

Are Your Background Check Disclosure Forms FCRA-Compliant?

Article By:

Mark Wiletsky

A rash of class action lawsuits is forcing employers to defend their background check disclosure and authorization forms. The current focus is on disclosure forms that include extraneous information. Here's what you need to know to lessen your risk of a similar class action lawsuit.

FCRA Disclosure Requirement

If you obtain background check reports from a third party, such as a consumer reporting agency that provides employment-related screening services, you need to comply with the Fair Credit Reporting Act (FCRA). The FCRA, among other things, requires that employers disclose to applicants/employees that a consumer report may be obtained for employment purposes before requesting the report. Specifically, an employer or prospective employer must provide "a clear and conspicuous disclosure" in writing to the individual on whom the report is to be conducted and that disclosure must be *"in a document that consists solely of the disclosure."*

It is this stand-alone disclosure requirement that is now the subject of many class action lawsuits. Applicants (and their class-action counsel) scrutinize the background check disclosure forms used by employers and if there is any extraneous information included on the form, they file a lawsuit alleging that the employer violated the FCRA by failing to provide a stand-alone disclosure. The applicants can allege a statutory FCRA violation without suffering any actual damages, seeking recovery of between \$100 and \$1,000 for each member of the class of applicants who were provided the same form. They also seek punitive damages for willful violations of the FCRA.

Extraneous Information on FCRA Forms

The text of the FCRA does not define what it means to be a "document that consists solely of the [required] disclosure." It does, however, state that the required written authorization from the applicant/employee may be included with the disclosure. Consequently, employers may combine the FCRA disclosure with the authorization/consent requirement, but any other information on the form may jeopardize compliance.

As these cases proceed through the courts, judges have found certain types of additional information on the FCRA disclosure form to be problematic, including:

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- Imbedding the FCRA disclosure within a job application
 - Release of liability, e.g., “I hereby release [employer] and any of its authorized agents from liability”
 - Acknowledgement of no discrimination, e.g., “I fully understand that all employment decisions are based on legitimate non-discriminatory reasons”
 - Ramifications of falsified information, e.g., “I understand that submission of false information on this or any employment forms may result in non-selection or termination if hired”
 - State-specific notices, e.g., notices specific to California or New York applicants, etc.
 - Statements about how background information will be gathered and from which sources
 - Procedures for how to dispute information on the reports, including time frames for challenging the accuracy of any report
 - Name, address and contact information of the consumer reporting agency

In most cases, the courts have refused to dismiss these lawsuits at an early stage, allowing the class representatives to proceed with their allegations of FCRA violations based on these types of extraneous information in disclosure forms. It is unclear whether a judge or jury will ultimately conclude that an FCRA violation exists in these cases, but the affected employers face significant risk of liability as well as the time, expense and public notoriety related to defending these actions in court.

Don't Rely On Your Screener

If you think you are out of danger because you rely on FCRA forms provided by your background screening company, think again. Consider the recent class action filed against Big Lots in Philadelphia. The national chain of retail stores used a “Consent to Request Consumer Report & Investigative Consumer Report Information” form provided by its background check provider, Sterling Infosystems, that did not contain the required disclosure language. Instead, the form included allegedly extraneous information, including an implied liability waiver, a full page of state-specific notices, and information about how background information will be gathered and how disputed information may be challenged.

The class action seeks to hold Big Lots liable for its alleged violation of its FCRA disclosure obligations, and it will be up to Big Lots to try to hold Sterling Infosystems liable for providing non-compliant forms. However, because many background screening providers limit their liability in their service contracts, sometimes to only two or three months' worth of screening costs, you may be left without much recourse.

Review Your FCRA Forms

Take the time to review your background check disclosure and authorization forms now. Make sure your FCRA disclosure and authorization is not imbedded or buried in your employment application. If your disclosure forms include extraneous statements, such as liability waivers, state-specific

disclosures, or other background check procedures, your forms may not meet the FCRA requirement to be a stand-alone disclosure. Consider removing the extra wording from the FCRA disclosure forms and move them to a different, non-FCRA-related document. These sorts of class actions can be easy pickings, so taking action now will go a long way toward avoiding being hauled into court.

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