).

In light of the above, employers need to ensure that both their internal decision-making processes and their external communications with applicants comply with the FCRA's requirements. More specifically, there should be a clear delineation within applicant tracking programs and other human resources systems between applicants who have been fully, and finally, withdrawn from the application process, and those who are ''on hold'' pending the pre-adverse action notice period.

Obviously, form letters and other communications with the applicant (including electronic communications) should not contain language suggesting that a final adverse decision has been made before an actual adverse action notice is sent after the requisite waiting period.

Less obvious, perhaps, is that employers need to train human resources personnel and other employees who may communicate with applicants about the company's FCRA obligations, and they should consider developing scripts and other talking points for phone calls prior to an offer being officially revoked. Indeed, errant comments or unwitting statements made by an employee that a final decision has been made prior to an applicant's receipt of a pre-adverse action notice have been the cause of at least several recent FCRA class claims, and surely will lead to more in the future.

6. Don't Forget About State and Local Laws

In addition to ensuring compliance with the various requirements of the FCRA, employers must also be aware of, and take steps to comply with, the various state laws that impact various aspects of an employer's ability to obtain and make decisions based on criminal background checks and credit reports.

These requirements vary substantially from state to state. Some states regulate the circumstances under which an employer can obtain a background or credit check, and some regulate the types of information that can be sought. A number of states impose additional disclosure and/or notification requirements in addition to those mandated by the FCRA. And, unlike the FCRA, some states place limits on how employers may permissibly use information obtained from consumer reports when make hiring and other employment decisions.

In addition to the panoply of state law requirements, a number of cities—such as Chicago, San Francisco, Seattle, Washington, D.C., and, most recently, New York City—have started to pass ordinances that place additional requirements on employers that obtain and use criminal background checks or credit reports.

Keeping track of all of these state and local requirements can be daunting and confusing, even for the most sophisticated employers. As a result, companies that

hire and employ people in many different states would be well advised to consult with outside counsel regularly on these issues, and to task their human resources staff with staying abreast of new developments in this area.

7. Keep an Eye on *Spokeo*

For employers overwhelmed by all of these technical requirements and the recent litigation trend they have spurred, with its focus on potentially significant statutory damages even where plaintiffs cannot plead, much less prove, any actual damage, there *might* be some light at the end of the tunnel.

The U.S. Supreme Court recently agreed to hear a case that, depending on how the Court ultimately rules, could significantly alter the FCRA class action landscape

In *Spokeo, Inc. v. Robins*, the issue before the Court is whether Congress may confer Article III standing by creating a private right of action based on a violation of a federal statute, even if the plaintiff has not suffered any actual harm, as it has done with the statutory damages provision of the FCRA.

More specifically, the Court will decide if Article III standing exists with respect to FCRA claims where the plaintiff is not claiming any actual injury, but is instead seeking only statutory damages. This argument has gained some traction in some of the federal circuit courts (specifically the Second and the Fourth Circuits), and the district court in *Spokeo* dismissed the case on this basis, but the Ninth Circuit reversed, siding with a different view taken by the Sixth, Seventh, and Eighth Circuits. The Supreme Court recently granted *certiorari* to resolve the circuit split.

If the Supreme Court reverses the Ninth Circuit and finds that Congress cannot constitutionally authorize FCRA claims where the plaintiff does not claim to have suffered any actual harm, then the tide of FCRA employment class actions could slow dramatically.

But the ultimate import of the *Spokeo* case will depend not only on how the Court rules, but also on how it words its opinion, which will unquestionably be parsed carefully by attorneys looking for arguments to narrow the scope of whichever ultimate conclusion the Court reaches.

DLR ISSN 0418-2693