

FCRA's Dark Little Secret: Pre-Employment Background Checks May Give Rise to Liability

If you use a third-party to collect consumer information — whether via mobile apps, social media, or any other form of new media and technology — to conduct background checks on your current or prospective employees, be aware that such activity is likely covered by the Fair Credit Reporting Act (“FCRA”). As the flurry of Federal Trade Commission (“FTC”) enforcement action over the past two years makes abundantly clear, companies that deal in the collection of consumer data — including employers that retain them — are subject to the consumer protection measures required by the FCRA.

Indeed, on May 2, 2013, the FTC sent warning letters to ten data broker companies, including six companies that appeared to offer consumer information for employment purposes potentially in violation of the FCRA, including public-record information that is likely to affect negatively a consumer’s ability to obtain employment (e.g., arrests, indictments, criminal convictions, tax liens, or outstanding judgments). These six companies were: Crimcheck.com, 4Nannies, U.S. Information Search, People Search Now, Case Breakers, and USA People Search.

According to the letters, to the extent each company assembled or evaluated information on consumers and provided it to employers so that they can screen or evaluate employees, they are a consumer reporting agency (“CRA”) that is required to comply with the FCRA. According to the FTC, “even if you place a disclaimer on your website indicating that your data must not be used for employment or other FCRA-covered purposes, you may still be a CRA.”

Although the FTC made no determination that the companies were in fact violating the FCRA, it encouraged them to review their products and services, as well as their policies and procedures to ensure that they comply with the law, reminding them that a violation of the FCRA may result in legal action by the FTC, in which it is entitled to seek monetary penalties of up to \$3,500 per violation.

The Fair Credit Reporting Act

Before the FCRA was passed in 1970, little or no protection existed for job applicants who were denied employment or who were later fired because of false, inaccurate, incomplete, or irrelevant information contained in their consumer reports, which were (then lawfully) obtained without the employee’s knowledge or

consent from private consumer reporting agencies. Congress enacted the FCRA to ensure that employment decisions, together with other matters (like extension of credit), are based on fair, accurate, and relevant consumer information.

Under the FCRA, a *consumer report* is defined as any written, oral, or other communication of information provided by a consumer reporting agency bearing on a consumer's creditworthiness (and other credit-related matters) and/or his or her "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 ... employment purposes."

A subclass of consumer reports, called *investigative consumer reports*, contains information obtained through personal interviews with friends, neighbors, associates, and acquaintances of the consumer concerning the consumer's character, general reputation, personal characteristics, or mode of living.

Both types of reports must be obtained through a *consumer reporting agency* ("CRA"), which is defined as "any person who regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the

purpose of furnishing consumer reports to third parties."

For companies that assemble reports about applicants and regularly disseminate such reports to third parties, therefore, both the reporting company and the user of the report must ensure compliance with the FCRA, including the following provisions:

The law, entitled the "Privacy Rights for California Minors in the Digital World" (Cal. S.B. 568), requires operators of Internet Web sites, online services, online applications, or mobile applications ("operators") directed towards or known to be used by minors (that is, persons under the age of 18) to:

- **Notice and authorization**—An employer must get the applicant's written permission before asking for a report about him/her from a CRA or any other company that provides background information. The employer has no further obligation to review the application if permission is withheld. If an employer intends to use an *investigative consumer report* (that is, a consumer report based on personal interviews by the CRA) for employment purposes, the employer must disclose to the applicant that an investigative consumer report may be obtained, and the disclosure must be provided in a written

notice that is mailed, or otherwise delivered, to the applicant no later than three days after the date on which the employer first requests the investigative consumer report. Further, the disclosure must also include a statement informing the applicant of his or her right to request additional disclosures of the “nature and scope” of the investigation. In this regard, the disclosure “must include a complete and accurate description of the types of questions asked, the types of persons interviewed, and the name and address of the investigating agency.”

- **Due diligence**—The CRA or other company providing the background information must take reasonable steps to ensure the maximum possible accuracy of what’s reported (from public records, social network sites or otherwise) and that it relates to the correct person.
- **Pre-adverse action procedures**—If an employer might use information from a credit or other background report to take an adverse action (for example, to deny an application for employment), the employer must give the applicant a copy of the report and a document called *A Summary of Your Rights Under the Fair Credit Reporting Act*

before taking the adverse action. If any inaccurate or incomplete information is found in the report (for example, the report is for the wrong “John Smith,” contains a false driving or criminal record, or inaccurately lists salary, job titles, or employers), the job applicant is advised to contact the company that issued the report and dispute the information. Following an investigation, the CRA or other company providing background information must send an updated report to the employer if the applicant asks them to.

- **Adverse action procedures**—If an employer takes an adverse action against an applicant based on information in a report, it must provide the applicant with notice, which can be in writing or delivered orally or by electronic means. The notice must include the name, address, and phone number of the company that supplied the credit report or background information; a statement that the company that supplied the information did not make the decision to take the adverse action and cannot give the applicant any specific reasons for it; and a notice of the applicant’s right to dispute the accuracy or completeness of any information in the report and to get an additional free

report from the company that supplied the credit or other background information if the applicant asks for it within 60 days after receipt of the notice.

Key Takeaways For Employers

While the FCRA does *not* apply if the employer conducts the background screening entirely internally, even retrieving consumer information from a mobile app may trigger FCRA obligations given the FTC's broad definition of who qualifies as a "credit reporting agency." If covered by the FCRA, employers should be sure to obtain an applicant's authorization before getting a copy of his/her credit or other background report, provide the appropriate disclosures in a timely manner, and provide adverse action notices to unsuccessful job applicants.

In addition to civil remedies for those injured by an employer's noncompliance with the FCRA—which includes recovery of either actual damages or up to \$1,000 plus punitive damages for willful noncompliance, an employer who knowingly or willfully procures a consumer report under false pretenses may also be criminally fined and incarcerated for up to 2 years. Given the FCRA's steep civil and criminal penalties for noncompliance, employers conducting background checks without regard to the FCRA do so at their own peril.

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