

The Fair Credit Reporting Act: Misnamed but Mischievous

More and more, employers are falling victim to class action filings claiming that their background check procedures violate the Fair Credit Reporting Act (FCRA). Although the attention of in-house counsel and human resources managers has focused on “ban the box” campaigns against even asking about criminal history, employers who perform background checks may be subject to a federal law already in place. While its name might indicate that it is aimed at credit checks, the FCRA also regulates employer background checks. Indeed, the FCRA contains a number of potential traps for employers that a new wave of plaintiffs’ counsel has shown eagerness to exploit. Following is an overview of the most important elements of the law.

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NEWSLETTER

October 2015



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OVERVIEW OF FCRA & KEY TERMS

The FCRA, 15 U.S.C. § 1681 *et seq.*, regulates the procedures an employer must use when engaging a third party to conduct certain background checks on employees and/or applicants. Specifically, the FCRA applies when (1) the information sought meets the statutory definition of “consumer report” and (2) the party conducting the background check is a “consumer reporting agency.”



First, it is important to know the key terms. *Consumer report* is broadly defined to encompass (1) any written, oral or other communication of any information *by a consumer reporting agency* bearing on a person’s creditworthiness, character, general reputation, personal characteristics or mode of living (2) that is or may be used in whole or in part for an *employment purpose* (defined below). An *investigative consumer report* is a subset of a consumer report in which data is obtained through personal interviews.

The presence of a consumer reporting agency (CRA) is crucial. If a CRA is not present, the FCRA does not apply, even if the results of a background investigation otherwise would constitute a consumer report. A CRA is any person in the business of regularly preparing consumer reports for use by third parties using any means or facility of interstate commerce for the purpose of preparing or furnishing such reports.

The term *employment purpose* when used in connection with a consumer report means a report used for the

purpose of evaluating a person for employment, promotion, reassignment or retention as an employee. Thus, the FCRA applies not only to applicants for employment but also to current employees.

There is a special exception to the definition of *consumer report* for certain *employee investigations*. Specifically, a background check by a consumer reporting agency will not result in the creation of a consumer report if the communication is made to an employer in connection with an investigation of suspected misconduct relating to employment in compliance with law or any preexisting written policy of the employer. Transmission of the results of the report is limited to those persons listed in the FCRA, including the employer and its agents.

REQUIREMENTS UNDER THE FCRA

The FCRA mandates certain employer actions (1) before seeking creation of a consumer report on an individual, (2) before taking any adverse action based on that report and (3) after taking that adverse action.

Prior to the procurement of the consumer report (*i.e.*, requesting or commencing a covered investigation), the employer must comply with certain notice, written consent and certification requirements:

- First, the employer must furnish to the individual “a clear and conspicuous disclosure,” “in a document *that consists solely of the disclosure*,” that a consumer report may be obtained for employment purposes. This is one of the traps for the unwary. The employer cannot include the disclosure language within an employment application, for example.
- Second, prior to asking a CRA to prepare a consumer report, the employer must obtain the person’s *written* authorization for the procurement of the report.
- Finally, the CRA may not prepare the consumer report until and unless it receives the employer’s certification of compliance, both of the initial disclosure requirements of the FCRA and that the employer will comply with the additional FCRA requirements should it intend to take an adverse action against the individual.

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There are additional disclosure requirements prior to procuring an *investigative consumer report*. Not later than three days after the report was first requested, the employer must (1) inform the subject of the report, in writing, that “an investigative consumer report including information as to his character, general reputation, personal characteristics, and mode of living may be made”; (2) notify the individual of his right to request a “complete and accurate disclosure of the nature and scope of the investigation requested”; and (3) provide him with a written summary of rights under the FCRA in a specific form prescribed by the government. In addition, if the individual makes a written request for the additional information pertaining to the nature and scope of the investigation, the employer has five days to provide such. The employer also must certify to the CRA that it has made the required disclosures and will provide the additional information upon request by the individual.

Before taking any adverse action based in whole or in part on the consumer report, the employer must provide the subject of the report with (1) an un-redacted copy of the report and (2) a written summary of the person’s rights under the FCRA, in the form prescribed by the government.

This raises a number of practical concerns. For example, the employer of course may form the *intent* to take the adverse action prior to sending the required information to the subject of the report; the key is that the adverse action *itself* not actually be taken. The employer must delay taking the adverse action for a period of time to give the applicant/employee time to object to the contents of the report. For example, the individual may claim a case of mistaken identity or identity theft, or have some other explanation for doubting the report.

The question arises as to how long after providing the mandated information the employer must wait before taking the adverse action. There is no set time period. Originally, five business days was to be the rule set

by law. The time period, however, must be reasonably sufficient for the individual to respond to the report.

Another question is whether the employer must wait at least 30+ days, considering that *consumer reporting agencies* have at least 30 days (and as long as 45 days) to investigate reports challenged by individuals. At least one court has said no.¹



When the decision to take adverse action is made, a new set of rules applies. If the employer took adverse action against the individual based “in whole or in part” on information contained in a consumer report, the employer must provide notice of:

- The adverse action
- The name, address and telephone number of the consumer reporting agency that furnished the report
- A statement that the consumer reporting agency did not make the decision to take the adverse action, and is therefore unable to provide the employee the specific reasons why the adverse action was taken
- The employee’s right to obtain a free copy of the consumer report from the reporting agency, including the 60-day period in which the request must be made
- The employee’s right to dispute with the consumer reporting agency the accuracy or completeness of any information in the report.²

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¹ *Johnson v. ADP Screening & Selection Servs.*, 768 F. Supp. 2d 979, 983 (D. Minn. 2011). “[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 thirty days to investigate.”

² There are special but more limited disclosure requirements for *employee investigation* reports.

The CRA has certain obligations if its report is challenged, including the duty to undertake a reinvestigation free of charge and to notify the employer that inaccurate information was in the consumer report that has since been removed, or that the individual continues to dispute such. The employer, however, is not required by the FCRA to reconsider its adverse decision if the individual shows that the consumer report is in fact mistaken.

REMEDIES

The FCRA provides a variety of remedies for violations that vary depending on whether the violations were “willful” or simply negligent. Damages available include awards for emotional distress, punitive damages, attorneys’ fees and fines. Also, criminal penalties are available for certain knowing and willful violations. Significantly, any prevailing party – including the employer – may recover attorneys’ fees in the event of a filing in bad faith or for harassment.

OTHER ISSUES

Employers must remain aware of separate federal, state and local laws that restrict the use of criminal

convictions, or even asking about such matters. Such federal and state Equal Employment Opportunity laws trump the FCRA.

Finally, many states have their own versions of the federal FCRA, which in many cases impose additional disclosure and other requirements on those seeking to procure consumer reports.

CONCLUSION

The FCRA clearly imposes a significant number of requirements on those employers who would seek to obtain and use covered reports. These mandates provide a series of traps for the unwary. Legal counsel should be consulted before undertaking a background check that may result in the procurement of a report covered by the FCRA.

The attorneys in Wilson Elser’s Employment & Labor practice have trained legal and human resources personnel on the intricacies of the FCRA, and are available to provide such training or other consultation.

Members of Wilson Elser’s Employment & Labor practice, located throughout the country, provide one convenient point of contact for our clients. Please contact any of the following partners to access the experience and capabilities of this formidable team.

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