

Retailers Beware: Background Checks Continue To Be Subjected To Scrutiny and Class Action Litigation

Fair Credit Reporting Act / February 2, 2015 / Michael A. Logan

Retailers are getting hit with a tsunami of class action litigation alleging violations of the Fair Credit Reporting Act ("FCRA"), Federal Trade Commission ("FTC") guidelines, and related state laws. In general, these lawsuits all allege that the employers are in violation of the Act's requirement to provide proper notice to the prospective employee that a consumer report is going to be utilized to determine whether they will be hired. In addition, the cases allege a multitude of other "technical" violations of the Act.

Pursuant to the FCRA, before a prospective employer can obtain a consumer report, which is typically part of the background checks routinely conducted by retailers, the prospective employee must be provided with a clear and conspicuous written disclosure that a consumer report may be utilized. The disclosure must include a written authorization from the employee, and must be in a stand-alone document. Further, if the applicant was rejected due to something discovered in the background check, the employer is required to provide additional disclosures to the applicant, including a copy of the report and a summary of rights advising the employee that he may dispute the accuracy of the report. The damages available under the Act are "not less than \$100, and not more than \$1,000" per violation. In addition, the employee can seek injunctive relief, punitive damages, and attorneys fees.

In the last few months, multiple class actions have been filed against retailers, many as a result of on-line applications. Among the retailers being targeted is Dallas-based Michaels Stores, Inc., which was been sued three times in recent months in cases seeking class action status. The suits each concern the manner in which Michaels notifies potential employees of the use of background checks.

The most recent Texas class action alleges that Michaels violated the FCRA in connection with the hiring of prospective employees. Similar class action suits, which contains essentially the same allegations, have also been filed in Illinois and Missouri. The essence of the suits is that Michaels failed to properly notify the potential employees that Michaels intended to run a credit report on them and that Michaels does not provide separate written notice to the prospective employee that Michaels may obtain consumer reports on them, in violation of the FCRA and Federal Trade Commission ("FTC") guidelines.

According to the lawsuits, Michaels provides FCRA disclosures and authorizations within their online application, but that it is all in one long webpage, contains too much "extraneous information," and fails the "clear and conspicuous disclosure" requirement. In addition, it is alleged that the application improperly contains liability releases.

In 2014, the following retailers have been sued in class action litigation in various courts around the country: Whole Foods Market, Inc. , CEC Entertainment, Inc. d/b/a Chuck E. Cheese's, Extended Stay America, Nine West

Holdings, O'Reilly Automotive Stores, Inc., Century 21, Axxess Financial, Dollar General, Publix Super Markets, Panera, and American Multi-Cinema.

In light of this wave of litigation, every retailer should *IMMEDIATELY* have an employment attorney review its employment application forms to ensure strict compliance with the FCRA requirements and to address the multitude of complaints alleged in the suits. For example, the suits have alleged that the font used on the application was too small, that the term "consumer reports" was not used, that a release was requested, that the application was too long, that a separate document was not provided, and a variety of other complaints. It is too early to know if these suits will be successful, but the goal of the litigation is to coerce settlements. One retailer recently settled one class action for \$11.0 million! Therefore, a close review of online and paper application forms should be quickly undertaken.

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