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Employers Be Forewarned: The Forms You Use to Obtain Applicant Background Checks May Violate FCRA

For employers, a bad hiring decision can be a costly one. Background checks are increasingly popular as employers try to avoid hiring the wrong people.

While the Fair Credit Reporting Act (“FCRA”) authorizes employers to do background checks on prospective and current employees, it is important for employers to understand that the authorization is not unlimited. There are restrictions on conducting such checks. For example, an employer must provide written notice to the applicant or employee in a “clear and conspicuous disclosure” that a “consumer” report may be obtained for employment purposes. This notice must be “in a document that consists solely of the disclosure.”

Employers typically notify applicants about the background check with a notice that applicants must sign an authorization form to be considered for employment. The form sometimes includes a provision that releases the employer, the company conducting the background check, and those who provide information from any liability relating to the information obtained from a background check.

We are now seeing federal court decisions finding employers liable for violating the law because the form they used included a liability release. The employer’s inclusion of a release provision in the disclosure notice has been found to be objectively unreasonable. This has exposed employers to liability for up to \$1,000 in damages for each consumer, as well as punitive damages, attorneys’ fees and costs.

Given the increasing number of FCRA lawsuits over these documents, employers should take a closer look at their job application forms to be sure that they can survive a FCRA challenge. Look at what your authorization forms and disclosure notices say and make sure that they strictly comply with FCRA’s requirements.

Employers may want to use a separate release, such as a standalone document, although courts may view the notice and release as part of one document. There may not be a



significant risk of liability for the employer who does background checks and does not have a release signed, because there are opportunities for the applicant to challenge the information in the background check report and provide information to correct errors in the report. If a release is to be sought, it cannot be in the disclosure notice. Employers must weigh the risks and decide on which course of action they will take.

Questions or Assistance?

If you have any questions regarding this alert, please contact Daniel A. Schwartz at 860-251-5038 or dschwartz@goodwin.com, or Clarisse Thomas at 203-324-8164 or cthomas@goodwin.com.

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