Employers Beware: FCRA Class Actions on the Rise

By Kevin P. Prendergast

If your firm conducts pre-employment background investigations on employment candidates, you may be a ripe target for a class action lawsuit. The same holds true for your clients. Over the past few years, employers have been bombarded by class actions based upon technical violations of the federal Fair Credit Reporting Act (FCRA) relating to their employment screening programs. A recent article from the law firm Porter Wright declared that in the class action context, "FCRA is the new FLSA!"

A major area of focus for class action litigators involves the initial documents that must be presented to a job candidate prior to performing a background search. Section 604(b) of the FCRA requires that an employer disclose to a job applicant that a background investigation will be conducted and obtain the written consent of the applicant prior to procuring a report. The FCRA states that the disclosure must be "in a document that consists solely of the disclosure."

The initial lawsuits focused upon employers who made the disclosure and obtained the authorization within the job application. These cases were "low hanging fruit" for the class action attorneys and courts interpreted the word "solely" to mean solely. Those employers who had extraneous information combined with the disclosure found themselves in a difficult situation. As a result, many employers removed the disclosure language from application documents and made it a separate form; although, we do see an occasional new client with the problematic job application.

Unfortunately, as employment attorneys rushed to draft separate disclosure documents, many could not resist putting some extraneous items in the disclosure such as release language, state-required notices and requests for identifying information. What employment lawyer doesn't love a general release? However, these practices have spawned a new wave of class actions that are costing employers dearly.

Earlier this year, big box retailer Lowes Stores agreed to settle a class action worth an estimated $22.5 million and Home Depot settled another for approximately $3 million. Suits have been maintained against other giants such as Chipotle, Paramount Pictures, Express Services, Whole Foods, Panera, Nine West and even Chuck E. Cheese with potential exposure exceeding $100 million. The list is large and growing larger.

The FCRA provides that an employer who fails to comply with any of the law's many technical requirements may be liable for actual damages or statutory damages (ranging between $100 and $1,000), punitive damages and attorneys' fees and costs. FCRA lawsuits appear to be particularly attractive to plaintiffs' attorneys due to the draw of statutory damages, the potential ease of demonstrating commonality when the only alleged injury at stake is a technical defect and widespread publication of large settlements.

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My firm performs background investigations for many national and international businesses, including law firms. Most law firms now realize the importance of performing background investigations on all of their employees, including professional staff. Our findings in the legal industry reveal that for every 20 employees receiving a job offer, one will be absolutely unsuitable for employment due to an issue in their background. There are few things worse than being hit with a lawsuit by a completely unqualified candidate over a technical violation in the background screening paperwork.

Having worked with many firms, I would strongly recommend you review your background screening documents to ensure you are not a target for a lawsuit. Do not assume that because you are a law firm, your HR forms are correct.

You may also want to consider reviewing the forms of your clients. In addition to the requirement that there be a separate disclosure and a written authorization, employers should also provide applicants with the Summary of Rights form issued by the federal Consumer Financial Protection Bureau at this stage of the process. You will also need to be aware of a number of state laws that require additional notices at the pre-employment stage, including Washington, D.C., New York and California and municipalities, such as New York, San Francisco and Philadelphia.

At Research Associates, we have automated the entire compliance process for background screening. Applicants use a simple automated tool to enter basic information and then are provided with all required notices and forms. Then the forms are made part of each applicant's investigative file and made available for future use if an applicant ever claims they were not provided with the correct documentation. We have also developed a compliance manual for businesses reviewing their practices, which is available upon request.

It is vital that when selecting an employment screening vendor, you choose a compliance-driven organization that will partner with you in reducing the risk of a lawsuit. The same holds true for your clients. Compliance is not difficult when working with the right firm. Non-compliance is potentially devastating.

Kevin P. Prendergast is the president and general counsel at Research Associates Inc., a corporate investigative firm serving clients since 1953. Kevin oversees the compliance program at RAI and works with clients and their counsel in developing legally compliant background screening programs. Mr. Prendergast graduated from the Cleveland Marshall College of Law and has been licensed to practice law since 1987. He is a member of the American Bar Association, Ohio State Bar Association and the Society for Human Resource Management. Kevin can be reached at (800) 255-9693.