News and Legislation Relating to Employment and Background Checks

Federal News and Legislation:

Background Checks

- On August 10th, the Seventh Circuit dismissed a putative class action against Advocate Health and Hospitals Corp. (AHHC) alleging that the hospital violated the Fair Credit Reporting Act (FCRA) by failing to protect patients' medical information, ruling that the hospital is not a consumer reporting agency. According to the Seventh Circuit, a hospital such as AHHC is not considered a consumer reporting agency under the FCRA because it does not get paid for gathering information on patients. In response to the plaintiffs' argument that such a ruling would limit the FCRA's reach to the three major credit bureaus, the Seventh Circuit said, "[o]ther entities…may act in ways that satisfy the statutory definition of 'consumer reporting agency,'" offering a staffing agency as one example. *Tierney et al. v. Advocate Health and Hospitals Corp.*, No. 14-3168 (7th Cir., Aug. 10, 2015).

- On August 5th, Senator Elizabeth Warren (D-MA) introduced S. 1981, the Equal Employment for All Act of 2015. The bill would "amend the Fair Credit Reporting Act (FCRA) to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions." Under the bill, "a person, including a prospective employer or current employer, may not use a consumer report or investigative consumer report, or cause a consumer report or investigative consumer report to be procured, with respect to any consumer where any information contained in the report bears on creditworthiness, credit standing, or credit capacity of the consumer:
  - For employment purposes; or
  - For making an adverse action."

  The bill highlights two exceptions where an employer may use a consumer report which includes credit information:
  - When the consumer applies for, or currently holds, employment that requires national security clearance; or
  - When otherwise required by law.

  (http://www.warren.senate.gov/files/documents/Equal_Employment_for_All_Act_of_2015.pdf)

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- On August 3rd, the Federal Trade Commission (FTC) published a blog post entitled, "How to Dispute Credit Report Information That Can't Be Confirmed." In the post, the FTC focuses on what consumers can do when a debt collector reported a debt to a credit reporting agency and then went out of business. The post cites an FTC enforcement action against Crown Funding Company (Crown), a debt collection company the FTC sued for deceptive practices, which resulted in the company shutting down its business. According to the FTC, "[f]ederal law says that, when consumers dispute information on a credit report, the credit reporting agencies must investigate it. If the credit reporting agency can't confirm the information with the company that reported the debt — and in the case of Crown, it can't — it must delete the information from the consumer's credit report, usually within 30 days of receiving the consumer's dispute." The blog includes a list of steps consumers can take in contacting a credit reporting agency to correct their credit report, as well as a sample letter to assist consumers disputing items in their credit report. (http://www.consumer.ftc.gov/blog/how-dispute-credit-report-information-cant-be-confirmed)

State News and Legislation:

- On August 12th, a California appeals court reversed a state district court's ruling to strike down California's Investigative Consumer Reporting Agencies Act (ICRAA) as unconstitutionally vague, stating that it disagreed with the precedent used by the lower court to declare the law "unconstitutionally vague." The lawsuit was brought by two bus drivers against First Student, Inc. alleging that the company violated the ICRAA when it ran background checks on them without their consent. The state district court struck down the law, calling it unconstitutionally vague due to overlap with California's Consumer Credit Reporting Agencies Act. However, the appeals court reversed this decision, disagreeing with the precedent used in the decision and saying that "[t]here is nothing in either law that precludes application of both acts to information that relates to both character and creditworthiness," adding that, "[t]herefore, we conclude the ICRAA is not unconstitutionally vague as applied to such information."
Eileen Connor et al. v. First Student, Inc. et al., No. B256075 and B256077 (Cal. Ct. App., Aug. 12, 2015).

- On August 7th, Delaware Governor Jack Markell (D) signed HB 109, the *Employee/Applicant Protection for Social Media Act*, which will make it "unlawful for employers, subject to

certain exceptions, (i) to mandate that an employee or applicant disclose password or account information that would grant the employer access the employee or applicant's personal social networking profile or account, or (ii) to require or request that employees or applicants log onto their respective social networking site profiles or accounts to provide the employer direct access. The law also prohibits employers from viewing such accounts, to accept a "friend" request from the employer, or to disable privacy settings on those accounts. Exceptions that will permit an employer to request social media account information include:

- Investigating allegations of employee misconduct;
- Accessing an electronic communication device supplied by the employer; or
- Accessing information already in the public domain.

(http://legis.delaware.gov/LIS/lis148.nsf/vwLegislation/HB+109/$file/legis.html?open)

- On July 12th, Maine Governor Paul LePage (R) failed to veto HP 640 by a specified deadline, resulting in the measure, along with 65 other bills, becoming law without the governor's signature. HP 640 will limit an employer's access to prospective employees' social media accounts. LePage sought a ruling from the state's Supreme Court, which issued an advisory opinion finding that the governor's veto was not timely, resulting in the 65 bills, including the social media privacy measure, becoming law without the governor's signature. Under the law, an employer may not require or coerce an employee or applicant to turn over their social media account passwords, or force them to log into their social media accounts in their presence or in the presence of an agent of the employer. The law identifies three exceptions that permit employers to access social media accounts:
  - When the information about the applicant or employee is publicly available;
  - When complying with a duty to screen employees or applicants before hiring or to monitor or retain employee communications; and
  - When the employer is conducting an investigation based on reasonable allegations of employee misconduct.

  Under the law, employers can be fined $100 for the first violation, $200 for the second violation, and $500 for each violation thereafter.
  (http://www.mainelegislature.org/legis/bills/getPDF.asp?paper=HP0640&item=7&snum=127)