

Compliance Check: Background Check Class Action Suits Continue at Great Expense to Employers

Article By:

Jana P. Grimm

If you set goals late last year or early this year for workplace compliance to be completed in 2016 and have not yet met your goals, now is the time to revisit them. It is critical to allocate time and energy now to review your policies and achieve compliance with various statutes including the **National Labor Relations Act**, the **Fair Labor Standards Act** and the **Fair Credit Reporting Act** (“**FCRA**”) as the repercussions to employers for failing to do so are proving to be very costly. As was predicted for 2016, the trend of filing class actions for failure to comply with the requirements of the FCRA has and continues to grow.

When an employer uses a third party consumer reporting agency to conduct a background check on an applicant, the FCRA requires certain specific notices to be given to the applicant concerning his/her rights and requires the employer to provide such notices. These notices are designed to make the employee aware of the background check as a part of the application process, provide information on the consumer reporting agency to be used, provide a copy of the consumer report to the applicant, and allow opportunity for the applicant to respond to the consumer report before an employment decision is made. Failure to have a written policy in place regarding these requirements exposes the employer to liability; and in fact, many of the actions that have been filed could have been prevented if such a policy had been implemented and enforced in the workplace.

Recently, embattled **Uber Technologies, Inc.** tentatively settled a pending federal court case for the sum of \$7.5 million to resolve class actions alleging that Uber violated the FCRA by using credit reports during background checks to deny employment without properly notifying the applicant or obtaining the applicant's authorization. The case filed in the United States District Court for the Northern District of California in November 2014 also alleged that the company failed to provide the required pre-adverse action notices and a reasonable opportunity to dispute the information before denying applications to drive for the company. The lead plaintiff alleged that he did not receive a copy of his consumer report and his rights under the FCRA. As part of the settlement, Uber retains the right to pursue further appeal to the Ninth Circuit Court of Appeals, but should it lose, withdraw, or the appeal be rendered moot, the settlement figure climbs to \$9 million dollars. The settlement is awaiting approval by the Court.

Similarly, a proposed nationwide class of Waffle House job applicants has asked a Florida court for class certification in its pending lawsuit alleging that the company violated the FCRA. The allegations

again surround the failure to give proper notices to the applicants as required by the statute. In this case, the Plaintiff had worked at various Waffle House restaurants without incident but was denied a job based on a background check when he re-applied at a Waffle House in Florida in 2014. The background check performed by a third party, also a defendant in the lawsuit, indicated a history of criminal convictions. Plaintiff alleges that he was not made aware of the background check and was not given the necessary notices as mandated by the FCRA. As with the Uber case, the lead plaintiff alleges that he did not receive a copy of his report or information about the third party consumer reporting agency used. The Florida court recently denied Waffle House's motion to dismiss the action against it. A motion to certify the class remains outstanding, but if approved, the class could include thousands of individuals classified into various subgroups.

Based on the above cases and others like them, the best employment practice for any employer would be to implement a written, detailed background check policy that notifies all potential applicants that the company uses a pre-employment background check as part of its employment procedures and contracts with an outside agency to perform the background checks. The policy should detail the procedure for the background investigation, including the notices that will be provided to allow the applicant the opportunity to contest or refute the information disclosed by the background check and the reasons for not hiring if a decision is made based upon the results of the background check. Confidentiality of the process should also be disclosed in such a policy.

© Steptoe & Johnson PLLC. All Rights Reserved.

National Law Review, Volume VI, Number 287

Source URL: <https://natlawreview.com/article/compliance-check-background-check-class-action-suits-continue-great-expense-to>