by Lucas J. Asper

Hoteliers beware: FCRA class action lawsuits on the rise!

This past calendar year has produced an alarming trend in employment litigation to which employers should pay particular attention – a boom in the number of class action lawsuits filed under the Fair Credit Reporting Act (FCRA) based on allegations of improperly conducted applicant/employee background checks. These lawsuits have resulted in several multi-million dollar settlements, not to mention the dramatic legal fees and costs associated with defending any class action. Thus, all employers, including hoteliers, should develop a familiarity with FCRA requirements and implement FCRA-compliant background screening policies and procedures in order to prevent costly litigation and provide a defense in the event of litigation.

Background

Many hotels utilize some form of background and credit checks as part of their screening and hiring process, especially when hiring employees for accounting positions and jobs that may require them to handle cash. This process can be as simple as in-house Internet searches or applicant questionnaires, but about half of American employers use more in-depth information from a third-party Credit or Consumer Reporting Agency ("CRA"). CRAs such as Equifax, TransUnion, and Experian can create comprehensive consumer reports about everything from creditworthiness to criminal records.

When an employer utilizes a CRA to obtain information about an employee or applicant, the employer must ensure compliance with the FCRA (or run the risk of statutory penalties for each violation). In order to comply with the FCRA, an employer must (1) properly disclose its intent to procure the consumer report; (2) obtain express authorization from the applicant/employee to procure the consumer report; (3) provide the applicant/employee with a pre-adverse action notice if the employer plans to take an adverse action based in whole or in part on information contained in the consumer report; and (4) provide the applicant/employee with an adverse action notice after taking the adverse action on these grounds. Each of these four requirements contains sub-requirements, thereby creating the need for employers to generate and implement detailed policies and procedures for their background screening processes to ensure compliance with the FCRA.

If a court determines that an employer has negligently violated the FCRA, the employer is subject to damages equaling: (1) any actual damages the applicant/employee sustains as a result of the violation; and (2) the costs of the action together with reasonable attorneys' fees (if the applicant/employee prevails in litigation to enforce his or her FCRA rights). The finding of a willful violation subjects an employer to damages equaling: (1) any actual damages the applicant/employee sustains as a result of the violation OR statutory damages between $100 and $1000 (in which case the applicant/employee is not required to prove actual damages); (2) punitive damages; and (3) the costs of the action together with reasonable attorneys' fees (if the applicant/employee prevails in litigation to enforce his or her FCRA rights).

In 2007, the United States Supreme Court defined "willfulness" under the FCRA in accordance with traditional common law principles, thereby subjecting both "knowing" and "reckless" violations of the FCRA to the more severe penalty provisions. *See Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 57–58 (2007). In order to constitute "recklessness," the Court noted that the conduct in

question must violate "an objective standard: action entailing 'an unjustifiably high risk of harm that is either known or so obvious that it should be known.'" Accordingly, the Court held that an employer willfully violates the FCRA when it violates the Act in a manner that runs the "risk of violating the law substantially greater than the risk associated with a reading that [is] merely careless." The Court made clear that an employer's subjective knowledge that its conduct violated the FCRA is insignificant in determining whether the conduct is willful – that determination is based solely on an objective assessment.

FCRA class actions

Calendar year 2011 has seen a number of class actions claiming that employers have violated the FCRA in their background screening procedures. While one can only guess as to the subjective decisions that led to the filing of these actions, the driving force behind these claims appears obvious – money. The FCRA's statutory scheme and the nature of the facts underlying these claims may be suitable for class action litigation, and plaintiffs' attorneys are clearly honing in on this fact.

First, the FCRA contains a clear-cut remedy available to all individuals who can prove they have suffered from a willful violation of the Act. Second, there are likely a large number of potential class members in the event of a violation by any decent-sized employer – the FCRA's statute of limitations is two years, and an employer that performs background checks subject to the FCRA likely utilizes the same process for each applicant/employee it screens. Third, the FCRA allows a prevailing applicant/employee (or class thereof) to collect court costs and reasonable attorneys' fees. Fourth, and perhaps most significant, the FCRA contains no cap on total liability to which an employer can be subjected in the event of multiple violations. Thus, while single-plaintiff actions are not cost-effective for the individual or the attorney, a class action can be extremely fruitful for both – the individual's exposure in the event of an unsuccessful claim is essentially non-existent, and the attorney's ability to recover is amplified tremendously. Additionally, the potential exposure for the employer is often so great that the employer simply negotiates an out-of-court settlement to avoid costly legal fees and the chance that the plaintiffs will recover a dramatic verdict at the conclusion of trial.

A review of several recent FCRA class actions demonstrates the need for employers to remedy any FCRA compliance issues they may have sooner rather than later. In March 2011, an industry leading transport operator settled two FCRA class actions for the collective sum of $5.9 million in the face of allegations that its subsidiaries had conducted unlawful criminal background checks on prospective employees. In April 2011, a $2.6 million settlement resulted from a class action against a freight service and distribution provider in which the plaintiffs alleged that the employer did not provide FCRA-compliant disclosures, did not obtain FCRA-compliant authorizations, and did not provide pre-adverse action notices. Also in April 2011, a class action was filed against a global security company based solely on the company's failure to provide proper pre-adverse action notices. Finally, a class action against a national retail corporation was filed in October 2011 alleging that the employer utilized electronic disclosure and authorization forms and thereby failed to provide applicants with "written" copies of these forms in accordance with the Act's requirements.

Conclusion

The recent uptick in FCRA class actions suggests that this is an issue that will not simply fade away in the near future. Plaintiffs' attorneys have identified a money-maker in these claims, and it is now incumbent on employers to take necessary preventative steps to stop such claims before they come knocking on the employers' doors. While the possible exposure associated with an FCRA class action is tremendous, employers can easily prevent (or, at the very least, create winning defenses against) FCRA claims through the implementation and utilization of FCRA-compliant background screening procedures.

If your hotel or lodging management company utilizes background checks on applicants, we suggest that you consult with an experienced labor and employment attorney who has knowledge of FCRA requirements and strategies in complying therewith. Additionally, Ford & Harrison attorneys have developed a Fair Credit Reporting Act Kit, which includes an overview of the FCRA as well as the necessary forms and checklists. ✧

Court Action Prompts "Employee Rights" Posting Date Postponement until April 30, 2012

As presented in the September/October '11 issue of *The Rooms Chronicle*®, the National Labor Relations Board (NLRB) has mandated that American employers must post a new Employees' Rights poster in the workplace outlining employees' right to unionize. A federal court, which is hearing a challenge to the National Labor Relations Board's mandate, requested that the NLRB postpone the effective date of that rule until April 30, 2012. The NLRB complied.

The NLRB first sought to impose the rule on November 14, 2011. After the American Hotel & Lodging Association and others filed lawsuits challenging the rule, the NLRB initially postponed the requirement to January 31, 2012. AH&LA hopes to block the rule before its new effective date in April, and is working with the Coalition for a Democratic Workplace to make this happen.

Source: AH&LA

(Lucas Asper is an attorney at Ford & Harrison LLP, one of the nation's largest labor and employment law firms with approximately 200 lawyers working in 18 offices throughout the country. Ford & Harrison represents hoteliers and other hospitality employers in labor, employment, immigration and employee benefits matters. Based in Spartanburg, SC, Lucas services clients in a wide array of industries, including healthcare, hospitality, manufacturing, retail, education, banking, service, and not-for-profit organizations. In addition, Lucas counsels employers on a variety of issues, including terminations, reductions in force, and the drafting of employment agreements, separation agreements, and general employment policies and procedures. Questions or comments regarding the issues addressed in this article may be emailed to Lucas at lasper@fordharrison.com. For information regarding purchasing the Fair Credit Reporting Act Kit, please contact Nicole Montgomery at nmontgomery@fordharrison.com. Website: www.fordharrison.com)