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Phony Job Applicants Targeting Employers Based On Technical Violations of Federal Background Check Law

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As many employers know, claims brought against employers under the Fair Credit Reporting Act ("FCRA") arising out of one aspect or another of employers' background investigation procedures have been the litigation *de jure* recently. In fact, in 2014 and 2015 alone, no less than two dozen nationwide class action lawsuits were filed against employers, generally asserting claims based on hyper-technical and picayune non-compliance with the FCRA's notice requirements. As has been widely reported, many of these lawsuits have resulted in multi-million dollar settlements.

There is a rather pernicious new development in this area. Opportunistic *faux* job applicants - who have no intention of taking employment with the targeted employers - are completing and submitting employment applications solely to position themselves as the named plaintiff in class action litigation and secure a windfall settlement or litigation recovery. The modus operandi of these opportunistic phony job seekers is to fill out an online job application (usually with companies that have nationwide operations), sign the background-check authorization associated with the employer's hiring protocol, and then, after receiving an offer/rejection letter from the targeted employer, send a demand letter stating that the employer's background check disclosure does not comply with the requirements imposed by the FCRA and demanding exorbitant sums of money to settle the dispute and avoid the filing of a class action lawsuit.

We will note that it appears that one individual has become familiar with the technical requirements pertaining to the notice and disclosures employers must give to job applicants prior to obtaining a background investigation report on them and is leveraging that knowledge for purposes of writing and sending



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targets such demand letters. The stakes can be quite high, as in certain cases the FCRA provides for statutory damages ranging from \$100 to \$1,000 per violation for non-compliance with the FCRA's notice and disclosure requirements - *even where the plaintiff job applicant/employee has suffered no actual injury or damages.*

These lawsuits and demand letters have principally invoked §1681b(b)(2)(A) of the FCRA as the basis for the threatened claims. This section requires that "a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless: (i) a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and (ii) the consumer has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person." Threatened claims under this provision generally assert that the employer's disclosure contains extraneous language (including, but not limited to, release of claim language) or additional disclosures or information regarding FCRA rights and thus is not made in a document that consists solely of the disclosure.

The key take away here is that there is a new breed of opportunistic individuals (and potential class action plaintiffs) who are trolling the internet in search of employment applications (and/or other hot spots in employers' hiring protocols) that arguably fail to comply with the FCRA's notice and disclosure requirements. In light of this spate of opportunistic demand letters and lawsuits by phony job seekers, the risk of costly litigation and/or "legal blackmail" demand letters must be taken seriously. Regardless of whether your attorney had a role in drafting your background check disclosure forms, prudence should compel you to re-examine your disclosure forms and ensure fastidious compliance with the FCRA's requirements.

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