

News and Legislation Relating to Employment and Background Checks

Federal News and Legislation:

Background Checks

- On September 25th, a federal district court rejected Kohl's Department Stores, Inc.'s (Kohl's) attempt to transfer a putative class action to Florida. During the hearing, the judge also considered and questioned plaintiffs' counsel about their allegations that the company violated the Fair Credit Reporting Act (FCRA) by using improper background check disclosure forms. The judge questioned plaintiffs' attorney and appeared to not agree with their assertion that the disclosure and authorization form was deficient because it was included with other materials. Without deciding on Kohl's motion to dismiss, the court inquired about plaintiffs' claim against Kohl's that the company's background check disclosure form violated the FCRA by including extraneous information unrelated to the company's background check policies. According to the court, the plaintiffs' allegation "makes no sense whatsoever." When the plaintiffs' attorney quoted from the FCRA, specifically where the statute mentions the need for a "separate, clear and conspicuous document," the judge replied, "that argument is ridiculous." The court took the arguments under submission.
(Coleman v. Kohl's Department Stores, Inc., No. 3:15-cv-02588 (N.D. Cal., Sep. 25, 2015).
- On September 23rd, a U.S. Marine filed a putative class action against the Office of Personnel Management (OPM) and background check provider KeyPoint Government Solutions, Inc. (KeyPoint) over OPM's recently announced data breaches affecting up to 21 million current and former government employees' personal information. According to the complaint, the plaintiff alleges that OPM and KeyPoint failed to implement proper data security policies and practices to safeguard current and former government employees' personal data. According to the plaintiff, "[t]his massive data theft followed years of warnings, commencing in 2007 and culminating in a November 2014 audit report, from OPM's Office of Inspector General, which informed the agency that its computer systems contained myriad material weaknesses."
(Sims v. U.S. Office of Personnel Management et al., No. 1:15-cv-13426 (D. Mass., Sep. 23, 2015).

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- On September 16th, Representative Steve Cohen (D-TN) introduced HR 3524, the *Equal Employment for All Act*. The Senate version, S. 1981, is sponsored by Senator Elizabeth Warren (D-MA) and was introduced August 5th (previously reported). The bill would “amend the Fair Credit Reporting Act to prohibit the use of consumer credit checks against prospective and current employees for the purposes of making adverse employment decisions.” According to a statement on Cohen’s website, HR 3524 seeks to “protect job seekers from unfair discrimination from employers based on credit ratings that are often inaccurate and bear little to no correlation to job performance or ability to succeed in the workplace.” Specifically, Cohen’s statement asserts that the bill “would protect prospective employees from being forced to disclose their credit history as part of an employer’s application process.” According to the text of S. 1981, “a person, including a prospective employer or current employer,” may not use a consumer report or procure a consumer report on any consumer that contains information on the consumer’s creditworthiness, credit standing, or credit capacity:
 - For employment purposes; or
 - For making an adverse action, as listed in the bill.

(Cohen Statement: <http://cohen.house.gov/press-release/cohen-warren-bill-protect-job-seekers-credit-based-discrimination-introduced-house>; S. 1981: <http://www.gpo.gov/fdsys/pkg/BILLS-114s1981is/pdf/BILLS-114s1981is.pdf>).

- On September 16th, the Federal Trade Commission (FTC) announced a settlement with auto dealer Tricolor Auto Group (TAG), requiring TAG to pay approximately \$82,000 to resolve alleged violations of the Fair Credit Reporting Act (FCRA) by “fail[ing] to have written policies and procedures regarding the accuracy of reported credit information, and fail[ing] to properly investigate disputed consumer credit information.” According to the FTC’s complaint, the agency alleges that TAG’s loan-servicing group, Tricolor Auto Acceptance LLC (TAA), violated the FCRA’s Furnisher Rule by not having written policies or procedures addressing how to ensure the accuracy of the consumer information it provided to a credit reporting agency (CRA). Additionally, the FTC alleged that “when consumers disputed the accuracy of the information provided by TAA to the CRA, TAA referred them back to the CRA instead of conducting an investigation as required under the Furnisher Rule.” In addition to the approximately \$82,000 civil penalty, the terms of the settlement bar TAA from any further violations of the Furnisher Rule.

(https://www.ftc.gov/news-events/press-releases/2015/09/texas-auto-dealer-will-pay-more-82000-settle-ftc-charges-it?utm_source=govdelivery).

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- On September 16th, a plaintiff filed a putative class action against Chipotle Mexican Grill, Inc. (Chipotle) alleging violations of the Fair Credit Reporting Act (FCRA) over its background check disclosure practices. According to the complaint, the plaintiff alleges that Chipotle improperly procured prospective employees' background checks after failing to adequately disclose the company's background check procedures. According to the plaintiff, Chipotle's background check disclosure was not a stand-alone document consisting solely of information on the company's background check procedures, a violation of the FCRA. Specifically, the plaintiff said that "[u]nder the FCRA, it is unlawful to procure or cause to be procured, a consumer report or investigative consumer report for employment purposes, unless the disclosure is made in a document that consists solely of the disclosure and the consumer has authorized in writing the procurement of the report." (*Mejia v. Chipotle Mexican Grill, Inc. et al.*, No. 5:15-cv-01911 (C.D. Cal., Sep. 16, 2015)).
- On September 15th, a federal district court approved a settlement between Whole Foods Market Group, Inc. (Whole Foods) and a class of employees in an action alleging the grocery chain violated the FCRA with its background check notification methods. The lead plaintiff filed the class action in December 2014 alleging that Whole Foods' background check disclosure forms violated the FCRA by not providing prospective employees with a clear and conspicuous stand-alone document explaining the company's background check procedures. Under the terms of the settlement, Whole Foods has agreed to pay a total of approximately \$803,000 to roughly 20,000 class members, granting each member about \$24 after other expenses. The class is comprised of both current and prospective employees who were subject to a consumer report procured by Whole Foods within five years of the filing of the class action. (*Colin Speer v. Whole Foods Market Group, Inc.*, No. 8:14-cv-03035 (M.D. Fla., Sep. 15, 2015)).
- On September 14th, a plaintiff filed a lawsuit against Experian for alleged violations of the Fair Credit Reporting Act (FCRA) and California's Credit Reporting Agencies Act by selling reports containing inaccurate information on the plaintiff. According to the complaint, the plaintiff alleges that Experian sold reports indicating that the plaintiff is "deceased," which has made it "practically impossible" for him to obtain credit. The complaint further alleges that Experian has refused to allow him to update his information and that the credit reporting agency does not take steps to verify that an individual is dead prior to identifying them as "deceased." Specifically, the complaint states that "[d]efendants have no independent procedure to change an erroneous deceased status on its own and will merely parrot their

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furnishing source in the case of a reinvestigation into the accuracy of the deceased status upon a consumer's report," explaining that "[e]ven in instances where the purportedly deceased consumer communicates directly with the defendants, defendants employ no procedures which assure that a consumer with a 'deceased' mark on his/her report is, in fact, deceased."

(*Perstin v. Experian Information Solutions Inc. et al*, No. 8:15-cv-01480 (C.D. Cal., Sep. 14, 2015).

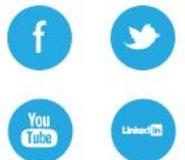
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