Background Check Litigation Continues To Rise

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Earlier this month, O'Reilly Auto Parts agreed to pay close to $1 million to settle claims filed under the Fair Credit Reporting Act for alleged violations relating to their background screening process. In that case, a federal court in California approved a class action settlement that included the payment of almost $250,000 for the plaintiffs' attorney fees.

This case and others illustrate the continuing need for employers to stay vigilant in how they handle their candidate background checks and to work with a background screening provider that always keeps compliance at the forefront.

While the hyperlitigious environment has posed a significant threat to employers for over two decades, FCRA cases continued to proliferate during the last year. A recent report by WebRecon shows an increase in FCRA lawsuits for 2022, with almost 6,000 lawsuits filed during the year. December, 2022 alone showed an 8% month-over-month increase.

The FCRA lawsuits continue to focus on flaws in employer disclosure and authorization documents and inadequate employer adverse action procedures.

In February, 2023, a federal court in Oregon allowed a lawsuit to proceed against Robert Half International alleging violations of the FCRA adverse action requirements. In that case, the background screening company provided adjudication services which marked reports with a green, yellow or red flag.

While we have warned employers in previous articles as to the dangers of outsourcing adverse action and individualized assessments to their background check providers, many continue to avail themselves of this process with potentially disastrous results. The recent ruling against Robert Half stated that the plaintiffs had presented evidence showing that the process involved a potential willful violation of the FCRA, exposing the defendant to punitive damages which are often not covered by commercial liability insurance policies.

Employers should continually train their team members on FCRA compliance issues and this is especially true today given the higher rates of employee turnover over the past several years.

At RAI, we are happy to assist clients in providing our compliance expertise and training. While more and more vendors offer quicker and cheaper background checks, my 30-plus years of industry experience has shown that quick and cheap do not lead to thorough, accurate and compliant. And as more employers find themselves on the wrong side of a lawsuit, they soon discover that quick and cheap can prove quite costly in the long run.

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