

Employee Background Checks: Ripe for Class Action Lawsuits

Labor & Employment Law Update

on May 6, 2016

Employers conduct employee background checks to *reduce* risk and improve hiring decisions. Ironically, any missteps during the background check process can open employers to significant legal exposure that easily outweighs any benefit obtained from using background checks in the hiring process. The Equal Employment Opportunity Commission's (EEOC) has been clear that use of background checks in the hiring process might lead to discrimination claims. However, our experience shows that employers face a far greater threat to legal exposure when conducting employee background checks through a separate law – the Fair Credit Reporting Act (FCRA). Large employers have been the target of FCRA class action litigation and we have seen first-hand that this trend is continuing with increased attention on smaller-sized employers. Our advice to all employers conducting background checks is to immediately have your documents and procedures reviewed by experienced employment counsel. The claims under the FCRA are highly technical and the forms/procedures put in place by third-party background check companies have been found to be in violation of the FCRA.

To highlight the sense of urgency, employers should be aware that these highly technical claims about background check forms being in violation of the FCRA have led to massive class wide settlements based on statutory damages regardless of whether anyone has been injured or not. For example, the following have been reported as recent FCRA class action settlements: Publix Super Markets, Inc. settled for **\$6.8 million**; Swift Transportation settled for **\$4.4 million**; Dollar General settled for **\$4.08 million**; K-Mart settled for **\$3 million**; Dominos settled for **\$2.5 million**...and the list continues. Suffice it to say, compliance with this law deserves immediate attention.

The FCRA applies to employers who use a third-party to conduct background checks. The FCRA has technical requirements regarding the type and content of notice and authorization employers must provide before conducting third-party background checks. In addition, if an employer takes an "adverse action" based on information from the background checks, there are procedural requirements of the FCRA that must be followed.

We are aware of individuals and Plaintiff's attorneys actively reviewing employer background check forms to identify "flawed" forms. The FCRA requires that a "clear and conspicuous" disclosure be provided to applicants/employees in a stand-alone document. Seemingly minor "flaws" can prompt a demand to settle with the threat of filing a class action lawsuit. Unfortunately, the majority of courts reviewing FCRA lawsuits agree that allegations of seemingly minor flaws may be enough to avoid dismissal of the lawsuit.

There is a simple proactive solution. Employers should conduct an immediate audit and review of background check procedures, including all documents used in the process, to ensure the highly technical requirements of the FCRA are met. Implementing and using compliant background check forms and procedures will greatly reduce the likelihood of having to defend an expensive and costly FCRA class action lawsuit.

Employee Background Checks: Ripe for Class Action Law- suits