

PUBLICATION

Background Checks Increasingly Leading to Litigation

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Background checks are increasingly leading to class action lawsuits alleging violations of the Fair Credit Reporting Act (FCRA). Many employers utilize background checks that include "consumer reports" during the hiring process. Employers understandably want to screen potential employees, especially those to be placed in positions of trust. However, they must be careful not to run afoul of the FCRA when doing so if they would like to avoid joining a number of high profile employers who have become defendants in FCRA lawsuits.

The FCRA, codified at 15 USC § 1681 et seq., contains a number of requirements related to obtaining and using "consumer reports." A consumer report is any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for credit or insurance to be used primarily for personal, family, or household purposes, employment purposes, or any other purpose authorized under section 1681b of this title.

Under the FCRA, a prospective employee must be provided with a clear and conspicuous written disclosure that a consumer report may be obtained for employment purposes and the disclosure, including a written authorization by the prospective employee. The disclosure and authorization must be in a **stand-alone document**. If the contents of the consumer report cause the employer to take an adverse action, such as not hiring a prospective employee or withdrawing a job offer, additional disclosures must be made to the employee, such as including a copy of the report and a summary of rights advising the employee that he or she has the right to dispute the accuracy of the report.

Employers must strictly adhere to the requirements of the FCRA to protect themselves from expensive and otherwise avoidable litigation. For example, we have seen class action lawsuits based on technical violations such as failing to put the FCRA disclosure in a stand-alone document. However, if done properly, background checks can be an incredibly useful tool for employers.