United States: Background Check Forms Face Increased Scrutiny In Federal Court

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Businesses should check their background check consent forms and their pre-adverse action waiting periods, after a recent federal court decision out of Pennsylvania.

In Reardon v. Closetmaid Corporation, the district court granted summary judgment in favor of a class of more than 1,800 job applicants. The Court ruled that the employer's consent and disclosure form was improper because it contained a waiver of liability, even though the inclusion of such waiver language is commonplace. The Court also granted summary judgment to a subclass of job applicants who were properly sent a pre-adverse action notification form, as required under the Fair Credit Reporting Act (FCRA), but whose applications were then denied within fewer days than what this Court considered a "reasonable time period."

Because the Court also determined that the employer's background check procedures were unreasonable, the company now faces statutory liability of $100 to $1,000 per applicant, plus punitive damages and attorneys' fees. Yet, there is no indication that any of the class members suffered any injury whatsoever.

Disclosure and Consent Forms

Under the FCRA, before a background check is conducted for employment purposes, the employer must disclose to the applicant that a background check may be obtained and must receive the applicant's written consent. The FCRA requires that the disclosure be made in writing and "in a document that consists solely of the disclosure." 15 U.S.C. § 1681b(b)(2).

The FCRA permits the consent to be obtained on the same form as the disclosure, and the Federal Trade Commission (which enforced the FCRA until recently) has further opined that it is permissible to include, on the same form, "minor additional items" that do not distract from the nature of the form. Examples of additional items that can be added to the form include a place for the applicant to write identifying information or the inclusion of a notice that the background check may include information obtained from through interviews with individuals (i.e., an investigative consumer report). The FTC's primary concerns were that the disclosure not be diminished in importance by the inclusion of unrelated information and that the disclosure not be buried in small text at the end of an employment application, where it could be missed by an applicant.

It has been clear for years, therefore, that the consent and disclosure must be provided in a stand-alone document, separate from the employment application. At the same time, it had become commonplace for employers to include a sentence in their consent and disclosure forms that releases from liability the employer and anyone who provides information used in the background check process.

The FTC has not opined on this practice. The FTC had previously warned that the consent and disclosure form cannot include a waiver of an applicant's *rights under the FCRA*, but the FTC has never opined that it would be inappropriate to include a statement waiving claims (such as defamation) against individuals who provide information that becomes a part of the background check report.

The Pennsylvania Court, however, applied an exceedingly narrow and literal interpretation of the "consists solely of the disclosure" requirement and held that by including waiver language in the form, the company violated the FCRA. The Court interpreted the FTC opinion that prohibited waivers of FCRA rights as if it were much broader, prohibiting all waiver language of any kind. The Court ruled that because the disclosure form included waiver language, the form did not consist solely of the disclosure.

Making matters worse (or better, if you are a plaintiff's class action lawyer), the Court also ruled that to include the waiver language was an unreasonable interpretation of the statute. The "unreasonable interpretation" finding meant that the violation was "willful," therefore subjecting the company to statutory damages, even though no one was harmed. Statutory damages for a willful violation of the FCRA include payment of $100 to $1,000 per consumer, plus punitive damages, plus attorneys' fees.

Based on this decision, employers should strongly consider removing any waiver language from their background check consent and disclosure forms. Limited waiver language, if desired, can be inserted into the employment application or another document instead. Shortly after this decision was issued, the parties settled this class action lawsuit, so this ruling will not be reviewed by the Third Circuit Court of Appeals.

Pre-Adverse Action Notice

The FCRA also requires that an employer give fair warning before taking an adverse action, if the adverse action is to be based on information it learns from a background check. An adverse action includes, for example, not hiring someone because of negative information in the background check.

The fair warning requirement does not require an employer to disclose what adverse action it is considering (or that it is considering one at all), but it does require that before taking any final adverse action, the employer provide the applicant with a copy of the report and a form entitled Summary of Your Rights under the Fair Credit Reporting Act.

The FCRA is silent as to how long an employer must wait before finalizing the adverse decision. It merely requires that the pre-adverse action steps be followed before the actual decision is made.

The FTC has advised: "There is no specific period of time an employer must wait after providing a pre-adverse action notice and before taking adverse action against the consumer. Some reasonable period of time must elapse, but the minimum length will vary depending on the particular circumstances involved."

Despite there being no set period of time in the statute, and despite the FTC having ruled that there is no set period of time required, the federal court in *Reardon* decided that the employer could have violated the statute by waiting fewer than five business days. The Court noted that the employer's pre-adverse action letter had advised that it planned to wait five business days before making any final decision and found that there was evidence the employer actually decided after four business days. The Court ruled that it would be up to a jury to decide whether the company's four-business-day waiting period was reasonable.

Although this decision does not establish five business days as the minimum waiting period between a pre-adverse action notice and the taking of an adverse action, employers may view this decision as a cautionary tale. At least according to this Court, five business days or more is presumptively reasonable, and less than five business days may be subject to further scrutiny.

Parting Thoughts

The *Reardon* decision is a district court decision from the Western District of Pennsylvania. It is not an appellate decision or a Supreme Court decision, and it remains to be seen whether this strict interpretation will be followed by other courts in other districts.

As a result of this decision, cautious employers should strongly consider:

1. Removing from their consent and disclosure forms any waiver language, and
2. Implementing an internal policy of waiting five business days between sending a pre-adverse action notice and taking any adverse action.

Background check policies and forms should be checked by qualified employment law counsel to ensure that they are in compliance with the FCRA and are consistent with the Equal Employment Opportunity Commission's recommended practices.

Baker Hostetler attorneys are available to help employers craft their consent and disclosure forms, their pre- and post-adverse action forms, and their internal practices for conducting background checks. As we have posted previously here, background checks remain a hot topic of litigation and are a priority enforcement target for the EEOC.

Postscript

On February 7, 2014, a new lawsuit was filed against Whole Foods in California, alleging the same deficiencies in background check forms as found in the *Reardon* case. The plaintiff seeks certification of a nationwide class of job applicants.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

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