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BACKGROUND CHECKS AND THE FAIR CREDIT REPORTING ACT – DO YOU KNOW THE LAW?

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Does your company conduct pre-employment background checks? Does your company conduct periodic background checks after an employee is hired?

Employers that conduct background checks should be sensitive to recent developments involving the Fair Credit Reporting Act (“FCRA”). For those who do not know, the FCRA is the federal law that requires employers to both obtain consent from job candidates or employees before conducting a background check performed by a credit reporting agency and provide the required notice of rights. The FCRA consent form and notice of rights are always required for credit checks, but not always for criminal background checks. The FCRA consent form and notice of rights are required for criminal background checks provided by a credit reporting agency. Put simply, a credit reporting agency is an entity that provides background checks to third parties for a fee.

Credit reporting agencies include the major three reporting agencies: Experian, Equifax and TransUnion, but do not include law enforcement agencies or clerks of court. As such, if a criminal background check is requested, for example from the Florida Department of Law Enforcement, a prospective employee would not have to sign the FCRA compliant consent form and be given the FCRA notice of rights. However, all background checks (including criminal) provided by a credit reporting agency require both the stand-alone FCRA compliant consent form signed by the affected person and the FCRA notice of rights.

A common—but not FCRA compliant—practice is to include the consent to background checks within the four corners of an employment application in a paragraph that includes other representations by the applicant. For example, “I attest that all of the information that I have provided on this application is true and accurate. I understand that my candidacy or any subsequent employment may be terminated if any of the information I have provided proves to be false. I also consent to background checks, including credit and criminal.” Burying the background check consent language in the employment application does not comply with the FCRA. To comply with the FCRA, the employer must provide a separate

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consent form and the notice of rights. Failure to comply with the FCRA leaves an employer exposed to potential litigation, liability for statutory damages and attorney fees. FCRA lawsuits are on the rise because FCRA rights are being violated and the FCRA provides for recovery of attorney fees. Further, several large companies, including Michaels, Whole Foods and Publix have catapulted the issue into the limelight.

Employers of all sizes are well served to review their policies and practices relating to background checks for the purposes of determining compliance with the FCRA. Unlike some laws that only apply to employers of a certain size, the FCRA applies to all employers that procure background check reports from credit reporting agencies.

The FCRA requires notice of FCRA rights and a separate FCRA compliant consent form. Failure to provide both is a violation of the FCRA and that is all that a plaintiff's attorney needs to prove.

If an applicant is not hired because of adverse information contained in a background check, the FCRA requires that the candidate be told the reason and the name of the credit reporting agency. Failure to provide such information constitutes a violation of the FCRA as well.

Don't become the next employer to be sued for failure to comply with the FCRA. Questions regarding FCRA compliance should be referred to competent legal counsel. Note also that information is available at www.ftc.gov on the FCRA.

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