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CAREFUL WHAT YOU ASK FOR... AND HOW YOU ASK FOR IT!

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A recent Western District of Pennsylvania case shed light on the Fair Credit Reporting Act's ("FCRA" or "Act") extensive rules and regulations governing employer-initiated criminal background checks. Employers who plan to use such checks in connection with hiring decisions would be wise to tailor their forms to the particularized requirements of the Act, or risk being involved in a protracted legal dispute over the propriety of their hiring practices.

In [*Reardon v. ClosetMaid Corporation*](#), a class of plaintiffs sued their employer for violating the provisions of the FCRA. Specifically, the class alleged ClosetMaid did not comply with the FCRA's disclosure requirements, and a sub-class of plaintiffs claimed the company failed to provide adequate notice of potential adverse action and an opportunity to contest the consumer report obtained about them by the company.

The Disclosure Requirement

Section 604(b)(2)(A)(i) of the FCRA requires employers to disclose to applicants that a consumer report may be obtained about them for employment purposes and to receive authorization from the applicant prior to obtaining a report. The statute mandates the disclosure be clear and conspicuous, in writing, and in a document that consists "**solely of the disclosure**." (emphasis added). The only other text allowed on the same document as the disclosure is the "authorization" to be signed by the applicant. Section 604(b)(2)(A)(ii).

Included on ClosetMaid's document containing the disclosure and authorization for a consumer report was a one-line waiver of liability for damages resulting to the applicant because of compliance with the authorization and request for release. Even though the disclosure requirement was clear and conspicuous and in writing, the court determined that it violated the Act because the waiver did not constitute an "authorization" – the only other language allowed on the form.

The Pre-Adverse Action Requirement

Before an employer takes any adverse action against an applicant, including denying employment altogether, based in whole or in part on information contained in a consumer report, the employer must provide the applicant with a copy of the report and a summary of rights under the FCRA. Section 604(b)(3)(A). Although not stated in the statute, the legislative history of the Act mandates the employer provide the applicant with "a reasonable period" to respond to information contained in the report before officially denying employment (or taking other adverse action). H.R. REP. 103-486 at 40 (1994). Congress' report indicated a reasonable period was "not required to exceed five business days" following the applicant's receipt of his/her consumer report. *Id.*

Until recently, the Federal Trade Commission (“FTC”) regulated implementation of the FCRA and has reaffirmed the reasonableness of the five-day period suggested in the Congressional Report. However, the FTC was recently replaced by the Consumer Financial Protection Bureau (“CFPB”) as the new regulating agency for the FCRA. Whether the CFPB will adhere to this five-day policy is unknown.

The subclass of plaintiffs in *ClosetMaid* claimed the company did not provide them with a reasonable amount of time to contest the information contained in their reports before denying them employment. Upon further review, the court determined some plaintiffs had been given eight days’ notice, while others given only four days’ notice. The court found although eight days was sufficient notice, a jury could find four days’ notice was not a “reasonable” amount of time to dispute information contained in the report, and thus denied summary judgment to the company for the plaintiffs who received only four days’ notice.

Employer Takeaway

The *ClosetMaid* decision provides valuable guidance on how employers can comply with the strict requirements of the Act so that hiring decisions cannot be challenged under the FCRA. This guidance closely echoes the recently released [EEOC and FTC’s Joint Tips on Use of Employment Background Checks](#). First, employers should ensure their disclosure notices contain no information other than the authorization, no matter how related to the consumer reporting process the information is. The disclosure and authorization should be on their own document separate from the employment application.

Second, employers who are contemplating denying employment to an applicant based, in whole or in part, on information discovered in a criminal background check must provide notice prior to taking an adverse action. This notice, accompanied by a copy of the consumer report and a summary of their rights, should come at least five days before the employer takes any adverse action, so that the applicant has sufficient opportunity to challenge the propriety of the report. Employers who do not conform their practices risk defending legal claims based on procedural flaws even if the substantive decision not to hire was prudent and legitimately based on information in the report.