

Client Alert

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Not-So-Unlikely Bedfellows? The FTC and the EEOC Join Forces to Issue Guidance on Employment Background Checks

By Mary Race, Christine Lyon and Michael Miller

For the first time, the Federal Trade Commission (FTC) and the Equal Employment Opportunity Commission (EEOC) have worked together to publish two guidance documents about employment background checks.¹ One document, “Background Checks: What Employers Need to Know,” reminds employers that federal laws restrict employers’ collection and use of employees’ and applicants’ background information.² The other document, “Background Checks: What Job Applicants and Employees Should Know,” informs individuals about their rights under federal laws, including the right to review background reports for accuracy.³

It stands to reason that the FTC and the EEOC would coordinate their efforts on this front, since both agencies are concerned with the use of employment background checks—the EEOC enforces federal laws against employment discrimination, while the FTC enforces the Fair Credit Reporting Act (FCRA), the law that regulates the use of “consumer report” information in a number of different employment, financial, and other contexts.

The jointly issued guidance documents accordingly combine two trends: the FTC’s concerns about violations of the FCRA by employers in connection with their use of various employment screening products for background checks, and the EEOC’s concerns about the potential discriminatory use of background checks in hiring or other employment decisions (including “discriminatory use” arising out of disparate impact rather than intentional discrimination). As EEOC legal counsel explains, “The laws enforced by the EEOC and the FTC intersect on the issue of employment background checks, so this was a unique opportunity for the agencies to work together to provide user-friendly technical assistance to our stakeholders.”

The contents of the guidance documents themselves are not surprising or particularly new. They provide a succinct and plain-English summary of existing federal law, rather than seeking to establish new practices. According to EEOC legal counsel, their primary goal is “to ensure that people on both sides of the desk understand their rights and responsibilities.” The documents instruct employers on how to obtain written permission before getting background reports, how to comply with FCRA requirements for adverse action, and how to properly dispose of background information. They likewise advise employees on what types of background information employers are allowed to request, how to obtain a copy of a background report, and how negative information in the background report can be used by the employer. There is nothing unexpected in the documents themselves.

¹ The FTC’s press release is available at <http://www.ftc.gov/news-events/press-releases/2014/03/employment-background-checks-ftc-eeoc-offer-tips-employers-job>. The EEOC’s press release is available at <http://www1.eeoc.gov/eeoc/newsroom/release/3-10-14.cfm?renderforprint=1>.

² “Background Checks: What Employers Need to Know” is available at <http://business.ftc.gov/documents/0487-background-checks-what-employers-need-know>.

³ “Background Checks: What Job Applicants and Employees Should Know” is available at <http://www.consumer.ftc.gov/articles/0488-background-checks-what-job-applicants-and-employees-should-know>.

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Yet the fact that the two agencies have joined forces to issue guidance on the use of background checks in the employment context *is* a new development, and a useful reminder of the obligations employers must face in using this important hiring tool. It raises the question of whether the FTC may seek to expand its involvement in employee privacy, as well as consumer privacy.

The FTC remains active in enforcing the FCRA, even with the recent transfer of interpretive authority to the Consumer Financial Protection Bureau (CFPB). Due to the FCRA's statutory-damages liability scheme, there is a growing amount of class action activity in this area, particularly against employers, including recent significant settlements against a wide range of employers (including Kmart and Domino's) and new cases filed to take their place against a similarly wide range of companies (including Disney, major financial institutions, a number of national transportation companies, and many others). Significantly, the FCRA allows a class of affected plaintiffs to receive statutory damages (which range from \$100 to \$1,000, plus punitive damages where appropriate) even in situations where class members suffer no actual damages. What this means is that technical, "gotcha" type violations can result in substantial exposure—and have led to substantial settlements. These and other cases have alleged violations of some of the basic FCRA requirements, such as failure to have a permissible purpose for obtaining the screening report, failure to send the required pre-adverse and adverse notices to prospective employees, and failure to properly re-investigate consumer disputes. Moreover, various other information sources, like Spokeo, Social Intelligence, Choice Level, and others, have been alleged to be acting as credit reporting agencies, and thus subject to the requirements of the FCRA. Private plaintiffs are likely to try to use the new EEOC/FTC guidance as evidence of a defendant's "willfulness"—that is, that the guidance provides further evidence of the defendant's actual knowledge or reckless disregard of the relevant legal requirements.

The FTC's recent collaboration with the EEOC on employment background checks may signal the FTC's continued interest in pursuing such cases against employers, as well as background-check providers. Employers obtaining background checks, and companies providing background-check services, should take heed of this guidance, and use this opportunity to confirm compliance with these EEOC/FTC- and CFPB-enunciated standards.

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