The Use of Background Checks

Avoid Missteps That Can Lead to Class Action Exposure

By Rachel E. Yarch and Danielle J. Gould

Recent class actions demonstrate how background checks and taking action in response to them can easily trip up even large, sophisticated companies.

Background checks are a critical screening tool for employers. However, it is imperative that companies conduct background checks, and take action in response to them, in a lawful manner. As illustrated by a recent string of class action lawsuits, this issue appears to have tripped up some of the country's largest companies, which undoubtedly have sophisticated human resource personnel and otherwise competent in-house or outside counsel. The reality is that compliance is not always simple, and employers should proceed carefully.

The Fair Credit Reporting Act

Two critical pieces of federal legal authority govern an employer's ability to conduct background checks and take adverse action based on the information contained within an applicant or employee's criminal background. The first is the Fair Credit Reporting Act (FCRA). 15 U.S.C. § 1681, *et seq.* The FCRA requires that before an employer obtains any form of consumer report, the employer disclose to the individual that the company may use information contained in the consumer report as the basis for employment-related decisions. The disclosure provided to the individual must be in writing and must be a stand-alone document. The term "consumer report" means the following:

> 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 (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other purpose authorized under [the FCRA].

15 U.S.C. § 1681(a). This definition includes criminal background checks that are com-

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monly run by employers during the hiring process.

The FCRA also requires that an employer obtain written authorization from the individual before conducting any screening. This authorization must be executed by the individual, and it can be obtained at the same time as the disclosure referenced above. In addition, if the company wishes to retain the right to check employee backgrounds periodically during the period of employment, the document must clearly state that intent.

After reviewing a background report, an employer must notify the individual before taking any adverse action. The employer must provide the individual with a copy of the background report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act," which is available from the Consumer Protection Financial Bureau, at http://files.consumerfinance.gov. This notice allows the individual the opportunity to refute any information in the report. For example, a report could contain information regarding someone with the same or a similar name, it could include evidence of identity theft, or it could include information that was properly expunged.

Finally, if an employer decides to take adverse action based on information contained in a report, the individual must receive a notice stating the basis of the decision and the specific information relied on. Moreover, the employer must provide the individual with (1) the name, address, and phone number of the consumer-reporting company that supplied the report; (2) a statement that the company that supplied the report did not make the decision to take the unfavorable action and can't give specific reasons for it; (3) a notice of the individual's right to dispute the accuracy or completeness of the information contained in the report; and (4) information regarding how the individual can obtain an additional free report from the company within 60 days. While these steps may seem a bit mundane and redundant, skipping any one of them can lead to potential individual or class liability if the policy or procedure of a company does not comply with the law and affects a group of people over time.

The U.S. Equal Employment Opportunity Commission Enforcement Guidance

The second relevant federal authority is the Enforcement Guidance issued by the U.S. Equal Employment Opportunity Commission (EEOC) in 2012, regarding criminal background checks. *See* EEOC Enforcement Guidance, No. 915.002, April 25, 2012, available at https://www.eeoc.gov. The EEOC intended the Enforcement Guidance to be used by (1) employers considering the use of criminal records in their selection and retention processes; (2) individuals who suspect that they have been denied jobs or promotions, or have been discharged because of their criminal records; and (3) EEOC staff who are investigating discrimination charges involving the use of criminal records in employment decisions.

The Enforcement Guidance provides that across-the-board prohibitions on hiring or promoting based on criminal history potentially leads to discrimination and is unlawful. Essentially, the EEOC strives to prevent applicants and employees from being placed in the "no" pile for hiring or promotion simply because they have some sort of criminal background. Rather, the EEOC requires employers to make decisions based on criminal background information that is job-related and consistent with business necessity. The mandate requires that companies consider the type of conviction, the timing of the conviction, and whether it is reasonably related to the position being applied for.

For example, if an applicant was convicted of check fraud and he or she is applying for a bookkeeping position, that would likely be considered a lawful basis to reject the applicant because the conviction is reasonably related to the applied for position. The same is true for an applicant with a violent criminal history who is applying to work in a position with a vulnerable population, e.g., a school or assisted living facility. The safety of the vulnerable population would be considered a business necessity, and thus, a denial decision would likely be appropriate. However, the EEOC would probably frown on denying a position to an otherwise qualified candidate who was convicted of check fraud, 20 years ago, when he or she was not applying to work with financial accounts. The same would go for someone who was convicted for a bar fight, 20 years ago, when he or she was not applying for a job to work with children or the elderly. Basically, the EEOC expects employers to do some reasonable analysis regarding the specific criminal history, rather than to place an individual in the proverbial "no" pile automatically.

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Wherever there are statutory requirements and regulatory guidance that an employer must apply to a group of people, there are plaintiffs' attorneys looking for a potential class action. The requirements of the FCRA and the EEOC Enforcement Guidance are the foundation for the recent examples discussed below.

The Background Check Process

The disclosure and written authorization requirements under the FCRA are distinct, but often they are intertwined because an employer must meet both requirements before obtaining a consumer report for employment purposes. 15 U.S.C. § 1681b(b)(2)(A). For example, an employer could, but is not required to, use the same document as both a disclosure and an authorization form. *Id.* It goes without saying that the failure to provide a person with the disclosure, to secure the written authorization, or both, before obtaining the consumer report for employment purposes is a violation of the FCRA. The difficulty for

employers attempting to comply with the FCRA requirements generally arises with the form of the disclosure itself, which must be "clear and conspicuous" and consist solely of the disclosure that a consumer report may be obtained for employment purposes, except that the authorization may be obtained in the same document.

In the wake of the decisions in *Syed* and *Hargrett*, other large-scale employers, including Home Depot, Walmart, and Marriott, face recently filed class action lawsuits raising similar issues of willful violations of the disclosure and authorization provisions of the FCRA.

The Background Check Process: Relevant Cases

In *Culberson, et al. v. Walt Disney Parks and Resorts,* Case No. BC526351, pending in the Superior Court of the State of California, County of Los Angeles, Central District, the plaintiffs filed a class action alleging that Disney violated the FCRA by obtaining consumer reports without first providing clear and conspicuous disclosures in a writing that consisted solely of the disclosure that reports may be obtained for employment purposes. While Disney provided disclosure and authorization forms to prospective employees, the plaintiffs complained that the forms did not meet the FCRA requirements because they consisted of multiple pages presented in eye-straining, tiny typeface writing. The plaintiffs also complained that the forms contained (1) extraneous information, such as disclosures related to a state statue and general statements that hiring decisions are based on non-discriminatory reasons; and (2) misleading information in that the forms referenced terms in the state statute that have different meanings than in the FCRA. While the court has yet to rule on the merits of the plaintiffs' claim, the case has been heavily litigated since its filing in November 2013, and the California Superior Court recently certified a "Defective Disclosure Class" against Disney.

In *Syed v. M-I LLC*, 853 F.3d 492 (9th Cir. 2017), the Ninth Circuit reversed the district court's dismissal of the plaintiff's claim against his prospective employer, M-I LLC, holding that the inclusion of a liability waiver in the same document as the disclosure constituted a willful violation of the FCRA. The document at issue was labeled a "Pre-employment Disclosure Release," which informed the plaintiff that his credit history and other information could be obtained and used in making an employment decision. However, the document also provided that by signing the document, the plaintiff was waiving his right to sue M-I LLC and its agents for violations of the FCRA. Thus, the plaintiff's signature on the document "served simultaneously as an authorization for [the prospective employer] to procure [the] consumer report, and as a broad release of liability." In holding that inclusion of the liability waiver in the same document as the disclosure constituted a willful violation of the FCRA, the Ninth Circuit stated that the "clear and conspicuous" nature of the disclosure was irrelevant to the analysis. In other words, presenting prospective employees with a "clear and conspicuous" disclosure does not negate the requirement that the document "consist[] solely of the disclosure." Given the risk of class liability in light of the Ninth Circuit's ruling, M-I LLC filed a petition for a writ of certiorari with the United States Supreme Court seeking review of the Ninth Circuit's decision. *Syed v. M-I LLC*, Case No. 1:14-742 WBS BAM (E.D. Cal.).

Similarly, in *Hargrett v. Amazon.com DEDC LLC,* 235 F. Supp. 3d 1320 (M.D. Fla. 2017), industry giant Amazon faces a high-risk of class liability after the district court for the Middle District of Florida denied its motion to dismiss in January 2017, ruling that allegations that the disclosure form was part of an online application, which contained a liability release and other extraneous information, sufficiently stated a claim for a willful FCRA violation. In the wake of the decisions in *Syed* and *Hargrett*, other large-scale employers, including Home Depot, Walmart, and Marriott, face recently filed class action lawsuits raising similar issues of willful violations of the disclosure and authorization provisions of the FCRA. *Saltberg v. Home Depot U.S.A., Inc.,* Case No. 2:17-CV-05798 (C.D. Cal.), *filed Aug. 4, 2017* (alleging disclosure forms contain a liability waiver; obtaining dismissal based on lack of subject matter jurisdiction); *Pitre v. Wal-Mart*, Case No. 8:17-cv-01281 (C.D. Cal.), *filed June 20, 2017* (alleging disclosure forms contain extraneous information); *McComack v. Marriott Ownership Resorts, Inc.,* Case No. 17-CV-1663 (S.D. Cal.), *filed Aug. 18, 2017* (alleging disclosure forms contain a liability waiver; seeking dismissal based on lack of subject matter jurisdiction). While others, including Publix, Postmates, FTS USA, Wells Fargo, and Uber have agreed to pay millions in class settlements to resolve the FCRA disputes brought against them. *Knights v. Publix Super Markets, Inc.,* Case No. 3:14-cv-00720 (M.D. Tenn.) ($6,797,475 class settlement); *Nesbitt, et al. v. Postmates, Inc.,* Case No. CGC15547146 (Super. Ct. Cal.) ($2,500,000 class settlement of defective disclosure and pre-adverse action notice classes); *Thomas v. FTS USA, LLC,* Case No. 3:13-cv-825 (E.D. Va.) ($1,300,000 class settlement after court granted class certification of defective notice and pre-adverse action notice classes); *Manuel v. Wells Fargo Bank, N.A.*, Case No. 3:14-cv-238 (E.D. Va.) ($12,000,000 class settlement after court granted certification of impermissible use and adverse action classes); *In re Uber FCRA Litig.,* Case No. 14-cv-05200-EMC (N.D. Cal.) ($7,500,000 class settlement of background check/consumer report class).

Taking Adverse Action Based on a Background Check

While compliance with the disclosure and authorization requirements of the FCRA enables a prospective employer to obtain a consumer report for employment purposes, a different set of considerations arises

should the prospective employer want to take adverse action based on the consumer report (i.e., rescind an offer of employment). These considerations include the information that the prospective employer provides to the prospective employee, the timing involved in when that information is provided, and the options that the prospective employee has on receiving information regarding the consumer report.

The provisions of the FCRA are clear that (1) a copy of the consumer report and a copy of the summary of rights under the FCRA must be given to the prospective employee, and (2) the information must be provided "*before* taking any adverse action based in whole or in part on the report." 15 U.S.C. § 1681b(b)(3)(A) (emphasis added). Also, while the FCRA does not specify how much time must pass between the pre-adverse action notice and the notice of the adverse action, guidance provided by the Fair Trade Commission suggests that five business days is the minimum. Yet, despite the seeming clarity of the requirements, many prospective employers have faced questions about their compliance with these provisions.

Taking Adverse Action: Relevant Cases

In *Thomas v. FTS USA, LLC,* 312 F.R.D. 407 (E.D. Va. 2016), a consumer report incorrectly attributed to the plaintiff numerous felony convictions, which were identified by the consumer-reporting agency to have been in error, and also attributed several moving violations to the plaintiff, and a car accident for which the plaintiff was at fault. On the same day that the plaintiff was informed that he was ineligible for the position that he had applied for, he was provided with a copy of the updated consumer report. The plaintiff, however, was never provided with a copy of the summary of his rights under the FCRA. The district court certified an "Adverse Action Subclass" because, among other reasons, there was no effort to provide any pre-adverse action notice to prospective employees. Thereafter, FTS USA settled the case on a class basis. *Thomas v. FTS USA, LLC,* Case No. 3:13-cv-825 (E.D. Va.).

In *Manuel v. Wells Fargo Bank, N.A.*, Case No. 3:14-cv-238, 2015 WL 4994549 (E.D. Va. Aug. 19, 2015), the consumer report pulled on the plaintiff after he submitted an employment application identified criminal convictions, from which Wells Fargo rendered the plaintiff ineligible for employment. Upon Wells Fargo entering an ineligibility code into a vendor system, the vendor generated and sent a "Pre-Adverse Action Notice" to the plaintiff, enclosing the report and the required summary of rights. The same day that the vendor generated the notice, the plaintiff received a telephone call from a Wells Fargo representative who informed him that he did not qualify for a job because of the information contained in a consumer report. After receiving the notice, the plaintiff underwent a dispute process and a second report was generated, which still contained the criminal convictions precluding his employment. Wells Fargo argued that it was only after the dispute process that it rendered the plaintiff ineligible for employment. The issue, therefore, was whether the entry of the ineligibility code was the adverse action so that entering it before issuing the Pre-Adverse Action Notice violated the FCRA. Finding that Wells Fargo engaged in a standardized practice to enter the code before issuing these notices, the district court granted class certification. Wells Fargo settled the case on a class basis. *Manuel v. Wells Fargo Bank, N.A.*, Case No. 3:14-cv-238 (E.D. Va.).

Similarly, in *Culberson*, the court certified a second class, titled the "Pre-Adverse Action Notice Class." Case No. BC526351, pending in the Superior Court of the State of California, County of Los Angeles, Central District. Noting that an "adverse action" under the FCRA is "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee," the court found that there was evidence that Disney had a uniform practice of making a "no hire" decision before sending the pre-adverse action notice enclosing the consumer report and the summary of rights. The court rejected Disney's attempts to focus the case on what the court viewed as irrelevant issues, such as when an applicant may have received a phone call from a Disneyland representative, whether the applicant understood the notice, and whether the applicant appealed the "no hire" decision. The court also rejected Disney's position that proof of an inaccurate consumer report was a prerequisite to FCRA recovery and created individual issues that precluded class certification.

While class action risk, as faced by the companies in these cases, should be a motivator to implement good practices related to background checks, the simple fact that a consumer report may inaccurately present an individual's criminal history should encourage employers to provide a prospective employee with the opportunity to respond and dispute the report before a hiring decision is made. Two recently filed class action lawsuits illustrate this point.

In *Wills v. Starbucks Corp.,* Case No. 1:17-cv-03654-CAP-CMS (N.D. Ga.), *filed Sept. 20, 2017*, the plaintiff, Kevin Wills, alleges that he had his preliminary offer of employment to work as a barista at a Georgia store revoked after Starbucks obtained a consumer report that included domestic violence convictions for Kevin W. Willis (not Wills), residing in Minnesota. Likewise, in *Petry v. Ide Management Group, LLC*, Case No. 3:17-cv-00062-RLY-MPB (S.D. Ind.), *filed Apr. 19, 2017*, the plaintiff alleges that she received a conditional offer of employment, but was subsequently informed that she would not be hired due to the background report identifying multiple felonies, including a felony conviction for drug paraphernalia and theft. The plaintiff alleges that she has not been convicted of any felonies. The plaintiff further alleges that she was not provided with a copy of the report and a copy of the summary of rights before the employer made the hiring decision and that the prospective employer refused to identify the name of the company that provided the consumer report with the felony convictions.

If the allegations in *Wills* and *Petry* are true, there is loss to the employers in that they delayed hiring, or failed entirely to hire, applicants that the employers apparently believed would make good employees. Instead, those applicants are suing them for not giving the applicants a chance to correct the attachment of serious criminal convictions to their names. It's a consequence that could be avoided with relatively simple adjustments in the timing of the hiring process. The adjustments to meet the requirements of the FCRA, and specifically to enable applicants to correct errors in a consumer report, are relatively

straightforward. However, an employer's hiring process consumer report-use procedures should not end with the FCRA; they should also consider the EEOC's Enforcement Guidance when an applicant does, in fact, have a past criminal conviction.

Recently, a district court certified three subclasses of former, current, and prospective employees of the Washington Metropolitan Area Transit Authority (WMATA), in *Little v. Washington Metropolitan Area Transit Auth.*, Case No. 14-1289, 2017 WL 1403122 (D.D.C. Apr. 18, 2017). The plaintiffs allege that the criminal background check procedure used to screen applicants and employees is facially neutral, but it has a disparate impact on African Americans. The WMATA's procedures are described in a manner that appears compliant with the FCRA: if a disqualifying conviction is located for a candidate, notice is sent, and the candidate has 10 days to dispute the results, and absent a response, a letter is sent rescinding the contingent offer of employment. However, a candidate (or current employee) may only dispute the accuracy of the report and cannot ask the WMATA to make an exception to its criminal conviction policy, and there is no discretion in applying the policy. Moreover, the plaintiffs allege, in the first place, that the policy fails to tie to "any fair determination of employee honesty, reliability, or safety," because, in contravention to the EEOC's Enforcement Guidance, the WMATA (1) fails to consider the nature and gravity of the offense; (2) treats all convictions in a particular category as the same, no matter how old; and (3) does not connect the policy to the requirements of the positions. On November 22, 2017, the parties filed a joint motion for preliminary approval of a class settlement.

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Practical Considerations

Based on the recent class action lawsuits filed by disgruntled applicants and employees, and rulings from various courts, there are steps that employers can take to ensure compliance and avoid potential liability.

One of the simplest ways to avoid liability for a screening decision is to use a third-party vendor to collect information and conduct the background checks on behalf of the hiring company. Vendors that specialize in this area are in the best possible position to understand the nuances in the law and to conduct the screening in a fashion that complies with the law. However, employers should understand and be knowledgeable about a vendor's process to be certain that it complies with the law. It would be a mistake to assume that all vendors are equally informed and competent. Obtaining a referral from a trusted resource may be the best way for a company to narrow down the field of possible vendors.

In addition, an employer should seek strong indemnification language in the agreement with the outside vendor to shield the company from liability for vendor missteps.

Not all employers are in the position to hire a vendor to handle this process. In that case, employers should have skilled human resource personnel who are well versed in the FCRA and the EEOC Enforcement Guidance, and the employers should have in-house or outside counsel to rely on when sticky situations arise. Indeed, counsel can provide direction not only in meeting the requirements of the FCRA and EEOC Enforcement Guidance, but also when the employer must balance the important considerations that arise with an applicant, or an employee with a good track record, who does, in fact, have a criminal record, including any safety risk that person may bring to other persons that he or she engages with in the work environment.

Advising clients that this area is currently a land mine for litigation and providing them with a refresher on the requirements of the law, are worthwhile risk management strategies. As gleaned from recent litigation, disclosures to applicants and employees should be unambiguous and easy to comprehend. Employers must not couple the background check disclosure with a waiver, release, or any other miscellaneous information. Rather, it must be a stand-alone document. An employer needs to pay attention to timing requirements and ensure that a copy of the report and the summary of rights are provided to a prospective or current employee *before* taking any adverse action, and the employer should be counseled to ensure that the prospective or current employee has an opportunity to dispute the report. (Many states have enacted "Ban the Box" legislation, which requires that either an interview has taken place or an offer has been extended to a candidate before any form of background screening can happen. Thus, employers should also be cognizant of compliance with state law.) An employer must also give careful consideration to how any criminal conviction correlates with the position sought or currently held by a potential or a current employee.

Simply put, performing background checks on applicants and employees remains a key component in an employer's hiring tool kit. Indeed, background checks can be the best way to uncover red flags that would otherwise be unknown regarding an applicant or an employee. However, employers, their human resource personnel, and their counsel, must ensure compliance with the law and take a reasonable and thoughtful approach when deciding to exclude an individual from a job opportunity. In many cases, employers are right to consider criminal convictions in hiring, and in fact, they must do so given the potential liability that they face in the event of any negligent hiring and retention claim resulting from harms caused by their employees. The bottom line is that employers must ensure that those who are in charge of hiring are effectively dotting their *i*'s and crossing their *t*'s when they execute the background check process to avoid potential liability from individuals or in a class context. FD