# News and Legislation Relating to Employment and Background Checks

## Federal News and Legislation:

### Background Checks

- On September 10th, Rep. Elijah Cummings (D-MD) introduced HR 3470, the Fair Chance Act, which would "prohibit federal agencies and federal contractors from requesting that an applicant for employment disclose criminal history record information before the applicant has received a conditional offer." Sen. Cory Booker (D-NJ) introduced the Senate version, S. 2021. According to a statement published on the House Oversight and Government Reform Committee's website, the bill would assist formerly incarcerated individuals in obtaining a "fairer chance at securing employment." In the statement, the sponsors of the legislation highlight "Ban the Box" policies that have been implemented in "eighteen states and over 100 cities," adding that "companies such as Walmart, Koch Industries, Target, Home Depot, and Bed, Bath & Beyond have embraced these 'Ban the Box' policies to more fairly assess job applicants." The statement says that the Fair Chance Act would, among other things:
    - Ban the federal government—including the executive, legislative, and judicial branches—from requesting criminal history information from applicants until they reach the conditional offer stage;
    - Prohibit federal contractors from requesting criminal history information from candidates for positions within the scope of federal contracts until the conditional offer stage; and
    - Include important exceptions for positions related to law enforcement and national security duties, positions requiring access to classified information, and positions for which access to criminal history information before the conditional offer stage is required by law, as listed in the statement.

  (http://democrats.oversight.house.gov/news/press-releases/booker-cummings-johnson-issa-members-of-congress-introduce-bipartisan).

- On September 8th, the CFPB filed an amicus brief with the U.S. Supreme Court in *Spokeo, Inc. v Robins*, a lawsuit alleging that Spokeo, Inc. (Spokeo) violated the Fair Credit Reporting Act (FCRA) by publishing inaccurate information on the plaintiff. At issue is whether a plaintiff who cannot show actual harm from a violation of the FCRA still has standing to sue under Article III. In its brief, the CFPB expressed support for the plaintiff's standing to sue, arguing that a plaintiff can show the "injury in fact" requirement for Article III standing "by

demonstrating an invasion of his own legally protected interests" as long as the plaintiff can show the invasion was "actual and concrete." The Supreme Court is scheduled to hear oral arguments in the case on November 2, 2015. (http://files.consumerfinance.gov/f/201509_cfpb_amicus-brief_spokeo-merits-stage.pdf).

- On September 8th, fifteen law professors also filed an amicus brief with the U.S. Supreme Court in *Spokeo, Inc. v. Thomas Robins et al.*, urging the Court to not dismiss the plaintiff's lawsuit against Spokeo, Inc. (Spokeo) for violations of the FCRA after allegedly publishing inaccurate information about him. According to the professors, the Ninth Circuit properly rejected Spokeo's argument that its "people search engine" did not cause actual harm to the plaintiff to establish standing. Additionally, the professors express concern over how consumer reporting agencies would react if the Ninth Circuit decision were reversed. According to the amicus brief, "[t]he FCRA's consumer transparency requirements and remedial provisions were designed to encourage steady improvement in consumer reporting practices and to relieve pressure on public enforcement authorities," adding that, "[Spokeo's] claim that [the plaintiff] cannot pursue it for its violations of the FCRA would unravel that bargain, preserving consumer reporting agencies' broad immunity from suit while diminishing incentives to handle data fairly."
(*Spokeo, Inc. v. Thomas Robins et al.*, No. 13-1339 (S. Ct., Sep. 8, 2015).

- On September 8th, the U.S. Equal Employment Opportunity Commission (EEOC) announced that BMW Manufacturing Co., LLC (BMW) entered into a consent decree, requiring BMW to pay $1.6 million to settle EEOC allegations that the car manufacturer discriminated against African American logistics employees through application of criminal background checks which had a disparate impact and lead to said employees' termination. Under the consent decree, BMW is enjoined from use of the criminal background check guidelines which were in effect. Additionally, the consent decree lays out key requirements for BMW and its logistics provider, including:
    - They agree not to decline to hire any job applicant or otherwise disqualify any individual in a logistics position because of "criminal arrests or charges of any type if such arrests or charges did not result in a conviction."
    - They can, however, postpone an offer of employment if there is a pending charge, pending resolution of the charge.
    - They must conduct an individualized assessment if they seek to disqualify any job applicant based on criminal history. Meaning they must provide written notice to the

job applicant describing the criminal history which is at issue, and an offer to the applicant to explain the conviction and their appropriateness for employment.
  - Above notice must be delivered by "reasonable means" and must afford the job applicant a period of at least 21 days during which time they can contact BMW or the logistics provider before an adverse employment decision is finalized.
  - They must appoint an official to review all final decisions to decline to hire or otherwise disqualify an applicant due to criminal history.

([http://www.immigrationcomplianceinsights.com/2015/09/08/bmw-signs-consent-decree-background-screening/](http://www.immigrationcomplianceinsights.com/2015/09/08/bmw-signs-consent-decree-background-screening/)); *U.S. Equal Employment Opportunity Commission v. BMW Manufacturing Co., LLC*, Sept. 8, 2015 (7:13-cv-01583).

- On September 3rd, plaintiffs filed a putative class action against Uber Technologies, Inc. (Uber) and a contractor for alleged violations of the FCRA over the ridesharing company's employment screening practices. According to the complaint, the plaintiff alleges that Uber and its contractor denied prospective employees the opportunity to dispute inaccurate information on their consumer reports and failed to provide a stand-alone background check disclosure form as required under the FCRA. Specifically, the complaint states that the "purpose of the stand-alone disclosure is to inform the consumer job applicant that a background report will be procured about him or her, not to provide the employer an opportunity to obtain the prospective employee's signature on a form filled with confusing language and self-serving protections for the employer or waivers of the employee's rights," adding that " Congress included in the statutory scheme a series of due-process-like protections that impose strict procedural rules on 'users of consumer reports,' such as Uber." (*Joseph Cuccinello et. al. v. Uber, Inc. et. al.*, No. 2:15-cv-06604 (D.N.J., Sep. 3, 2015).

- On September 3rd, a federal district court granted Trans Union's motion to stay in an action alleging that Trans Union violated the FCRA by not permitting consumers to challenge criminal and terrorist alerts on their credit reports. According to Trans Union, the case should be stayed while the Supreme Court rules in an FCRA class action against Spokeo, Inc., which will determine whether a plaintiff can allege FCRA violations without suffering actual harm, as well as *Tyson Foods v. Bouaphakeo*, which is expected to address whether statistics may be used to determine damages in class actions rather than assessing individual damages for each plaintiff. In the Trans Union case, the plaintiff alleges that the credit bureau inaccurately included criminal and terrorist alerts in credit reports and then furnished those reports to prospective employers and landlords without the consumers' knowledge. Counsel

for Trans Union said that "it's far from clear that [the plaintiff] has suffered any actual harm."
(*Patel v. Trans Union LLC et al.*, No. 3:14-cv-00522 (N.D. Cal., Sep. 3, 2015).

- On September 1st, a putative class action was filed against Universal Studios Orlando (Universal) for alleged violations of the FCRA over its background check procedures. According to the complaint, the plaintiff alleges that Universal failed to properly disclose that it would procure the plaintiff's credit report as part of the company's background check procedures for prospective employees. Specifically, the complaint states that Universal "procur[ed] consumer reports on Plaintiff and other putative class members for employment purposes, without first making proper disclosures in the format required by the statute," adding that the FCRA requires such disclosures to be in a "document solely consisting of [Universal's] disclosure that it may obtain a consumer report on any person for employment purposes."
(*Mendez v. Universal City Development Partners, Ltd.*, No. 6:15-cv-0142 (M.D. Fla., Sep. 1, 2015).

- On August 31st, Plaintiff Thomas Robins filed a brief with the U.S. Supreme Court arguing that he has standing to sue Spokeo, Inc. (Spokeo) in a putative class action for alleged violations of the FCRA by publishing inaccurate information about him. According to Spokeo, the plaintiff lacks standing because he has not suffered a "real-world" or actual injury based on Spokeo publishing inaccurate information on the plaintiff. The plaintiff, however, relied on "centuries of common-law precedent" to argue he has standing. According to the plaintiff, "this court's standing decisions, and separation-of-powers principles all disprove Spokeo's claim that a 'bare' statutory violation without additional 'real-world' harm is not a cognizable injury," adding that "[n]o decision of this court holds that Article III bars Congress from creating personal legal rights and fashioning monetary relief to redress them in federal court." Regardless, the plaintiff argues he suffered the exact type of "real-world" harm that the statute is designed to protect, stating that "[a]s soon as Spokeo willfully invaded [the plaintiff's] legal rights under the FCRA by creating a false report about him without using procedures mandated by the statute, he was entitled to statutory damages," explaining that "[h]is claim for those damages created a classic legal dispute over whether one party (here, Spokeo) owes another ([the plaintiff]) a fixed sum of money. Spokeo's failure to compensate [the plaintiff] is a monetary — or wallet — injury."
(*Spokeo Inc. v. Thomas Robins et al.*, No. 13-1339 (S. Ct., Aug. 31, 2015).

- On August 28th, a plaintiff, who filed a putative class action against Kohl's Department Stores (Kohl's) alleging that the retailer violated FCRA over its background check disclosures, filed a response criticizing the retailer's motion to dismiss arguing that it relies on a faulty interpretation of the law. According to Kohl's motion to dismiss, the plaintiff filed the putative class action after the two-year statute of limitations had passed under the FCRA. However, the plaintiff argues that the statute of limitations is five years and claims that the period starts the date the plaintiff discovered the possible violation. Specifically, the plaintiff states that she "could not have discovered the violations underlying her FCRA claims until she learned that defendant had actually procured a consumer report on her," adding that, "the confusing nature of the forms, including the fact that plaintiff was required to sign multiple forms at the same time, only compounded plaintiff's confusion surrounding the forms and their resultant unlawful nature."
(*Coleman v. Kohl's Department Stores, Inc.*, No. 3:15-cv-02588 (N.D. Cal., Aug. 28, 2015).