Summary of Application of Fair Credit Reporting Act (“FCRA”) to Criminal Background Checks

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Where a criminal record report is provided to an employer by a credit reporting agency (“CRA”), the Fair Credit Reporting Act (“FCRA”), 15 U.S.C. § 1681 et seq, is applicable. See Beaudette, FTC Informal Staff Opinion Letter, June 9, 1998 (attached and available at http://www.ftc.gov/os/statutes/fcra/beaudett.htm). FCRA creates obligations both on CRAs preparing criminal background reports and on employers using them.

Among the duties on CRAs compiling criminal background reports for employers are the following.

- CRAs may not report arrests or other adverse information (other than convictions of crimes) which are more than seven years old, provided that the report does not concern employment of an individual who has an annual salary that is $75,000 or more.1 15 U.S.C. §§ 1681c(a)(5), 1681c(b)(3).

- CRAs must use “reasonable procedures” to insure “maximum possible accuracy” of the information in the report. 15 U.S.C. §1681e(b).

Elements of cause of action: (1) Inaccurate information in report; (2) inaccuracy due to CRA’s failure to follow reasonable procedures to assure maximum possible accuracy; (3) consumer suffered injury (can include emotional injury); and (4) injury was caused by inaccurate entry. Crane v. Trans Union, 282 F.Supp.2d 311 (E.D. Pa. 2003)(Dalzell) (citing Philin v. Trans Union Corp., 101 F.3d 957, 963 (3d Cir. 1996)).

- A CRA reporting public record information for employment purposes which “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either notify the person that the public record information is being reported and provide the name and address of the person who is requesting the information or the CRA must maintain strict procedures to insure that the information it reports is complete and up to date. 15 U.S.C. §1681k.

Among the duties that FCRA imposes when an employer uses a consumer report of a criminal record provided by a CRA for purposes of a hiring decision are the following.

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1 For many years, the seven year limit also applied to reporting of convictions. However, this seven year limit was eliminated by Congress in the Consumer Reporting Employment Clarification Act of 1998, P.L. 105-347, Sect. 5.
The employer must provide a clear written notice to the job applicant that it may obtain a consumer report. 15 U.S.C. § 1681b(b)(2). It also must obtain written authorization from the job applicant to get the report. 15 U.S.C. § 1681b(b)(3). Therefore, in situations where a CRA is involved, ex-offenders ought to be made aware that their criminal record will be scrutinized, which often is not the case when criminal records are obtained directly by the employer from public sources. If the employer intends to take adverse action based on the consumer report, a copy of the report and a Federal Trade Commission (“FTC”) Summary of Rights must be provided to the job applicant before the action is taken. 15 U.S.C. § 1681b(b)(3). The obvious reason for this requirement is to permit a job applicant to address the report before an employment decision is made. If this requirement were satisfied, ex-offenders would have a rare chance to check whether their criminal record were correctly reported and to address whether they would be suitable employees for the particular job notwithstanding their records. Afterwards, the employer, as a user of a consumer report, must notify the job applicant that an adverse decision was made as a result of the report and must provide, among other things, the name, address and telephone number of the CRA and the right to dispute the accuracy or completeness of the report. 15 U.S.C. § 1681m(a).

There are only a few reported decisions under FCRA involving criminal background reports. They include the following.

Dalton v. Capital Associated Industries, 257 F.3d 409 (4th Cir. 2001): Dalton indicated on application that he did not have any felonies. CRA’s investigation found that he had a conviction but the grade was unclear from the records. A clerk incorrectly said it was a felony. After Dalton disputed this, another clerk said it was not a felony. Dalton was denied employment, probably based on independent reasons in his employment history. Among the court’s holdings: (1) the agency was a CRA subject to FCRA; (2) whether the report was inaccurate and whether the CRA used unreasonable procedures by failing to instruct its subvendors on proper sources of criminal record information were jury issues; and (3) Section 1681k creates heightened standards for procedures to collect information for employment purposes.

Obabueki v. IBM, 236 F.Supp.2d 278 (S.D.N.Y. 2002): Plaintiff was denied employment because he did not reveal an expunged conviction on his employment application. The court held that the CRA’s report was incomplete, but because the plaintiff provided the employer with a copy of the expungement order before it made its decision to deny his employment, the CRA was not the proximate cause of the plaintiff’s harm.