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PRIVACY RIGHTS

While the Equal Employment Opportunity Commission's agenda regarding how employer background checks may have a disparate impact on minorities has received significant attention, federal and state laws governing the procurement of such information have often been left on the sidelines, authors Melissa Bergman Squire and Jeffrey W. Rubin of Dechert LP say in this BNA Insights article.

But that is quickly changing, the authors say. By now most employers know that the Fair Credit Reporting Act is not limited to traditional credit reports as its name implies. This article summarizes the law's technical requirements and remedial scheme, identifies common mistakes made by employers and the resulting litigation, and provides a discussion of best practices to help employers navigate the process of procuring background check reports without falling victim to the FCRA class action fever.

Don't Get Swept Up in the FCRA Flood—Understanding Common Pitfalls and Practical Guidance for Minimizing Risk

BY MELISSA BERGMAN SQUIRE AND JEFFREY W. RUBIN

While much attention has been paid over the last decade to the EEOC's agenda regarding background checks and the concern that employers' use of criminal and other background information may have a disparate impact on minorities, federal and state laws governing the procurement of such information have often been left on the sidelines.

But, that is quickly changing. By now most employers know that the Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681a et seq., is not limited to traditional credit reports as its name implies. Instead, it is a federal law that prescribes exacting procedures employers must follow when they use a third party to conduct almost any type of background check on current or prospective employees, including criminal history checks, reference checks and, yes . . . credit checks.

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The FCRA's procedures, while rigid, are nothing new. Yet, the number of lawsuits asserting claims under the FCRA has recently surged, and the overwhelming majority of them have been brought as putative class actions. This trend, which is reminiscent of early wage and hour litigation, can be attributed to the increased awareness by plaintiffs' lawyers that the FCRA's strict provisions and liberal remedial scheme render it perfect for class action lawsuits.

With the availability of statutory damages for each alleged violation of the act (even absent a showing of actual damage), the ability to obtain punitive damages and attorneys' fees, and standardized practices by employers, FCRA class actions are as good as gold. Of course, the widespread publication of several multimillion dollar class action FCRA settlements over the past year has only added fuel to the fire.

Though retailers and restaurant chains have been prime targets due to their frequent hiring and large pool

of applicants for whom recovery can be sought, the recent wave of lawsuits demonstrates that employers of every size and in all industries are potentially at risk.

The changing tide of FCRA class action litigation makes strict compliance with the FCRA more important than ever. This article summarizes the FCRA's technical requirements and remedial scheme, identifies common mistakes made by employers and the resulting litigation, and concludes with a discussion of best practices to help employers navigate the process of procuring background check reports without falling victim to the FCRA class action fever.

The FCRA's Rigid Procedural Requirements

The FCRA permits employers to obtain ''consumer reports'' to evaluate individuals for employment, but outlines very specific steps employers must follow in doing so. *See* 15 U.S.C. § § 1681a(h), 1681b(a)(3)(B).

A ''consumer report''[1] is defined broadly to include almost any type of background check report received from a third party vendor (known as a ''consumer reporting agency'').[2] This includes criminal background reports, as well as reports containing information regarding an individual's credit history, motor vehicle records, educational and employment background, and licenses.

Before requesting a consumer report, employers must notify employees or applicants that they are obtaining or may obtain a consumer report for employment purposes in a ''clear and conspicuous'' writing. *See* 15 U.S.C. § 1681b(b)(2)(A).[3]

The disclosure must be contained in a document that ''consists solely of the disclosure.'' It may not, for example, be a paragraph contained in an employer's application form. Nor may it contain a liability release or other extraneous information. If an employer seeks an ''investigative consumer report'' (which is essentially a ''consumer report'' that was prepared by interviewing third parties), the employer must make additional required disclosures and include a copy of the FCRA Summary of Rights form (the newer version of which employers should have begun using effective January 1, 2013). *See* 15 U.S.C. § § 1681a(e), 1681d.

In addition to providing the required notice, employers must obtain written consent from employees or applicants before attempting to obtain a consumer report. This authorization may be given on the separate disclosure form referenced above. *See* 15 U.S.C. § 1681b(b)(2)(A).

Employers must also certify to the consumer reporting agency from whom they intend to obtain the report that they have a ''permissible purpose'' for requesting the report and that they will comply with the relevant FCRA provisions and equal opportunity laws.

The notice and consent requirement is not the end of an employer's obligations under the FCRA. Before an employer takes any adverse action (i.e., denying employment or any other action that adversely affects a current or prospective employee) against an applicant or employee based in whole or in part on a consumer report, the employer must provide the individual with a pre-adverse action notice.

The pre-adverse action notice must include a copy of (a) the consumer report and (b) the new FCRA Summary of Rights form. *See* 15 U.S.C. § 1681b(b)(3). The purpose of the pre-adverse action notice is to give the subject of the report an opportunity to review the report and discuss or explain any discrepancies.

Although no specific time period is set out in the statute, as a practical matter, employers should wait a reasonable period of time (at least five business days) after informing an applicant or employee of its intent to take an adverse action before doing so.

When making an adverse decision final, employers must provide an additional oral, written, or electronic notice to the employee or applicant. This notice must include a laundry list of specific information required by the statute, including the name, address and toll-free telephone number of the vendor that conducted the background check. *See* 15 U.S.C. § 1681m(a).

Watch Out for State Counterparts to the FCRA

To further complicate things, many states have their own notification and consent requirements applicable to employment-related background checks. Some state laws mirror the federal legislation, while others require additional information to be included in required notices and/or different procedural steps.

For example, several states, including California, Oklahoma, and Minnesota, require employers to include a checkbox in their consent forms enabling individuals to indicate whether they wish to receive a copy of their background check report.

Against this backdrop, multi-state employers struggle to maintain compliant forms and procedures, making it critical for employers to have their forms and procedures reviewed by legal counsel before proceeding to conduct background checks.

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[1] A ''consumer report'' is any communication 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 employment purposes.'' 15 U.S.C. § 1681a(d).

[2] A ''consumer reporting agency'' is ''any person which, for monetary fees, dues, or on a cooperative nonprofit basis, 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. . . .'' 15 U.S.C. § 1681a(f).

[3] With advances in electronic communication, many employers are now conducting their hiring processes online and rely on electronic signatures to satisfy their FCRA obligations. The use of electronic signatures to constitute the ''written'' consent required by the FCRA has become yet another issue for plaintiffs to challenge in their class action suits. *See e.g., Pitt v. K-Mart Corp*., Case No. 3:11-cv-00697 (E.D. Va. May 24, 2013) (discussed below). The prevailing view is that the federal E-SIGN Act, 15 U.S.C. § 7001(a), permits employers to obtain electronic signatures to authorize the procurement of consumer reports under the FCRA. *See e.g., Miller v. Quest Diagnostics*, 2015 BL 39805, No. 14-cv-04278 (W.D. Mo. Jan. 28, 2015). In fact, the FTC issued an advisory opinion in 2001 recognizing the applicability of the E-SIGN Act to FCRA disclosures and consents. *See* Letter from Brinckerhoff to Zalenski (May 24, 2001). Nevertheless, employers who use or intend to use electronic signatures to obtain consent from applicants for background checks should take steps to ensure that their programs meet the requirements of both the FCRA and the E-SIGN Act.

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Potential Liability for FCRA Violations.

Plaintiffs' attorneys have recently discovered that the FCRA's remedial provisions are quite ''class action friendly.'' The FCRA permits applicants and employees to bring a private cause of action against an employer for either ''negligent'' or ''willful'' noncompliance with the act. A plaintiff must file suit ''not later than the earlier of (1) two years after the date of discovery by the plaintiff of the violation that is the basis for such liability or (2) five years after the date on which the violation that is the basis for such liability occurs.'' 15 U.S.C. § 1681p.

An employer that ''negligently'' fails to comply with the FCRA will be liable for actual damages sustained by the individual as well as reasonable attorneys' fees and costs. *See* 15 U.S.C. § 1681o.

An employer that willfully violates the FCRA can be held liable for actual damages, or statutory damages of not less than $100 and not more than $1,000, plus attorneys' fees, costs and punitive damages. *See* 15 U.S.C. § 1681n.

In *Safeco Ins. Co. v. Burr*, 551 U.S. 47 (2007), the United States Supreme Court held that a defendant acts ''willfully'' under the FCRA by either knowingly or recklessly disregarding a statutory duty. A defendant's conduct is reckless only if it was ''objectively unreasonable'' in light of legal rules that were clearly established at the time. In other words, an employer will not be found to have ''willfully'' violated the FCRA if it acted on a reasonable interpretation of the law.

The availability of statutory damages for willful violations is the critical component in FCRA class actions because it eliminates the need to prove actual damages and makes it easier to calculate damages on a classwide basis. Thus, FCRA class actions are often filed as a result of seemingly trivial, technical violations of the act even when the named plaintiffs and other class members suffered no resulting injury.

Pure negligence claims are almost never asserted because actual damages are typically nominal at best. Furthermore, with statutory damages capped at $1,000 per willful violation, single plaintiff cases are not very lucrative. Class actions can spell big money — especially in the case of large employers that receive thousands of applications per year.

The Supreme Court, however, may be poised to rain on this class action parade. In *Robins v. Spokeo, Inc.*, 742 F.3d 409 (9th Cir. 2014), Spokeo argued that because the plaintiff did not allege actual harm as a result of the alleged FCRA violation, the plaintiff lacked standing under Article III of the U.S. Constitution to pursue an action against Spokeo. The U.S. Court of Appeals for the Ninth Circuit disagreed, holding that the plaintiff in an FCRA suit has standing to proceed with his claims even absent a showing of actual injury where he is pursuing statutory damages for a ''willful'' violation of the Act. *See* 15 U.S.C. § 1681n(a).

Spokeo filed a writ of certiorari on May 1, 2014, asking the Supreme Court to review the Ninth Circuit's decision, and the Supreme Court granted certiorari on April 27, 2015. The justices will answer the question of ''[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute.'' Its decision could either ebb or flow the tide of FCRA class actions.

Common Procedural Pitfalls.

Unfortunately, when it comes to FCRA compliance, employers are learning the hard way that they have to sweat the small stuff. The law's procedure for procuring and using background check reports contains numerous steps and a host of super-technical requirements.

While endeavoring to comply with the spirit of the act, many employers are getting tripped up in the details. The last few years have seen a dramatic surge in the number of class actions alleging that employers violated the FCRA's pre-screening disclosure and consent requirement, the adverse action procedure, or both. The following summarizes common mistakes made by employers that are proving to be quite costly:

1. Including FCRA Disclosures in Employment Applications

One of the basic requirements of the FCRA is to provide a disclosure to job applicants and employees and to secure their authorization prior to conducting an employment background check. The authorization and disclosure must stand alone. It cannot be combined with other forms or hidden within a job application. Despite this fairly straightforward requirement, employers are still getting it wrong.

One of the basic requirements of the FCRA is to provide a disclosure to job applicants and employees and to secure their authorization before conducting an employment background check.

In fact, earlier this year, Pizza Hut was slapped with a potential class action claim in the Southern District of New York based in part on the fact that its purported FCRA disclosure was buried at the bottom of its job application. *See Rivera v. Pizza Hut*, Case No. 15-cv-00308 (S.D.N.Y. Jan. 15, 2015). Notably, after passing the background check, the plaintiff worked as a pizza delivery driver for Pizza Hut for over 7 months and suffered no harm as a result of the alleged deficiency.

Craft store giant, Michaels Stores, Inc., was also recently hit with a class action suit in the District of New Jersey on December 4, 2014, due to its failure to satisfy the FCRA's standalone requirement. *See Graham v. Michaels Stores, Inc.*, Case No. 14-cv-07563 (D.N.J. Dec. 4, 2014).

In that case, the plaintiff alleges that the employer's FCRA disclosure was included in an on-line job application which requested employment history (among other things). According to the complaint, the disclosure was simply one section in a single web-screen. The plaintiff did not have to click on anything on the web-screen to access a separate disclosure as some employers have required.

Again, no injury to the plaintiff is alleged. The plaintiff explains that he was hired by the company and voluntarily resigned a few months later. Two additional class actions pending against Michaels Store, Inc., in

Missouri and Texas were recently consolidated with this case and transferred to the District of New Jersey on April 2, 2015.

Offering some good news to employers last month, the U.S. District Court for the Central District of California dismissed a putative class action asserting, among other things, that an employer's FCRA disclosure form was not a stand-alone document because it was ''sandwiched'' between extraneous information consisting of over 15 pages in an online employment application process. *See Newton v. Bank of America*, No. 2:14-cv-03714 (C.D. Cal. May 12, 2015).

Although Bank of America's FCRA disclosure was written on its own separate page with a bold heading reading ''Electronic Authorization for Consumer Reports,'' the plaintiffs contended that it failed to meet the FCRA's requirements because it was presented side-by-side with distracting, extraneous information as part of a job application.

Rejecting the plaintiffs' argument, the court found that the disclosure was sufficiently clear and conspicuous and that it was made in a document consisting solely of the disclosure. According to the court, nothing in the FCRA prohibits employers from providing an FCRA disclosure as part of the employer's application process or alongside other employment documents—provided that it is a separate document.

2. Including Liability Releases and Other Extraneous Information in Disclosure Forms

By far the most common FCRA class action claims stem from the inclusion of extraneous information in employers' disclosure forms. Specifically, the inclusion of a release of liability within an FCRA disclosure is an issue that has been litigated repeatedly.

The plain language of the statute requires a ''clear and conspicuous disclosure . . . in a document that consists solely of the disclosure.'' 15 U.S.C. § 1681b(b)(2)(A). Based on this language, in 1998, the Federal Trade Commission issued two advisory letters opining that the inclusion of a waiver of rights within a disclosure form violates the FCRA's ''stand-alone'' requirement, which is intended to ''prevent consumers from being distracted by other information side-by-side with the disclosure.'' *See* Letter from Haynes to Hauxwell (Jun. 12, 1998); Letter from Brinckerhoff to Leathers (Sept. 9, 1998).

Most courts have agreed with the FTC's interpretation. *See, e.g., Singleton v. Domino's Pizza*, 2012 BL 19550, No. 11-1823 (D. Md. Jan. 25, 2012) (''[B]oth the statutory text and FTC advisory opinions indicate that an employer violates the FCRA by including a liability release in a disclosure document.''); *Reardon v. Closet-Maid Corp*., 2013 BL 331669, 37 IER Cases 535. No. 08-cv-01730 (W.D. Pa. Dec. 3, 2013) (holding that the defendant's inclusion of a waiver of rights in its disclosure form violated the FCRA); *Avila v. NOW Health Group, Inc.*, 2014 BL 398116, No. 14 C 1551 (N.D. Ill. Jul. 17, 2014) (holding that the plaintiff asserted a valid claim for willful violation of the FCRA where the defendant's FCRA disclosure and authorization forms contained a liability release); *Milbourne v. JRK Residential America, LLC*, Case No. 3:12cv861 (E.D. Va. Mar. 11, 2015) (holding that the inclusion of a waiver in an FCRA disclosure rendered it invalid).[4]

Given recent case law and the flood of publicity that has ensued, employers should be on notice concerning the risk of including liability waivers in their FCRA disclosures.

Late last year, Whole Foods became the latest victim of the FCRA ''waiver of liability'' class action trend. *See Speer v. Whole Foods Market Group, Inc.*, No. 14-cv-03035 (M.D. Fla. Mar. 30, 2015). Significantly, Whole Foods' disclosure form does not include a waiver of liability provision. Instead, the waiver of liability provision at issue is found in Whole Foods' FCRA authorization form — which is a separate page with its own distinct heading.

Nothing in the FCRA's statutory language specifically precludes extraneous information in an FCRA authorization form. Instead, the ''stand-alone document'' requirement is only referenced in the section of the statute detailing the requirements of the disclosure. *See* 15 U.S.C. § 1681b(b)(2)(A).

In his amended complaint, the plaintiff, Colin Speer, contends that Whole Foods' forms nevertheless violate the FCRA because the two forms were given to him simultaneously and must be read and analyzed together. The success of this argument remains to be seen. Denying Whole Foods' motion to dismiss on March 30, 2015, the U.S. District Court for the Middle District of Florida explained that ''with all inferences drawn in favor of Plaintiff, if both the disclosure and the consent forms are combined and read as one document with the waiver and release included simultaneously with the disclosure, the complaint states a claim for relief.''

Whole Foods' motion to stay the case pending the Supreme Court's decision in *Spokeo* was also subsequently denied on April 29, 2015. At the parties' request, the case has been referred to mediation.

In addition to waivers of liability, the inclusion of other types of ''extraneous information'' in FCRA disclosures, including at-will employment and other acknowledgements, have been subject to challenge.[5]

One such challenge was appropriately shut down in the US. District Court for the Northern District of California in March 2015 by Judge Chhabria. In *Peikoff v. Paramount Pictures Corp.*, 2015 BL 149901, No. 3:15-cv-00068 (N. D. Cal. Mar. 26, 2015), the plaintiff initially asserted that the FCRA disclosure form he signed was

[4] Recently, a district court in California dismissed a putative class action alleging that an employer violated the FCRA because its disclosure included extraneous information, including a waiver of liability. *See Syed v. M-I LLC*, 2014 BL 298854, 2014 IER Cases 170890, No. 14-742 (E.D. Cal. Oct. 23, 2014). Employers should not find solace in this case, however. The court noted that the disclosure form was used in 2011, prior to the cases cited above, and the employer's interpretation of the FCRA's disclosure requirements was not objectively unreasonable under then-existing authority.

[5] Plaintiffs' attorneys have also begun to challenge the common employer practice of including state-law disclosures in their FCRA notice and consent forms. *See e.g., Miller v. Quest Diagnostics*, 2015 BL 39805, No. 14-cv-04278 (W.D. Mo. Jan. 28, 2015). For multi-state employers, who must comply with a patchwork of varying laws, the inclusion of these required state-law notices in a single notice governing background checks seems like the most practical and efficient solution. As the required state law disclosures are similar to and concern the same subject matter as the federal disclosure, they do not detract from the purpose of the act — which is to ensure that the consumer fully understands that he or she may be the subject of a background check report. How the courts will respond to these challenges, however, remains to be seen.

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invalid because it included a release of liability provision.

Although defense counsel gave the plaintiff a copy of a separate disclosure and authorization document he executed which contained no liability waiver, the plaintiff refused to drop his claim. Instead, he filed an amended complaint, asserting that the disclosure was nevertheless invalid because it included a one-sentence certification that the identifying information provided in the authorization was true and correct.

By order dated March 26, 2015, the district court granted Paramount's motion to dismiss. Serving as a voice of reason, Judge Chhabria concluded that ''[t]he one-sentence certification Paramount included in its disclosure form, if not a part of the statutorily permitted authorization, was closely related to it,'' and served to focus the consumer's attention on the disclosure.

Furthermore, ''even if inclusion of the certification in Paramount's disclosure form did not comply with a strict reading of § 1681b(b)(2)(A)'s requirement . . ., it is not plausible that Paramount acted in reckless disregard of the requirements of the FCRA by using this language,'' the judge said. Judge Chhabria's decision is a sound and welcome development which will hopefully serve to deter similarly trivial claims.

3. Making Adverse Decisions Before Providing the Requisite Notice

Though it is not quite as common as claims regarding the initial FCRA notice and consent forms, employers are increasingly getting into hot water with respect to their FCRA adverse action procedures or lack thereof. While the FCRA's requirements in this regard may be tedious, they are fairly straightforward.

Employers are increasingly getting into hot water with respect to their FCRA adverse action procedures or lack thereof, and although the acts requirements may be tedious, they are fairly straightforward.

Employers have to follow a two-step notice process when taking adverse action against an applicant or employee based in whole or in part on a consumer report. Significantly, adverse decisions cannot be made until after the employee or applicant receives a pre-adverse action notice and has a meaningful opportunity to respond. Both the timing and the words used to convey the status of the applicant or employee are key.

Two recent cases demonstrate the importance of strict adherence to the FCRA's pre-adverse action procedure — and, in particular, avoiding the appearance that an adverse decision was made before the requisite pre-adverse action process was completed. [6]

In *Cox. v. TeleTech@Home, Inc.*, No. 14-CV-0993 (N.D. Ohio Feb. 5, 2015), the U.S. District Court for the Northern District of Ohio denied TeleTech@Home, Inc.'s motion for summary judgment, finding that it may have willfully violated the FCRA by sending the plaintiff, Anthony Cox, an ambiguous pre-adverse action notice suggesting that the decision had already been made to rescind his offer of employment.

In September 2013, Cox received a conditional offer of employment from TeleTech subject to his passing a pre-employment background screening. Cox consented to the background check, which was conducted by Sterling Infosystems, Inc.), a third party consumer reporting agency.

As part of the service provided to TeleTech, Sterling sent required FCRA notices to prospective employees using TeleTech letterhead. Notwithstanding this arrangement, TeleTech inexplicably incorporated another step into its pre-hire process that caused some confusion.

On September 17, 2013, TeleTech sent Cox a form email advising him that there was an issue with his pre-employment screening. The email had a subject line that read ''Urgent Rescinded Offer'' and explained that Cox was ''ineligible for hire at this time'' and TeleTech was rescinding his offer of employment. The email did not include a copy of Cox's consumer report or any other required content.

It did, however, invite Cox to contact TeleTech if he believed he was receiving the email in error. Two days later, Cox received a pre-adverse action letter by email from Sterling. He subsequently received a hard copy of this ''official'' pre-adverse action notice by mail, along with a copy of the background check report and a summary of FCRA rights.

Upon receiving the consumer report, Cox confirmed that Sterling had misidentified him as having an Alaska felony conviction. Cox completed and returned the paperwork to correct the information, and TeleTech reoffered him an employment position. However, Cox never ended up working for TeleTech. Instead, he brought suit, asserting that TeleTech willfully violated the FCRA by failing to provide a copy of the consumer report and summary of his rights before rescinding his job offer.

TeleTech moved for summary judgment, contending that the email it sent prior to the Sterling pre-adverse action notice did not actually rescind Cox's employment offer, but merely placed it on hold. The district court disagreed. The court explained that ''the FCRA is not violated until an adverse employment decision 'is communicated or actually takes effect, and an [employer] has until that time to take the necessary steps to comply with the FCRA's requirements.' ''

It further noted that ''[a]n adverse action does not occur where the employer merely alerts the prospective employee that it is considering revoking the offer.''

However, in denying TeleTech's motion, the court determined that a reasonable jury could find that TeleTech's ''Urgent/Rescinded Job Offer'' email went far be-

[6] Online retailer Amazon.com and its staffing company were recently hit with a proposed class action in the U.S. District Court for the Western District of Washington, accusing the companies of failing to comply with the FCRA's adverse action procedures altogether. *See Williams v. Amazon.com, Inc.*, No. 2:15-cv-00542 (W.D. Wash. Apr. 7, 2015). The lawsuit was brought by named plaintiff Gregory Williams, who asserts that he was denied a warehouse job after a criminal background check erroneously reported that he had a felony conviction for cocaine possession. The plaintiff contends that he did not receive a copy of the report or a summary of his rights (either before or after the adverse decision was made) in violation of the FCRA.

yond alerting Cox to an issue with his background check that, if true, would disqualify him from employment. Rather, the email suggested that the adverse decision was a *fait accompli*.

Furthermore, the fact that TeleTech ''had no systematic policy or procedure to ensure it complied with the FCRA, despite the fact that employees had received training and were aware of the FCRA's requirements'' suggested that TeleTech could be found to have willfully violated the FCRA.

Fortunately for TeleTech, Cox's motion for class certification was simultaneously denied. Nevertheless, this case sends a strong warning to employers that they should periodically review their FCRA compliance procedures and ensure that adverse employment decisions are not made or communicated without first complying with the FCRA's pre-adverse action process.

A class action complaint filed against Target Corporation last year sends a similar message. *See Freckleton v. Target Corp.*, No. 14-cv-00807 (D. Md. Mar. 17, 2014). Charmaine Freckleton applied for a job with Target Corporation in 2012 and consented to a background check, which was conducted by First Advantage. Target's contract with First Advantage included a ''scoring'' service, by which First Advantage would score an applicant in accordance with an adjudication matrix provided by Target.

The adjudication matrix assigned the applicant one of three classifications: in-eligible for hire; eligible for hire; or ''decisional'' — meaning Target needed to decide itself. Based on information in its database suggesting that Freckleton had been involved in a prior theft at CVS, First Advantage sent Target a report indicating that Freckleton was ''ineligible for hire.''

Target subsequently sent Freckleton a copy of the screening report accompanied by a written notice stating that the report ''might'' have an adverse effect on her application for employment.

Instead of challenging the adverse information in the report, Freckleton filed a class action complaint, alleging that Target willfully violated the FCRA by failing to provide her and other similarly situated individuals with a pre-adverse action notice, a copy of the background report, and the required summary of rights before taking adverse action.

Though Freckleton acknowledges that she received the required notice and accompanying documents, it is the timing of her receipt that is the basis for her objection.

According to Freckleton, the designation in the consumer report stating that she was ''ineligible for hire'' demonstrates that Target had already made the decision not to offer her employment before sending the required notice.

On Jan. 12, the U.S. District Court for the District of Maryland ruled Freckleton stated a claim against Target Corp. for violating the Fair Credit Reporting Act by failing to notify her that her background check might adversely affect her potential employment with the company (2015 BL 7904, 2015 IER Cases 174531; 11 DLR A-6, 1/16/15). The case remains pending, but serves as a reminder to employers to provide applicants with an opportunity to dispute negative information in consumer reports before making adverse decisions and to exercise caution in their related communications. Had First Advantage simply used red flags — instead of ''ineligible for hire'' notations — the plaintiffs wouldn't have a leg to stand on.

Big Settlements Are Fueling the Fire!

In the past few years, employers have paid out millions of dollars to settle class action lawsuits alleging violations of the FCRA. These headline-grabbing, hefty settlements continue to fuel additional lawsuits against employers and emphasize the importance of FCRA compliance. The following is a roundup of some of the biggest, and most highly publicized, FCRA class action settlements:

■ Knights v. Publix Super Markets, No. 3:14-cv-00720 (M.D. Tenn. Nov. 12, 2014). In the largest publicized settlement to date, Publix agreed to pay $6.8 million to settle a nationwide FCRA class action in which the plaintiffs asserted that Publix failed to provide a ''stand alone'' background check disclosure as required by the FCRA (209 DLR A-3, 10/29/14). Specifically, both Publix's written and electronic background check forms included extraneous information, such as waivers of liability. The settlement was approved on November 12, 2014.

■ Marcum v. Dolgencorp, Inc. d/b/a Dollar General, No. 12-108 (E.D. Va. Mar. 4, 2015). On March 4, 2015, the U.S. District Court for the Eastern District of Virginia approved a $4 million settlement between Dollar General and a nationwide class of job applicants alleging that the company failed to follow the FCRA's procedures when conducting background checks. A federal district court in Virginia had tentatively approved the deal in October (2014 BL 294630; (201 DLR A-1, 10/17/14).

The lawsuit initially stemmed from a claim by Jonathan Marcum that Dollar General denied him employment due to an incorrect criminal background report without first providing him a copy of his background check report and an opportunity to dispute its contents. The suit was later amended to add a claim that the company failed to provide a valid FCRA disclosure because the document included extraneous information, such as a waiver of liability.

■ Brown v. Delhaize America, LLC , No. 14-cv-00195 (M.D.N.C. Mar. 27, 2015). Food Lion's parent company, Delhaize America, LLC, recently joined the ranks of companies paying large dollar amounts to settle FCRA class action lawsuits. On March 27, 2015, the U.S. District Court for the Middle District of North Carolina preliminarily approved the parties' agreement to settle this FCRA class action for approximately $3 million.

The plaintiff claimed that Delhaize: (1) failed to provide class members with a clear and conspicuous, stand-alone disclosure that a consumer report would be obtained for employment purposes; and (2) frequently took adverse employment action against employees based on background reports without first providing those employees with a pre-adverse action notice as required by the FCRA.

The agreement would cover an estimated 59,350 people who applied to Delhaize stores over a two-year period, including supermarket chains such as Food Lion, Hannaford and Bottom Dollar.

■ Ellis v Swift Transportation Co., LLC, 2014 BL 284260, No. 13-0473 (E.D. Va. Oct. 7, 2014). In 2014, trucking conglomerate Swift Transportation Co. agreed to pay $4.4 million to settle a class action brought on behalf of

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over 10,000 potential class members contesting the company's background check procedures (195 DLR A-1, 10/8/14).

In his complaint, the named plaintiff alleged that Swift procured a consumer report on him without his consent and decided not to hire him based on his criminal background report without following the FCRA's two-step adverse action procedure. This was the second time Swift had been the target of an FCRA class action lawsuit, the first case having been dismissed earlier in 2013.

■ Singleton v. Domino's Pizza, LLC, 976 F. Supp. 2d 665 (D. Md. 2013). In 2013, Domino's Pizza agreed to a settlement of alleged FCRA violations in the amount of $2.5 million. The named plaintiffs asserted that the pizza giant willfully violated the FCRA by failing to obtain proper authorization before conducting background checks. Instead of being a ''stand alone'' document, the authorization was contained in an employment application package and also included a release of liability clause.

The plaintiffs further asserted that Domino's Pizza took adverse action against them and other prospective employees due to their background checks without first providing copies of the reports and the required notices of their rights.

■ Pitt v. K-Mart Corp., No. 3:11-cv-00697 (E.D. Va. May 24, 2013). Earlier in 2013, K-Mart Corp. agreed to a $3 million settlement stemming from allegations that it violated the FCRA by, among other things, using an outdated version of the FCRA Summary of Rights form, which did not adequately explain an applicant's right to dispute incomplete or inaccurate information contained in a background check report.

Best Practices.

Case law interpreting the FCRA's requirements in the context of employee background checks is in its infancy and the boundaries of the law continue to be challenged. While there is no sure-fire way to avoid sharing the spotlight with the ranks of Whole Foods, Publix, and Domino's Pizza (that is, short of avoiding third party background checks altogether), implementing policies and procedures to ensure compliance with the FCRA's strict technical requirements will go far in discouraging and defending against claims for willful violation of the act. What follows are recommended practices to stay legally compliant while actively and successfully screening candidates:

■ Use only reputable, third party screening firms that have a demonstrated expertise in FCRA legal compliance. Do not rely solely on the forms provided by these vendors. Instead, engage knowledgeable counsel to draft or review FCRA-compliant forms, policies and procedures.

■ Scrutinize your FCRA disclosure and authorization forms. Make sure the disclosure is in a clearly labeled, stand-alone document, is written in plain language, and does not include any extraneous information. While many employers have combined the disclosure and authorization in one document (as permitted by the statute), this practice is now disfavored due to the increased chance that something within the document will be challenged as extraneous. Consider putting state disclosures in a separate document to avoid the argument that they constitute extraneous information. Ensure that authorization forms are signed and dated before proceeding to request a background check report from a consumer reporting agency.

■ Review your adverse action procedure and forms. Ensure that your pre-adverse action notice and final adverse action notice contain all of the information required by the FCRA and any applicable state or local laws. Include a copy of the background check report with the pre-adverse action notice, as well as an updated copy of the FCRA Summary of Rights.

■ Follow the FCRA's adverse action procedures carefully when making negative decisions regarding applicants or employees based at least in part on the results of a background check report. Make sure you send the pre-adverse action notice before making a decision with respect to an employee or applicant. Wait a minimum of five business days after sending a pre-adverse action notice before making an adverse decision final. Be sure that your policies and records clearly reflect the sequence of events.

■ Train your human resources team and hiring managers on the requirements of the FCRA (as well as any state or local requirements) and how to communicate with applicants and employees during the pendency of the background check review process.