Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Employer Lessons In Avoiding FCRA Violations

Law360, New York (March 17, 2017, 10:43 AM EDT) --


Kersten Holzhueter

The federal Fair Credit Reporting Act outlines a strict procedure that employers must follow when they obtain criminal background reports, credit histories and other background reports on employees and applicants from a third party which is engaged in the business of preparing such reports. All such reports are called "consumer reports" under the FCRA.

A negligent violation can entitle an employee/applicant to recover actual damages, attorney's fees and court costs. A willful violation allows an employee/applicant to recover statutory damages ranging from $100 to $1,000 or actual damages (whichever is higher), attorney's fees, court costs and punitive damages.

The Ninth Circuit recently held that the FCRA's strict procedures are unambiguous, so an employer's deviation from those procedures was willful even though the employer subjectively believed that its conduct complied with the statute and even though the deviation may have seemed minor. Syed v. M-I LLC, No. 14-17186, 2017 U.S. App. LEXIS 1029, at *19-24 (9th Cir. Jan. 20, 2017). This standard paired with the significant damages available for a willful violation encourages litigation, including the filing of class actions. In fact, lawsuits under the FCRA are on the increase.

As such, it is important for employers to develop and follow policies for requesting a consumer report and taking adverse action based on a consumer report. The most important pieces of those policies are explained below.

Before requesting a background or consumer report, employers must follow these steps:

- First, the employer must provide written notice to the employee/applicant that it may obtain a consumer report on the employee/applicant for employment purposes. This written notice cannot be combined with any other content with one exception. It can be combined in the same document with the written consent of the employee/applicant (discussed in the next bullet point). One area of litigation has involved the employer including other information in the written notice. For example, if a written notice includes any of the following "additional" language, a court could very well deem it to be "noncompliant" and a violation of the FCRA: (1) language releasing the employer from liability under the FCRA; (2) language releasing from liability any third parties who provide information for the background or consumer report; or (3) any language that is state-specific (some states have their own versions of FCRA) but would not apply in the state where the job is located or the individual lives. Courts have held that this written notice cannot include information other than the fact that the employer may obtain a

consumer report for employment purposes and the employee's/applicant's written consent to obtain that report.

- Second, the employer must receive the employee's or applicant's written consent to obtain a consumer report. This can be a separate document from the written notice. If it is a separate document, it can include other provisions. But if it is combined with the written notice, no other provisions can be included.

- Third, at the time the employee/applicant signs the written notice and/or written consent, the employer should provide employees and applicants with a document titled "A Summary of Your Rights Under the Fair Credit Reporting Act," which can be found here. However, if this summary is provided at that time, it should not be stapled to the written notice (because doing so could be construed as "adding" language to the written notice).

After receiving a background or consumer report and if the employer might take adverse employment action (i.e., not hiring, not promoting, demoting, etc.) based, in whole or in part, on any information in the report, the employer must follow these steps:

- Before taking the adverse action, the employer must provide a "preadverse action notice" to the employee/applicant, stating that it may take adverse employment action based on information in the consumer report. Although this notice does not have to be writing, we highly recommend that it be a written notice. In addition to providing this "preadverse action notice," the employer must send a copy of the consumer report and a copy of the "summary of your rights" mentioned earlier (another reason to do a written preadverse action notice, which could serve as the cover letter to the enclosures).

- After deciding to take the adverse action, the employer must provide an "adverse action notice" to the employee/applicant stating what adverse action it is taking. While it may be inconvenient to do so, the employer should not provide this "adverse action notice" until at least five days after it sent the preadverse action notice. There has been litigation in which a claimant has argued that failure to provide such a five-day period is a violation of the FCRA because it deprives the employee/applicant of the opportunity to tender information to the employer that would prove the consumer report is inaccurate. In addition to stating what adverse action is being taken, the adverse action notice must contain the following:
    - The name, address and phone number of the third party that supplied the consumer report to the employer;

    - A statement that the third-party reporting agency did not make the decision to take the adverse action and cannot give reasons why the employer is taking adverse action;

    - A statement that the employee/applicant has a right to dispute the accuracy or completeness of his/her consumer report with the third-party reporting agency; and

    - A statement that the employee/applicant has a right to obtain a free consumer report from the third-party reporting agency upon request within 60 days.

The above information is only a summary of some of the FCRA requirements. Employers should consult with legal counsel regarding FCRA requirements as well as to determine if the employer's initial notice, consent, preadverse action notice and adverse action notice forms comply with the FCRA.

Although the remedies for noncompliance are severe, employers can avoid the risks of litigation by implementing relatively simple policies and procedures. Employers should also be aware that different states may impose additional requirements. Employers are advised to research or consult legal counsel regarding the potential state law variations.

—By Kersten Holzhueter, Spencer Fane LLP

Kersten Holzhueter is a partner at Spencer Fane in Kansas City, Missouri.