

Be careful when outsourcing your background checks

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The potential pitfalls of using a consumer reporting agency and maintaining compliance with the federal Fair Credit Reporting Act (FCRA) were highlighted in a recent decision by the federal district court in Richmond, Virginia. In the case, job applicants filed a class action lawsuit against Wells Fargo Bank and the First Advantage Background Services, a consumer reporting agency the bank retained to perform background checks.

Facts

According to the class action suit, the language of the disclosure authorization form used by First Advantage failed to comply with the FCRA's disclosure requirements. Among other things, the applicants argued the form, which contained a release of FCRA rights, was effectively hidden in Wells Fargo's lengthy job application form. As a result, the applicants said First Advantage had no legal right to run a background check or provide a background report to the bank.

Court's decision

Central to the federal court's assessment of the applicants' claims was whether they could establish an actual injury as required by the U.S. Supreme Court's 2016 decision in *Spokeo v. Robins*. In that case, the Supreme Court said anyone pursuing an FCRA claim must show "an invasion of a 'legally protected interest' that is 'concrete and particularized' and 'actual or imminent,' not conjectural or hypothetical."

In this case, the federal court concluded the applicants had failed the *Spokeo* test. It reasoned

they "knowingly and actively consented to the dissemination of their information to Wells Fargo" when, as part of the application process, they went to a website controlled by First Advantage and entered their private information for the explicit purpose of having a background check run. According to the court, "because [they] consented to this disclosure, they have not alleged a sufficient FCRA violation." *Frazier v. First Advantage Background Servs. Corp.*, Civil Action No. 3:17cv30.

Steps to compliance

Although Wells Fargo was successful in fending off the class action lawsuit, the case represents a cautionary tale for all employers that conduct background checks. Had the applicants not "actively and independently" used First Advantage's website to provide their information, the outcome could have been much different. Accordingly, to avoid being the target of an FCRA lawsuit, it's important to fully vet the company you use to conduct background checks and to thoroughly understand the processes used for satisfying the FCRA requirements. Questions you should ask include:

- What warnings are given to applicants during the background check process?
- Is there a separate website where applicants enter their information, or is another process used?
- Are the disclosure forms for applicants fully vetted, and are they in compliance with the disclosure requirements of the FCRA?
- Is your company using a standalone disclosure authorization form that has been properly vetted? (Using a standalone form is preferable to one that is combined with other

information and will reduce the possibility of an FCRA violation.)

Bottom line

Background checks are an increasingly useful hiring tool, but there remain pitfalls with FCRA compliance. Having a formal policy on the use of background checks and the methods for instituting them can help ensure you don't run afoul of the law. When in doubt, you should have experienced employment counsel review your policies and procedures to ensure FCRA compliance. When dealing with the FCRA, an ounce of prevention is worth even more than a pound of cure.

Editor's note: For additional information on the requirements of the FCRA and the Supreme Court's *Spokeo* decision, please see the following two articles in *Virginia Employment Law Letter*: "Know the rules before conducting background checks," Vol. 28, Issue 1, February 2016, and "U.S. Supreme Court clarifies FCRA liability," Vol. 28, Issue 5, June 2016.

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