

EMPLOYMENT SERVICES ALERT

2/5/15

Recent Tide of Class-Action Lawsuits Should Worry Employers Using Background Checks

A new wave of class-action lawsuits should concern any employer that regularly uses background checks in making employment decisions. These lawsuits allege violations of the Fair Credit Reporting Act (FCRA), the federal law that regulates the collection and use of consumer credit information. Many employers are unaware that FCRA also imposes obligations on employers that order background reports, including criminal and motor vehicle record checks, from a consumer reporting agency.

Before the employer may obtain a background report on an employee or job applicant, FCRA requires that the employer provide the individual with a written disclosure in a stand-alone document and obtain the individual's written permission. Additional steps are required if the employer decides to take an adverse action (such as denial of employment) based on the report's contents. Before taking the adverse action, the employer must provide the individual with a "pre-adverse action notice" and a summary of the individual's rights under FCRA. The employer must then provide the individual with a reasonable period of time, generally five business days, to dispute the information in the background report. If the employer still decides to take the adverse action, FCRA requires the employer to send yet another notice.

Common claims by plaintiffs are that employers included extraneous information in their written disclosures, failed to provide a pre-adverse action notice, or failed to wait a reasonable time before taking an adverse action. FCRA allows plaintiffs to recover actual damages, including attorneys' fees and costs. For willful violations, statutory damages (between \$100 and \$1,000) and punitive damages are also available. As a result, many of the class-action lawsuits have resulted in multi-million dollar settlements for the plaintiffs.

To mitigate the risk of a lawsuit, employers should review their policies and procedures for conducting background checks of employees and job applicants. We also advise a careful review of the notices and disclosures provided to employees to ensure these documents contain the specific information required by FCRA. For assistance complying with FCRA's rules for employee background checks, please contact one of the Roetzel & Andress attorneys listed below.

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