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Briefly
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# THE FCRA: DECEPTIVELY DANGEROUS

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"Ignorance is not bliss given the technical complexity of the FCRA, the growth in state law … protections and the potential risk of individual or class action lawsuits."

Fair Credit Reporting Act (FCRA) claims present very real and potentially expensive sources of employer woe. By its terms, the FCRA applies to "consumers." However, in the employment setting, the FCRA frequently comes into play in the course of third-party "background checks" conducted prior to employment and in connection with promotion or reassignments. Background checks that include personal interviews about a person's character or reputation are considered "investigative consumer reports." Accordingly, the FCRA applies not just to credit reports on individuals, but also to criminal background results and information obtained from individual interviews or other sources.

FCRA compliance intersects with other hiring and retention legal concerns. Some, like traditional state and federal anti-discrimination laws like Title VII of the Civil Rights Act of 1964 or the Tennessee Human Rights Act, are familiar. Others, such as state and local "fair chance" or "ban the box" legislation, are emerging. Whether due to its hyper-technicality or to the fact that most disputes about its application are not based on "juicy" facts, many professionals do not know much about the duties the FCRA imposes on employers. A brief (and very incomplete) review is in order.

When obtaining background information reported by a third party (a "consumer reporting agency"), employer duties include prior stand-alone disclosure of intent to obtain a report and the receipt of the individual's signed authorization. If the employer might use the information it receives to take adverse action (e.g., not hiring someone or terminating existing employment), it must, prior to the action, provide the applicant both a copy of the report and a summary of their rights under the law. After a "reasonable time," if the adverse action is then taken, the employer must provide the individual notice of the action and specific information about the agency that provided the report itself. Employers utilizing investigative consumer reports have some specific additional obligations.

Employer obligations for workplace investigations (e.g., harassment or financial misconduct, to name a few) are different. Under the Fair and Accurate Credit Transactions Act (FACTA), which amends the FCRA, employers need not notify the employee of the investigation or obtain consent. If the third party provides information on which the employer actually takes adverse action, the employer must give the target a summary of the nature and substance of the report (not the sources or identities of individuals interviewed). In short, FCRA requirements are specific and technical whether they relate to routinely executed background checks or investigations of potential misconduct or compliance with laws and internal policies.

In that specificity and technicality lies the danger. By April Fool's day of 2019, more than 640 cases were filed. All indications are that 2019 filings will top the more than 4,000 case filings in 2018. While the federal district courts with most FCRA actions were concentrated in large cities in Illinois, New York, California, Florida and Georgia, over 150 different federal district court divisional offices handled FCRA cases last year.

The stakes are real. Pet store retail giant Petco reached a $1.2 million class action settlement in November of 2018 over its failure to conform to the FCRA's disclosure requirements and to provide prior adverse action notice. See *Feist v. Petco Animal Supplies, Inc.*, 2018 U.S. Dist. LEXIS 197186 (S.D. Cal. Nov. 16, 2018). In January of 2019 Wal-Mart lost its argument in federal district court against standing and class certification in a case alleging faulty disclosure and notice violations for a class of approximately 5,000,000 individuals (no, that is not a "typo"- up to 5,000,000 individuals may be entitled to recovery). Not surprisingly, Wal-Mart has appealed. See *Pitre v. Wal-Mart Stores, Inc.*, 2019 U.S. Dist.

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# RECENT LESSONS FROM OSHA ON WORKPLACE VIOLENCE

**J. Eric Harrison**

"The Commission concluded that [the general provisions of the employer's handbook] did not adequately prepare the employees to prevent and deal with workplace violence."

A recent decision issued March 4, 2019, from the OSHA Review Commission ("the Commission") in Washington, D.C., will allow OSHA Compliance Officers to more easily issue general duty clause citations stemming from violence in the workplace. The Commission is the intermediate level appellate tribunal for OSHA decisions which are appealed from initial administrative law judge decisions. Appeals taken from the Commission's decisions go to the United States Circuit Courts of Appeal. At issue in the case was whether Integra Health Management, Inc. ("Integra"), which employs "service coordinators" to help its clients obtain and maintain medical care, violated the general duty clause by failing to adequately address a workplace violence hazard — specifically, the risk of Integra's employees being physically assaulted by a client with a history of mental illness and/or violent behavior during a face-to-face meeting. In this case, a 25-year-old employee of Integra, who was a recent college graduate with no experience in social work or dealing with persons with mental illness, was stabbed to death by a mentally ill client (with a violent criminal history) during a face-to-face meeting in the client's home. OSHA issued fines and citations to the company for violation of the general duty clause, which were upheld by an administrative law judge and, subsequently, the Commission.

Section 5(a)(1) of the Occupational Safety and Health Act of 1970, known as the general duty clause, states that "[e]ach employer . . . shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a)(1). To prove a violation of the general duty clause, OSHA must establish that: (1) a condition or activity in the workplace presented a hazard; (2) the employer or its industry recognized the hazard; (3) the hazard was causing or likely to cause death or serious physical harm; and (4) a feasible and effective means existed to materially reduce the hazard. In the case of *Integra*, the Commission made the following findings:

1. The company violated the general duty clause requirement that employers must "furnish to each of his employees, employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." According to the Commission, the company failed to adequately address the risk of its employees from being physically assaulted. "The record established that company could have taken precautions preventing injury by hiring, training, performing, and assigning work appropriately, but chose not to in the interest of saving money and time."

2. In its Safety Narrative, Accident Investigation Summary & Findings, OSHA stated the company "did not have a cohesive and comprehensive written workplace violence prevention program to address hazards that included engineering and administrative controls, personal protective equipment and training programs," and there was no workplace violence program previous to the incident. The ruling pointed out that Integra's Employee Handbook that addressed workplace violence was a "very general statement" that "was not specific to social workers or service coordinators in the field per se." The Commission concluded that it did not adequately prepare the employees to prevent and deal with workplace violence.

Of note, the Assistant Secretary of Labor included in the complaint that Integra could have had a stand-alone, written Workplace Violence Prevention Program that addressed the scenarios unique to its field employees who were likely to encounter mentally ill or violent clients, but had failed to do so. The decision against the company included a $10,500 penalty and requirement to provide a workplace violence prevention program. An administrative law judge twice upheld the OSHA citations in 2015.

The key take-away here is that an employer's general workplace violence policy may not be sufficient to be in compliance with the general duty clause of OSHA. Each employer needs to determine if it needs to have a more detailed workplace violence policy tailored to the specific circumstances/situations its employees can be expected to encounter, including the need for training specifically directed at preparing employees to appropriately deal with those situations.

LEXIS 11590 (C.D. Cal. Jan. 17, 2019).

Other cautionary examples abound. In late February of 2019, a settlement of $2.3 million between Delta Air Lines and lead plaintiff Joseph L. Schoefield (in a class of more than 44,000 members) received preliminary court approval. See *Schoefield v. Delta Air Lines, Inc.*, N.D. Cal. Case No- 3:18-cv-00382-EMC. One enterprising pro se plaintiff, Corey Groshek, garnered several hundred thousand dollars in "private enforcement" of FCRA disputes (i.e., demand letters and suits) over the course of eighteen months and in 2017 used some of the proceeds to self-fund the publication of his debut novel marketed to middle schoolers.

In addition to failing to provide *prior* adverse action notice, one significant source of exposure is failure to follow the FCRA's "stand-alone" disclosure requirements. Section 1681(b)(2)(A)(i) of the Act states: "Except as provided in subparagraph (B), 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. . ." The only exception to the stand-alone disclosure requirement is that the authorization signature line can be included with the disclosure. The Federal Trade Commission blogged advice in 2017 regarding obtaining lawful authorizations and providing adequate notice. https://www.ftc.gov/news-events/blogs/business-blog/2017/04/background-checks-prospective-employees-keep-required. To reduce risks of a faulty disclosure and authorization claim, the FTC advises, "keep it simple." According to the FTC, keeping it simple includes:

- Do not include a release from liability for conducting, obtaining or using the report;
- Do not include a certification by the prospective employee that all information in his or her job application is accurate;
- Delete any requirement that the prospective employee acknowledges that your hiring decisions are based on legitimate nondiscriminatory reasons; and
- Scrub overly-broad authorizations that permit the release of information that the FCRA doesn't allow to be included in a background screening report, like bankruptcies that are more than 10 years old.

Not every technical violation of the law is a claimant's slam-dunk and employers have enjoyed some success at dispensing with claims based on "standing." Article III of the U.S. Constitution grants federal courts the jurisdiction to hear "cases" and "controversies." In order to come within that jurisdiction, plaintiffs need to demonstrate an injury traceable to the defendant that could likely be redressed by a favorable decision. Under a recent Supreme Court decision, *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), FCRA claimants must do more than allege a bare procedural violation, divorced from concrete harm, to satisfy the injury-in-fact requirement of Article III of the U.S. Constitution. In short, not every exclamation of, "A-ha! Your FCRA process is lacking!" results in a win for the disappointed applicant or employee.

The Spokeo Supreme Court decision did not bring an end to disputes about standing. On remand, the Ninth Circuit determined that an individual could meet the concreteness requirement where he alleged he was unemployed but actively seeking employment, could show that at least one third party had already requested a report on him, and that he suffered mental harm as a result of inaccurate, inflated reporting about his employment background, education and marital status (the Spokeo case did not involve a claim against Spokeo as an employer, but in its capacity as a "people search engine"). See *Robins v. Spokeo*, 867 F.3d 1108, 1117 (9th Cir. 2017).

Federal district courts outside of the Ninth Circuit, sometimes within the same circuit, have applied their own gloss to the Supreme Court's "injury-in-fact" requirement in the employment context. Sometimes employers prevail on the standing issue on one part of a claim and lose on another. For example, the U.S. Court of Appeals for the Seventh Circuit (covering Illinois, Indiana and Wisconsin) recently affirmed the dismissal of an applicant's claim that her disclosure and authorization form contained extraneous information in violation of the FCRA, but at the same time held she could pursue claims that she was not given a copy of her consumer report before the employer took adverse action against her. See *Robertson v. Allied Sols, LLC*, 902 F.3d 690 (7th Cir. 2018).

The United States District of New Jersey recently rejected a claim similar to the one raised in the Pitre v. Wal-Mart, Inc., case above. See *Baccay v. Heartland Payment Sys., LLC*, 2019 WL 337585 (D. N.J. Jan. 28, 2019). Josephine Baccay worked for less than two months before "voluntarily resign[ing]" and bringing a putative class action suit against her former employer. She admitted she knew her employer would run a background check but nonetheless went forward with the online application. According to the *Baccay* court, the receipt of a disclosure notice with extraneous information did not meet the concrete injury

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requirement. In actuality, the disclosure form itself was "clean" but Baccay argued that because the authorization line was part of the application, the application form should be considered in conjunction with the disclosure form. Even taking that generous approach, the court had no difficulty dispensing with her claim. Baccay admitted that the supposedly faulty notice did not confuse her, distract her or deprive her of any of the information that she had a right to under the FCRA. Note that the court did not hold that all employers are automatically "off the hook" for getting their FCRA disclosure, authorization or notice obligations wrong, simply that this individual could not show the required injury.

One day after the *Baccay* decision, the full Ninth Circuit Court of Appeals refused to consider an entire "employment packet" in connection with a FCRA disclosure but ruled that any extraneous information in the FCRA disclosure form itself, even information related to state-mandated expansions of consumer rights, is unlawful. See *Gilberg v. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019). Desiree Gilberg worked for five months before voluntarily resigning and filing her class action lawsuit. The disclosure form she filled out included FCRA information, California "mini-FCRA" information, and similar state law disclosures for several other different jurisdictions. The Ninth Circuit agreed with the employer's contention that its notice was "conspicuous" but concluded it was anything but "clear."

Ignorance is not bliss given the technical complexity of the FCRA, the growth in state law consumer protections and the potential risk of individual or class action lawsuits. Consider a comprehensive, privileged audit by legal counsel of existing background check policies and procedures to maximize the benefits of the information consumer reports provide about potential and existing employees while minimizing the risks of time consuming and potentially expensive litigation. At a minimum, review any in-house forms and those utilized by any third-party vendor your organization uses. A final practical reminder: make sure to use the updated Consumer Summary of Rights form. Effective September 21, 2018, the new form incorporates changes required by recent legislation that amended the FCRA to require notice of the availability of "national security freezes" to those protected by the law.