# Avoiding the Next Tidal Wave of Employment-Related Lawsuits Under the Fair Credit Reporting Act

By Ashwin R. Trehan,[1] FordHarrison LLP

At this point, every local in-house lawyer knows that the I-4 corridor has been ground zero for Fair Labor Standards Act (FLSA) litigation over the past few years. Now, Fair Credit Reporting Act (FCRA) lawsuits are looking like the new FLSA.

Trying to hire the "right" employee is not an easy thing to do. Savvy employers try to find out as much as they can about a candidate before making a hiring decision, including using third party agencies to provide criminal and credit checks on applicants. Employers also may believe that these agencies know the law and have compliant forms, thus shielding the employers from liability. That belief, while reasonable, is often wrong. As common and helpful as the practice of using third parties to conduct background checks may be, an unsuspecting employer may be opening itself up to significant liability by failing to comply with the hyper-technical requirements of the FCRA when obtaining and using third party reports. Until fairly recently, the FCRA likely was not high on the list of employer concerns. But a tidal wave of successful class action lawsuits brought against name-brand employers should prompt in-house counsel to carefully examine their companies' practices to help steer clear of similar lawsuits. Some examples over the last few years include FCRA class action settlements involving K-Mart Corp. ($3 million) and Domino's Pizza LLC ($2.5 million).

### The FCRA and Employers

The FCRA was enacted in 1970, and may be best known as the federal law regulating the practices of consumer reporting agencies (CRAs) that collect and compile consumer information into consumer reports (i.e., background reports) for use by others. But the FCRA also applies to *users* of such consumer reports, including employers.

The basic tenets of the FCRA as it applies to employers are simple: an applicant or an employee for whom a consumer report will be obtained must be notified beforehand, must authorize the procurement of the report, and must clearly understand what he or she is authorizing. If the employer takes action based on the report, it must notify the applicant or employee (twice, in fact), and make certain required disclosures.

The language of the FCRA, however, is not simple. And unfortunately, the FCRA's hyper-technical requirements and ambiguous guidance have either tripped up or flown under the radar of many employers, who now find themselves slapped with lawsuits alleging FCRA violations.

### Case Study

Joe Employee applies for a job at ABC Corporation, which operates in nearly every state in the U.S. During the hiring process, Joe is handed several forms. One of the forms contains various policies, a handbook acknowledgement, and language disclosing that ABC will conduct a background check on Joe and authorizing ABC to do so. Joe signs the form. ABC then obtains

a consumer report from a third party and is satisfied based on the report that Joe is a safe bet. So, ABC hires Joe. Joe, unfortunately, is incompetent, and ABC fires Joe. Joe finds an attorney, and asks if he can sue ABC. The attorney asks, "Well, were you a good employee?" "No, I was awful," Joe admits, "but they made me fill out a bunch of forms when I was hired, and that really made me mad. Can I sue them for that?"

Joe's attorney doesn't laugh him out of the room. Instead, she helps Joe file a lawsuit under the FCRA. Joe sues ABC and seeks to represent a nationwide class of all other applicants within the last five years. Joe alleges ABC did not provide him and the class with a "standalone disclosure form" that notified him that a consumer report would be obtained. At this point, ABC thinks that even if its form was non-compliant, Joe wasn't damaged by this. Joe was hired, and he was let go because he was incompetent, not because of what the background check turned up.

That may not matter. If a court determines that ABC's form was not FCRA-compliant and the violation was "willful," then Joe and the class can receive statutory damages and potentially punitive damages, even if they did not suffer any actual damages. Moreover, even though the potential damages may not be overwhelming on an individual basis, they will quickly escalate if a class is certified. And, critically, a prevailing plaintiff under the FCRA is entitled to attorneys' fees and costs.

So, because ABC Corporation provided a form to Joe that appears to be technically deficient under the FCRA, it is facing a class action lawsuit, with potential punitive damages and attorneys' fees awards against it, even though few, if any, employees or applicants claim they were harmed by the form.

**FCRA for Employers: The Basics**

Employers often rely on forms provided by CRAs that notify an applicant or employee that a consumer report will be obtained and authorize the employer to obtain one. Given the rash of recent litigation, employers should not presume that these forms are FCRA-compliant.

Before an employer procures a consumer report on an applicant or an employee, the employer must first make a "clear and conspicuous" disclosure, in writing, to the employee or applicant, "in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes." The applicant or employee also must provide written authorization before the employer can obtain the report. Confusingly, this authorization may be made on the otherwise standalone disclosure document. Other than also containing the authorization language, the disclosure document should not contain any extraneous language (including, for instance, reference to other policies or job requirements, or a purported waiver of rights under the FCRA).

Failure to comply may trigger a lawsuit under the FCRA. While a lawsuit alleging negligent violations must allege actual damages, a lawsuit alleging willful violations may allege statutory damages between $100 and $1,000. That amount may not mean much to employers on its own, but if a plaintiff does not need to prove actual damages, is entitled to attorneys' fees and potential punitive damages if he prevails, and is bringing a class action, the potential exposure for employers is high, and the risk to the plaintiff is comparatively low.

**Employers Who Make Decisions Based on Consumer Reports**

Let's revisit ABC Corporation. Assume that ABC Corporation decided not to hire Joe based on information in the consumer report it obtained. The FCRA requires two forms of notice to the employee or applicant: both a pre-adverse action notice and an adverse action notice. The first type of notice must be given before the employer takes the adverse action against the employee or applicant, and must include a copy of the report on which the decision is based and a notice of rights under the FCRA. The second type of notice must be given after the adverse action is taken, and must contain several additional disclosures required by the FCRA.

**What Should In-House Counsel Do Now?**

Now is a good time for in-house counsel to audit their companies' hiring and background check processes. Due to the highly technical nature of the FCRA, in-house counsel should engage legal counsel who fully understand this unique area of the law.

The FCRA is a convoluted statute with plenty of potential hazards. But with the right forms and the right process in place, employers can minimize exposure to potentially costly litigation.

---

[1] Ashwin Trehan is an attorney in the Tampa office of the law firm of FordHarrison LLP, and is a member of the firm's dedicated FCRA practice team. He can be reached at (813) 261-7810 or atrehan@fordharrison.com.