PUBLICATION

Courts to Employers: Get Your Background Searches in Order

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Over the last few years, employers are facing a new type of class action claim – improper disclosure and authorization for background searches during the hiring process. Some courts have found violations are "willful," exposing the employer to statutory penalties, punitive damages and attorney's fees awards. Online employment applications create nuance regarding whether a web-based interface complies with the application regulations. And during the last week of January 2017, two federal courts reached conflicting decisions regarding the issue of what type of injury, if any, is required for plaintiffs to assert proper standing in these cases. What's an employer to do? Read on for information regarding the regulation governing background searches in employment, a survey of the current litigation landscape and quick tips for employers to protect against this new and growing litigation trend.

What Does the FCRA Have to Do with Employment?

The Fair Credit Reporting Act, 15 U.S.C. § 1681b(b)(2)(A) prohibits the use of a consumer report for employment purposes *unless*:

(i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured in a document that consists solely of the disclosure that a consumer report may be obtained for employment purposes.

(ii) the consumer authorized the procurement of the consumer report in writing (which authorization may be made on the document referred to in clause (i)).

In short, applicants must be given notice that the potential employer will run a background report on that individual as part of the application process, and the consumer must provide written authorization allowing the employer to request the background report. However, the disclosure and authorization must be set forth on a separate standalone document, not buried within the application or even included in a listing of other waivers or authorizations.

Increased Litigation Relating to this Issue and Potential for Damages Awards

Lawsuits against employers alleging these types of FCRA violations have become more pervasive. In April 2015, Whole Foods faced a class action challenge to its employment application in the Middle District of Florida. *Speer v. Whole Food Mkt. Grp., Inc.*, 8:14-CV-3035-T-26TBM, 2015 WL 145698 (M.D. Fla. Mar. 30, 2015). There, the class alleged that Whole Foods' application included a waiver and release of liability on the same form that included the consumer report disclosure in violation of the FCRA. Similarly, in *Walker v. Dollar Tree Stores, Inc.*, the named plaintiff sought certification of a class of employees alleging that Dollar Tree breached the FCRA by including a waiver of liability on its FCRA disclosure and consent form. *Walker v. Dollar Tree Stores, Inc.*, 8:15-cv-1170-T-36EAJ (M.D. Fla. June 9, 2015); s*ee also Mohamed v. Uber Technologies, Inc.*, Case No. 3:14-cv-05200 (N.D. Ca. 2015).

These cases are generally brought as class actions, and more often than not settle early. The *Whole Foods* case resolved through an approved settlement between Whole Foods and the class for $803,000.00 after Whole Foods' motion to dismiss was denied. The *Walker* case was dismissed without prejudice shortly after it

was filed. It has been reported that Dollar General settled various similar class action suits for large dollar amounts.

While the value in these cases typically arises from their class status, there is potential for statutory penalties, punitive damages and attorney fee awards. Indeed, on January 20, 2017, the Ninth Circuit denied a defendant employer's motion to dismiss a class action alleging violations of the FCRA stand-alone background search disclosure requirement. *Syed v. M-I, LLC*, 14-17186, 2017 WL 242559 (9th Cir. Jan. 20, 2017). Going a step further, the appeals court also found that the violation was willful, exposing the employer to statutory damages in the amount of $100 to $1000 per violation, punitive damages, and attorney's fees and costs.

Online Applications

Many of these cases involve online applications. Given the nature of web-based interfacing, online applications present additional issues in creating "stand alone" disclosure forms. For instance, some applications include the disclosure language within the middle of an online application – although it is listed as a standalone "line item" on the webpage. *See e.g. In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig*., No. 2615, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2017). Other cases involve a laundry list of terms and disclosures, including the FCRA disclosure language, preceding an "I Agree" button, which is clicked and approved by the applicant. *See e.g. Henderson v. The Home Depot U.S.A., Inc.*, Civil Action No. 1:14-cv-02123 (N.D.Ga. August 7, 2014). While the courts have not yet opined on how language presented in the online application can be "stand alone," best practice is to include the language by itself on its own page or "screen shot."

Conflicting Positions Regarding the Injury Required to State a Claim

More recently, online retailer Amazon.com and craft store Michaels Stores, Inc. faced FCRA challenges to their online employment application. The Amazon.com FCRA disclosure and consent authorization also included liability releases and "small print" language regarding arguably confusing information about which agencies were performing employee background searches, five state law notices and a notice that revocation of consent to a background search may result in termination or refusal to hire. *Hargrett v. Amazon.com*, No. 8:15-cv-2456, 2017 WL 416427, *6 (January 30, 2017). The plaintiffs in the *Michaels* case allege that the online retailer included its FCRA disclosure in the middle of the application, not in a stand-alone document. *In re Michaels Stores, Inc., Fair Credit Reporting Act (FCRA) Litig*., 2615, 2017 WL 354023, at *1 (D.N.J. Jan. 24, 2017).

In both *Amazon.com* and *In re Michaels Stores, Inc.* the issue of standing – namely whether the plaintiffs had sufficient injury to state a claim – was decided at the Motion to Dismiss stage. And both courts analyzed standing under the recent U.S. Supreme Court holding set forth in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 194 L.Ed. 2d 635 (2016). *Spokeo* assessed whether the plaintiff in that case sufficiently presented an injury-in-fact sufficient to establish standing. The Supreme Court decided that to allege injury-in-fact, a plaintiff must articulate a "concrete injury," which need not be tangible. *Spokeo*, 136 S. Ct. at 1549. However, "bare procedural violation [of a statute], divorced from any concrete harm" cannot satisfy the injury-in-fact requirement. *Id.*

Applying *Spokeo*, the District Court of New Jersey in *In re Michaels Stores, Inc.* and the Middle District of Florida in *Amazon.com* reached different conclusions deciding whether an employer's alleged violation of the FCRA is sufficient injury-in-fact to establish standing. The New Jersey Court found that the *Spokeo* factors were not met, holding that, without separate injury, the mere fact that the FCRA may have been violated is insufficient to bring a claim. Accordingly, on January 24, 2017, Michaels Stores, Inc.'s Motion to Dismiss was granted. Conversely, the Middle District of Florida found that the plaintiffs did show "concrete injury" through at least three kinds of harm: invasion of privacy, informational harm and risk of harm. On January 30, 2017, Amazon.com's Motion to Dismiss in that case was denied.

What to Do

The litigation on this issue is still in its infancy, however several things are clear: (1) these claims are likely to be brought as class actions; (2) given the class status, settlement values will be increased; and (3) there is uncertainty in whether courts will find that a violation constitutes an injury per se or if plaintiffs must show something more, making it difficult to predict the outcome of success. In light of these factors, here is a list of "takeaways" for employers to consider:

1. Avoid the Lawsuit!

The split of authority makes outcome predictability difficult. Class actions increase settlement value. The best advice – employers should make certain their background search consent forms comply with the FCRA. Even if an applicant or employee files suit, if the consent form is compliant, employers should dispose of the case at the motion to dismiss stage. If there is any ambiguity as to whether the form complies, or if the form is not compliant and the issue becomes whether the plaintiff has suffered an actual injury, employers will suffer increased litigation costs at a minimum, and possibly large settlement or verdict amounts if the case is brought as a class and the class is certified.

2. Review Online Applications.

Online applications pose additional difficulties for FCRA compliance. If the disclosure language is included on a page with any additional information, it may be in violation. Accordingly, it is wise to review online application forms and ensure that the disclosure language is on its own page or "form." It probably is not enough that the language is included in its own section of the application that shares the screen with other parts of the application. For the highest level of comfort, the only language visible on the screen should be the FCRA disclosure language.

3. Set Clear Policy and Follow It.

The Court in the *Amazon.com* case seemed bothered that the disclosure language included confusing information about which agency would perform the background search and who might be entitled to the results. Not only should the disclosure language be on a standalone document, but it should also include information that will allow the applicant to determine which entity will be obtaining his or her background information, and any other entities or individuals who may have access to review the results.

4. Early Resolution.

If a claim is brought, and it cannot be easily disposed of by a Motion to Dismiss, early resolution may be the best strategy. Many of these cases are dismissed before an answer is filed, indicating that the parties resolved the matter before the defendant employer entered the case. In class action cases, resolving and dismissing before the parties are required to begin the costly and onerous class discovery process is very beneficial and may be worth what is otherwise considered a premium settlement value. Once a class is certified, the court must approve the settlement, increasing the time and costs to effect the settlement. Also, in those instances, the settlement value will be made public.