

Class Action Stretches FCRA's (Fair Credit Reporting Act) Limits to Target LinkedIn

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With increasing regularity, states and localities have passed laws that limit the ability of private employers to inquire into or otherwise consider the criminal or credit histories of their prospective and current employees. At the federal level, the Equal Employment Opportunity Commission (EEOC) has continued to pursue litigation against a number of companies on the grounds that their screening procedures have a “disparate impact” on racial and ethnic minorities in violation of Title VII of the Civil Rights Act of 1964.

In recent years, however, private plaintiffs’ counsel have turned their focus to the **Fair Credit Reporting Act (FCRA)**, the federal law that permits background checks for purposes of employment so long as employers obtain authorization from the person subject to the check and furnish him or her with the appropriate disclosures and notices.

Unlike other federal, state, and local laws that restrict employers from conducting background checks regardless of whether they outsource the task to a third party, FCRA only applies to employers if they solicit a vendor known as a consumer reporting agency (CRA) to run the check. Thus, whether a given company qualifies as a CRA affects whether an employer must abide by FCRA when using that company to vet applicants and employees. To qualify as a CRA under FCRA, a company must regularly “assemble” or “evaluate” consumer information for third parties such as employers.

A new suit contends that LinkedIn, of all companies, is a CRA and, as a consequence, bound by FCRA. In *Sweet v. LinkedIn Corp.*—a case filed in the Northern District of California—the plaintiffs allege that LinkedIn violated several disclosure, certification, and notice requirements under FCRA in the course of disseminating “trusted reference” reports to prospective employers for a subscription fee. Trusted reference reports contain the names, locations, employment areas, and current employers and positions of all persons in a LinkedIn member’s network.

The plaintiffs argue that LinkedIn members must input and update their own employment history (including job titles) and that if a member falsifies his or her job title from a past employer, or fabricates an employment position altogether, that misrepresentation would appear on a reference

report for an individual who purportedly worked with that member at the same employer. This, according to the complaint, does not “assure maximum possible accuracy of consumer report information” and could lead to “negative consequences” in violation of FCRA.

We do not believe there is merit to the plaintiffs’ allegations, as several courts have held that merely obtaining and forwarding consumer information to a third-party does not make an entity a CRA. LinkedIn is not gathering information from multiple sources and creating a background report; it is simply formatting and sending the information that users voluntarily post to its site for the purpose of advertising themselves to potential employers. Moreover, it is generally understood and accepted that information posted on social media sites like LinkedIn may be inaccurate, incomplete or out of date.

Nevertheless, the lawsuit is the latest effort by the plaintiff’s bar to broaden the definition of a CRA beyond the intended scope of FCRA and illustrates that employers must continue to monitor developments to ensure that they are following FCRA as appropriate when seeking information about prospective or current employees from outside companies.

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National Law Review, Volume IV, Number 307

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