HUNTON
ANDREWS KURTH

Criminal Background Check Litigation on the Rise: What Employers Need to Know

Despite predictions to the contrary, class action litigation over criminal background checks in the hiring process has continued to climb. In 2020, plaintiffs filed over 5,000 claims related to the Fair Credit Reporting Act ("FCRA"), a 10-year high.[1] This article discusses important developing FCRA trends employers should be aware of, recommendations on how to ensure FCRA compliance, and reminds employers that although FCRA claims are on the rise, they must also ensure their background check policies comply with Title VII.

The Nature of FCRA Claims and Extent of Exposure

The FCRA governs the delivery and use of criminal background reports in the hiring process by employers and the vendors that furnish these reports. The most frequent claims against employers involve the alleged failure to provide adequate notice to an applicant that a background check will be run, and the alleged failure to provide additional notices in advance of making an adverse action decision, such as denial of a job offer, based on the report.

FCRA non-compliance can result in hefty damages. A recent survey of nearly 150 FCRA class action lawsuits[2] showed that employers have paid more than $150 million in the last 10 years[3] to settle litigation claims for alleged FCRA violations.

Some New FCRA Litigation Trends and Defenses

Several new trends, arguments, and defenses have emerged in FCRA litigation in the past several years.

Double Dipping

Plaintiffs increasingly seek to "double dip" in FCRA damages by pleading two separate causes of action for a single violation. Specifically, plaintiffs will assert that an inadequate disclosure (claim 1) renders invalid an applicant's written authorization to conduct the background check (claim 2). However, the FCRA does not expressly recognize these as two separate claims, and attempts to bifurcate a single cause of action should be the subject of express defenses and early motion practice to strike or dismiss the duplicative claim.

Summary of Rights Claims

Similarly, plaintiffs will assert that an employer's failure to send applicants a copy of the summary of rights under the FCRA along with their pre-adverse action notice, is an independent violation of the Act. At least for matters pending in federal court, there is emerging law suggesting that a plaintiff does not have standing to make such an assertion where the plaintiff subsequently learned what their FCRA rights are.[4]

Compliance Certification

An increasing number of FCRA lawsuits are being filed asserting merely that a consumer reporting agency vendor failed to obtain a certification of compliance from the employer, verifying that the background check would be only for lawful purposes, as required by Section 1681e of the FCRA.[5] Although these claims may only be asserted against the vendor, plaintiffs in such a case may also seek discovery regarding the employer's general compliance with the FCRA, which might expose that employer to a direct claim for its own noncompliance.

Disclosure Forms

Plaintiffs have also begun filing suits alleging that including language regarding "investigative consumer reports" in a regular consumer report disclosure violates the FCRA's stand-alone requirement for consumer report disclosures. The law is unsettled on this, and some defense theories have prevailed. In March 2020, in *Walker v. Fred Meyer Inc.*, the U.S. Court of Appeals for the Ninth Circuit held that a consumer report disclosure form could include information about investigative reports without violating the FCRA, so long as "the information about investigative reports is limited to disclosing that such reports may be obtained for employment purposes, and providing a very brief description of what that means."[6]

Class Standing

In a case decided June 25, 2021 by the Supreme Court of the United States, T*ransUnion LLC v. Ramirez*, the Court held that all class members of an FCRA class action lawsuit must have suffered a concrete harm in order to collect individual damages.[7] Although the impact of this case remains to be seen, it may reduce the size of future class action lawsuits.

1 https://webrecon.com/webrecon-stats-for-dec-2020-and-year-in-review/

2 Good Jobs First Violation Tracker

3 https://www.esrcheck.com/wordpress/2019/06/21/174-million-for-fcra-law-suits/

4 See *Long v. SEPTA*, 903 F.3d 312 (3d Cir. 2018).

5 15 U.S.C. § 1981.

6 *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020).

7 *TransUnion LLC v. Ramirez*, No. 20-297 ,2021 WL 2599472 (U.S. June 25, 2021).

Avoiding Becoming a Target of FCRA Litigation

Employers can help insulate themselves from FCRA exposure by taking the following important steps.

Routinely Audit and Update FCRA Forms and Processes.

Regular audits are critical in ensuring an employer's background check practices remain compliant. Employers must recognize that, given the multiple phases of the background check process, the frequent use of automation and online portals, and the involvement of numerous parties, something will eventually fall out of compliance.

To catch issues early, an employer's background check process should be reviewed frequently with all stakeholders involved, and ideally with the assistance of FCRA litigators who best understand how minor errors create openings for litigation.

Examine Your Relationship With Your Background Check Vendor

A high percentage of FCRA claims are spawned because an employer does not examine and question the mutual obligations under its contract with its consumer reporting agency vendor. The scope of responsibility of both parties must be clear and fully communicated to the employer's background check team. To that end, employers should resist purchasing off-the-shelf or turnkey services from a vendor.

In addition, relying on the vendor's expertise is usually not a defense for employers who are pursued for FCRA violations, and the employer must know where the vendor's legal obligations end and the employer's begins. Employers should also negotiate for reasonable indemnification obligations from the vendor in the event a claim is filed. Consumer reporting agencies have been narrowing their indemnity obligations in their form contracts in recent years, and employers should negotiate for more protection.

Title VII Obligations

Title VII of The Civil Rights Act of 1964 prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.[8] Although having a criminal record is not a protected category under Title VII, an employer's use of an applicant's criminal history in making employment decisions may violate Title VII's prohibition against employment discrimination based on race and national origin if candidates with the same background are treated differently based on a protected characteristic, or the employer's policy disproportionately screens out a protected group. Violations of Title VII may be investigated by the EEOC, or the subject of private litigation, and in recent years, there has been a steady increase in the number of EEOC systemic investigations.

Limiting Title VII Risk Exposure

In order to withstand a Title VII challenge, employers should be prepared to show that their background check policy is job-related and consistent with business necessity. To meet this threshold, the employer's policy should not exclude all individuals with a criminal record from employment. The policy should also take into account the nature and gravity of the criminal offense, the time elapsed since the offense occurred, and the nature of the job held or sought.[9]

Employers should also conduct an individualized assessment of the employee or applicant subject to the background check and consider whether an exception should be made because the policy as applied to the individual and/or their particular job, is not job-related and consistent with business necessity.

Conclusion

Background check litigation, and in particular claims regarding FCRA, will likely accelerate as 2021 continues. Employers can avoid being swept into this current by making their compliance transparent and uncomplicated, and by routinely reviewing their processes to ferret out occasional process glitches that may attract claims.

8 42 U.S.C. § 2000e-2.

9 See *Green v. Missouri Pacific Railroad*, 523 F.2d 1290 (8th Cir. 1975) EEOC Enforcement Guidance on the Consideration of Arrest and Conviction Records in Employment Decisions under Title VII of the Civil Rights Act available at https://www.eeoc.gov/laws/guidance/enforcement-guidance-consideration-arrest-and-conviction-records-employment-decisions.

AUTHORS

Robert T. Quackenboss
Partner, Washington, DC
and New York
rquackenboss@HuntonAK.com
+1 202 955 1950 (Washington DC)
+1 212 309 1336 (New York)

Kevin White
Partner, Washington, DC,
and Houston
kwhite@HuntonAK.com
+1 202 955 1886 (Washington, DC)
+1 713 229 5708 (Houston)

Eileen Henderson
Associate, Boston
ehenderson@HuntonAK.com
+1 617 648 2788

HUNTON ANDREWS KURTH