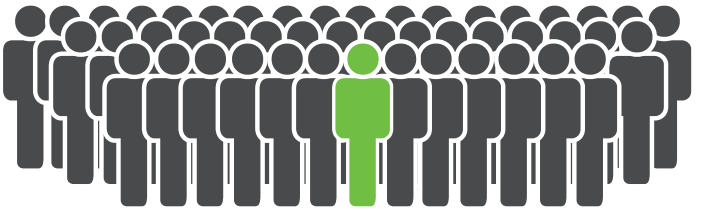
Is Your Background Screening Program Creating Risk for a Class Action Lawsuit?

By Kevin P. Prendergast



Earlier this year, Wells Fargo agreed to settle a class action for $12 million, which arose over their process for screening candidates for employment. They are far from alone as a wave of class action lawsuits has hit companies in every sector alleging violations of federal background screening laws.

Just in the past few years, Aarons, Aerotek, Allegis, Amazon, Bank of America, Big Lots, BMW, Calvin Klein, Chipotle, Dave & Busters, Dollar Tree and Domino's Pizza have all been targets and that list represents only the first four letters of the alphabet! A report by employment law firm Littler Mendelson P.C. recently stated, "The swelling tide of class action litigation against employers under the Fair Credit Reporting Act ("FCRA") is unmistakable. It cuts across all industries, including retailers, restaurant chains, theatre chains, manufacturers, financial institutions and transportation companies."

While most well-run businesses, including law firms, now realize that employment screening is an essential risk management tool, it is critical that the background investigation program be operated within the strict requirements of federal, state and in some cases, local laws. What may seem to be a harmless technical defect in a process could result in significant legal exposure. If your firm or its clients perform background investigations, it would be advisable to review the FCRA and then audit your background screening documents to ensure compliance with the applicable laws.

One of the key points of attack of the background screening lawsuits relates to the FCRA's adverse action requirements. Under the law, if an employer is considering taking adverse action against a job candidate and a background report played any role in that decision, the employer must follow certain steps. These steps include (1) sending the person a pre-adverse action notice with a copy of the background report and the FCRA summary of rights form; (2) waiting a reasonable amount of time to allow the person to dispute or explain issues that arose during the background investigation; and (3) sending the person an adverse action notice notifying them of the final decision regarding their candidacy if the issue has not been resolved.

Regarding the first step, it is imperative that the initial pre-adverse action notice does not indicate that any final decision has been made regarding the applicant's status. At this point in the process, it is contemplated that: (1) the applicant be advised that there is an issue in the background report that *may* disqualify them from consideration; and (2) the applicant be provided with the means to dispute information contained in the report, including a copy of the report, the FCRA summary of rights form and the contact information for the investigative agency. Any language indicating that a final decision has been made at this juncture is a source of risk for the employer.

The second step of the adverse action process then deals with allowing the applicant sufficient time to explain information contained in the investigative report and to have that information corrected. Many FCRA class action lawsuits deal with the issue of the period of time an employer must wait after sending the pre-adverse action notice and before sending the final adverse action notice. The FCRA is silent on this point. According to an opinion letter from the Federal Trade Commission (FTC), a minimum period of five business days is suggested.

An employer may consider a longer period just to be on the safe side. The time period should take into consideration the time that would be needed for an applicant to review the report, explain any information they believe is incorrect and allow the investigative agency to look into the applicant's claims. My firm recommends at least 10 business days.

If, after following the pre-adverse procedures, the employer desires to move forward with adverse action, they must send a final adverse action notice to the candidate. The FCRA contains very specific requirements as to the contents of this notice and the consequences of an employer's failure to follow these requirements.

Remember that an applicant who has been denied employment is often angry and looking for someone other than themselves to blame. These individuals must be handled carefully to ensure their claims are properly addressed. It would be quite embarrassing for a law firm to be hit with a large class action over a technical violation of the law, especially by a candidate who is unqualified for the position they were seeking.

My firm, Research Associates Inc., performs background investigations on a worldwide basis for law firms, their clients and businesses of all sizes. We have developed a platform that automates the entire compliance process, including the adverse action procedures. We also provide audits of background screening documentation for our clients to ensure compliance and reduce risk. The platform and documentation are updated frequently to reflect any new requirements and industry best practices.

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.