THE LITTLER REPORT

Fair Credit Reporting Act Amendment Offers Important Protections From Lawsuits Targeting Background Check Programs

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IMPORTANT NOTICE

This publication is not a do-it-yourself guide to resolving employment disputes or handling employment litigation. Nonetheless, employers involved in ongoing disputes and litigation will find the information extremely useful in understanding the issues raised and their legal context. The Littler Report is not a substitute for experienced legal counsel and does not provide legal advice or attempt to address the numerous factual issues that inevitably arise in any employment-related dispute.

Table of Contents

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Rod Fliegel, Co-Chair of Littler Mendelson's Hiring and Background Checks Practice Group, has been practicing exclusively in the area of labor and employment law since he graduated from law school in 1993. Rod joined Littler's San Francisco office in 1997 and was elevated to shareholder in 2001.

Rod has broad subject matter experience and significant expertise in class action defense, the intersection of the federal and state background check laws (*e.g.*, Title VII and the Fair Credit Reporting Act and their state law equivalents), and the intersection of the federal and state disability discrimination and family medical leave laws (*e.g.*, the ADA, FMLA and California Fair Employment & Housing Act).

Rod also has extensive experience defending employers in state, federal and administrative litigation, including matters with the Equal Employment Opportunity Commission, the Federal Trade Commission, and the New York Office of the Attorney General. As the national coordinating counsel for a large nationwide retailer and a large nationwide background check company, Rod handles and oversees civil and administrative matters throughout the country.

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Jennifer Mora focuses her practice on representing and advising employers on a wide range of labor and employment issues, and has been doing so since graduating from law school in 2001. In particular, Jennifer has developed a special expertise in and advises employers and consumer reporting agencies on the intersection of federal and state background check laws (*e.g.*, Title VII and the Fair Credit Reporting Act and their state law equivalents). Jennifer also defends employers and consumer reporting agencies in federal and state courts against claims brought under the Fair Credit Reporting Act and its state law equivalents.

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Criminal background checks obtained for employment purposes are under attack from various sources—the plaintiffs' bar via class and individual lawsuits lodged against employers and consumer reporting agencies,[1] the U.S. Equal Employment Opportunity Commission,[2] regulatory agencies,[3] and the legislatures of states and municipalities.[4] On the other hand, even the U.S. Supreme Court has reaffirmed the potential value that background checks have for employers, noting that, "[r]easonable investigations of applicants and employees aid the Government in ensuring the security of its facilities and in employing a competent, reliable workforce."[5] Likewise, governments continue to pass laws *requiring* specified employers, such as those in the healthcare, financial, security, and child care industries, to conduct criminal background checks, with the explicit or implicit rationale of protecting the public from risks associated with employing certain ex-offenders.

The contrast between employers' continuing legitimate interests in conducting thorough criminal background checks and the concurrent elevated risks of non-compliance with a varying and increased patchwork of legal requirements means that employers must use every tool available to demonstrate that their background check practices are lawful when challenged. One such tool that has been underutilized to date is the subject of this Littler Report—a portion of the federal Fair Credit Reporting Act (FCRA)[6] which was amended by the Fair and Accurate Credit Transactions Act of 2003 (FACTA).

The FACTA provides that certain reports on employees related to employer "investigations" are exempt from most of the usual requirements that FCRA imposes on employers that obtain and use those reports from third-party consumer reporting agencies (CRAs) for employment purposes (which are further summarized herein). As such, depending on the circumstances, an employer who is subjected to individual or class action lawsuits based on an alleged failure to comply with the FCRA may have a complete defense available under the FACTA. There are still many open questions about the applicability of the FACTA, but employers should remain aware of, and be certain to evaluate, this potential defense in any FCRA lawsuit lodged against them.

SUMMARY OF FCRA OBLIGATIONS ON EMPLOYERS THAT USE CONSUMER REPORTS FOR EMPLOYMENT PURPOSES

A brief background of the FCRA's general requirements of employers is necessary to understand the potential import of the FACTA. More than 40 years ago, Congress enacted the FCRA. Despite the use of the term "credit" in its name, the FCRA does far more than regulate the exchange of consumer credit information between the nationwide credit bureaus (*e.g.,* Experian, Equifax and Transunion) and creditors in connection with mortgage lending and other consumer credit transactions (*e.g.,* credit reports). Instead, the FCRA also regulates the exchange of consumer information between employers that use, and CRAs that provide, screening reports with other types of information, including criminal records. Generally speaking, employers must comply with the FCRA when they order virtually any type of report from a CRA, including reports derived from public record sources (*e.g.,* criminal and motor vehicle records checks).

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1 *See generally* Rod M. Fliegel and Jennifer Mora, *The FTC Staff Report on "40 Years of Experience with the Fair Credit Reporting Act" Illuminates Areas of Potential Class Action Exposure for Employers*, Littler Report (Dec. 12, 2011), *available at* http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin. (hereafter "The FTC Staff Report").

2 *See generally* Rod M. Fliegel, Barry Hartstein, and Jennifer L. Mora, *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, Littler ASAP (June 12, 2013), *available at* http://www.littler.com/publication-press/publication/two-new-eeoc-criminal-record-lawsuits-underscore-important-strategic-a; Barry Hartstein, Rod Fliegel, Jennifer Mora and Marcy McGovern, *Criminal Background Checks: Evolution of the EEOC's Updated Guidance and Implications for the Employer Community*, Littler Report (May 17, 2012), *available at* http://www.littler.com/publication-press/publication/criminal-background-checks-evolution-eeocs-updated-guidance-and-implic; Rod M. Fliegel and Barry A. Hartstein, *The EEOC's Priorities Still Include Regulating the Use of Criminal Records by Employers*, Littler ASAP (July 27, 2011), *available at* http://www.littler.com/publication-press/publication/eeocs-priorities-still-include-regulating-use-criminal-records-employe ; Rod M. Fliegel, Allan King and Frederick J. Barrow, *Conviction Records and Disparate Impact, Journal of Labor & Employment Law*, ABA, Vol. 26, Number 3.

3 *See* The FTC Staff Report, *supra*, n. 1, http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin.

4 *See, e.g.*, Rod M. Fliegel and Jennifer Mora, *Rhode Island Enacts "Ban the Box" Law Prohibiting Employment Application Criminal History Inquiries Until the First Job Interview*, Littler ASAP (July 17, 2013), *available at* http://www.littler.com/publication-press/publication/rhode-island-enacts-ban-box-law-prohibiting-employment-application-cri; Rod M. Fliegel, Pam Salgado, Dan Thieme and Jennifer Mora, *Seattle Adopts Ordinance Limiting Inquiries Into and Use of Criminal Records for Employment Purposes*, Littler ASAP (June 20, 2013), *available at* http://www.littler.com/publication-press/publication/seattle-adopts-ordinance-limiting-inquiries-and-use-criminal-records-e.

5 *NASA v. Nelson*, 131 S. Ct. 746, 758 (2011); *see also* Rod M. Fliegel and William Simmons, *U.S. Supreme Court Holds that Constitutional Privacy Rights Do Not Restrict the Government's Discretion to Background Check Federal Contractors*, Littler ASAP (Jan. 24, 2011), *available at* http://www.littler.com/publication-press/publication/us-supreme-court-holds-constitutional-privacy-rights-do-not-restrict-g.

6 15 U.S.C. § 1681 *et seq.*

Thus, the FCRA has long imposed requirements on employers who use "consumer reports" or "investigative consumer reports" for employment purposes.[7] A consumer report is generally known as a "credit report" or a "background check report" prepared by a CRA whereas an investigative consumer report is a special type of consumer report whereby the CRA obtains information through personal interviews (*e.g.*, an in-depth reference check).[8]

Broadly speaking, the FCRA's requirements on employers may be divided into two categories: (1) requirements that employers must follow before they obtain a consumer report from a CRA, and (2) requirements that employers must follow if they take "adverse action" against an individual based in whole or in part on information contained in the consumer report.

Before an employer may obtain a consumer report from a CRA, typically it must make a clear and conspicuous written disclosure to the consumer, in a document that consists "solely" of the disclosure, that a consumer report may be obtained.[9] The applicant or employee must provide written permission for the employer to obtain a consumer report for employment purposes.[10] A properly worded disclosure and authorization from an applicant will allow an employer to obtain a consumer report during employment without the need obtain a new authorization after the individual is hired.[11] The employer also must make a certification to the CRA regarding its permissible purpose for the report, and its compliance with relevant FCRA provisions and state and federal equal opportunity law.[12] If the employer intends to obtain an "investigative consumer report" on an applicant or employee, however, additional disclosures to the individual are necessary, the employer must allow the employee to request information about the "nature and scope" of the investigation, and the employer must respond in writing to any such request within five days from either the date of the request or when the report was obtained, whichever is later.[13]

After the employer obtains the consumer report or investigative consumer report on an employee or applicant for employment, the employer must follow certain requirements if it intends to take "adverse action" against the applicant or employee based in whole or in part on the contents of the report. In the context of a consumer report used for employment purposes, an adverse action broadly includes "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee."[14]

First, *before* the employer implements the adverse action against the applicant or employee, the employer must provide a "pre-adverse action" notice to the individual, which must include a copy of the consumer report and the Consumer Financial Protection Bureau's[15] (CFPB) Summary of Rights.[16]

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7 For more detailed coverage of the FCRA's requirements on employers, see The FTC Staff Report, *supra* note 1, http://www.littler.com/publication-press/publication/ftc-staff-report-40-years-experience-fair-credit-reporting-act-illumin. This Report will include a general summary of those requirements as necessary background.

8 15 U.S.C. §§ 1681a(d) and (e).

9 15 U.S.C. § 1681b(b). *But see* 15 U.S.C. § 1681a(y) (related rules for misconduct investigations). For employers regulated by the federal Department of Transportation (DOT), and where the applicant applies for employment by mail, telephone, computer or other similar means, the employer may provide the disclosure, along with a summary of rights under the FCRA, to the applicant or employee orally, in writing or by electronic means. 15 U.S.C. § 1681b(b)(2)(B)(i).

10 15 U.S.C. §§ 1681b(a)(3)(B) and 1681b(b). For DOT-regulated motor carriers, and where the applicant applies for employment by mail, telephone, computer or other similar means, consent may be oral, written or electronic. 15 U.S.C. § 1681b(b)(2)(B)(ii). In addition, the Electronic Signatures in Global and National Commerce Act (ESIGN), 15 U.S.C. § 7001, generally gives legal force to electronic signatures, contracts, and other records. The FTC issued an opinion letter in 2001 indicating that it believed that a "consumer's consent is not invalid merely because it is communicated in electronic form," under the FCRA as a result of ESIGN. *See* FTC Opinion Letter May 24, 2001 (Brinckerhoff). Nevertheless, employers should consult with their counsel before making any changes to their FCRA procedures, including any contemplated transition to electronic records.

11 *See*, e.g., FTC Opinion Letter Aug. 5, 1998 (Haynes) ("We believe, therefore, that a one-time disclosure may be made and permission obtained from applicants and current employees for the employer to obtain consumer reports at any time during the application process or during an employee's tenure.").

12 15 U.S.C. § 1681b.

13 15 U.S.C. § 168ld.

14 15 U.S.C. § 1681a(k)(l)(B)(ii).

15 The Federal Trade Commission (FTC) previously had regulatory responsibility for the FCRA but that responsibility has now been transferred to the CFPB.

16 15 U.S.C. § 1681b(b). If an individual contacts the employer in response to the pre-adverse action notice to say there was a mistake (inaccuracy or incompleteness) in the consumer report, the employer may exercise its discretion whether or not to move forward with the hiring decision or engagement; the FCRA does not dictate a course of action. However, by law, the CRA must within 30 days promptly investigate any dispute about the accuracy or completeness of the report from the individual. 15 U.S.C. § 1681i. If the CRA updates the consumer report, both the individual and the employer will receive notice.

Once the employer is prepared to take the adverse action against the applicant or employee, it must then provide an adverse action notice to the individual.[17] The adverse action notice, which can be made in writing, orally or by electronic means, must contain the following information:

1. The name, address and telephone number of the CRA that provided the report to the employer;
2. A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made;
3. A statement setting forth the applicant's or employee's right to obtain a free disclosure of his or her report from the CRA if the applicant or employee makes a request for such a disclosure within 60 days; and
4. A statement setting forth the applicant's or employee's right to dispute directly with the CRA the accuracy or completeness of any information contained in the report that the CRA provided to the employer.[18]

POTENTIAL LIABILITY FOR FCRA NON-COMPLIANCE AND THE GROWING WAVE OF FCRA CLASS ACTIONS

The FCRA allows an applicant or an employee to pursue a private right of action against an employer for "negligently" or "willfully" failing to comply with any of the FCRA's requirements with respect to that individual.[19] The statute of limitations for violations of the FCRA requires that an action must be brought by the earlier of: (1) two years after the date of discovery by the plaintiff of the violation; or (2) five years after the date on which the violation that is the basis of the alleged liability occurred.[20]

The range of available damages varies for negligent and willful violations. An employer that negligently fails to comply with any requirement of the FCRA with respect to an applicant or employee is liable for: (1) actual damages sustained by that individual; and (2) reasonable attorneys' fees and costs.[21] An employer that is found to have willfully failed to comply with the FCRA is liable for: (1) actual damages or statutory damages ranging between $100 and $1000; (2) punitive damages; and (3) attorneys' fees and costs.[22] The U.S. Supreme Court has held that to prove a "willful" violation of the FCRA, a plaintiff must demonstrate that the company either "knowingly" or "recklessly" acted in violation of the FCRA. The Court noted also that "a company subject to FCRA does not act in reckless disregard of it unless the action is not only a violation under a reasonable reading of the statute's terms, but shows that the company ran a risk of violating the law substantially greater than the risk associated with a reading that was merely careless."[23] Thus, the Supreme Court and other courts have held that where the defendant acted consistent with a "reasonable interpretation" of the FCRA, for instance where the FCRA's statutory language is ambiguous, where there is a dearth of authority interpreting a particular FCRA requirement, or where there is some authority supporting the defendant's view of the FCRA, a plaintiff cannot prove a "willful" violation of the FCRA—even if the court ultimately disagrees with the defendant's interpretation.[24]

While the liability related to individual lawsuits or compliance actions is certainly sufficient to deter non-compliance, another growing risk to employers is class action suits alleging that employers have willfully failed to comply with some of the FCRA's requirements as to all applicants or employees, such as by failing to obtain proper authorizations from or provide a copy of the background reports to applicants or employees before adverse action is taken. The first high profile FCRA case against an employer involved a settlement of over $5 million with a transit provider. Recently, however, several other multi-million dollar settlements were reached based on alleged employer violations of the FCRA:

- a national retailer reached a $3 million settlement;
- a national pizza delivery chain reached a $2.5 million settlement; and
- a trucking company reached a $2.75 million settlement.

17 15 U.S.C. § 1681m(a).

18 *Id*. DOT-regulated motor carriers are not required to provide a "pre-adverse action" notice to applicants or employees if the applicant applied for employment by mail, telephone, computer or other similar means. 15 U.S.C. § 1681b(b)(3)(B). Rather, motor carriers must provide to the individual, within three days of taking adverse action, an oral, written or electronic notification that adverse action has been taken, which must include the same disclosures required in "adverse action" notices for non-trucking employers. *Id*.

19 15 U.S.C. §§ 1681n and 1681o.

20 15 U.S.C. § 168lp.

21 15 U.S.C. § 168lo.

22 15 U.S.C. § 168ln.

23 *Safeco Ins. Co. of Am. v. Burr*, 551 U.S. 47, 52, 69 (2007).

24 *See id.; Fuges v. Southwest Fin. Servs., Ltd.*, 707 F.3d 241, 249 (3d Cir. 2012).

Smaller employers should not take comfort in the large publicized settlements against national companies—class actions against employers, regardless of size, are brought with increasing frequency across the country with less attendant publicity. Indeed, as more publicized settlements occur, the potential risk grows for "copycat" suits brought by employment plaintiffs' counsel not previously familiar with the FCRA or considered class action specialists.

In any event, FCRA class actions typically allege that the employer has not just failed to comply with a technical requirement of FCRA, but that the employer has also done so "willfully" because, as a procedural matter, proving actual damages with regard to all class members (as is required for a negligence theory of liability) creates individualized issues that tend to defeat the ability to certify a class. Thus, the FACTA provisions discussed herein may have particular importance in FCRA class actions alleging "willful" violations, because: (1) the plain language of the FACTA exempts certain reports from the requirements of FCRA that frequently form the basis of class action lawsuits; (2) there is already authority applying the FACTA and construing it broadly supporting an employer's "reasonable interpretation" that the FCRA does not apply to some of the reports that frequently form the basis of class action lawsuits; and (3) to the extent that a court might hold the application of the FACTA is dependent on the circumstances surrounding each report obtained and used by the employer, there would be individualized issues that may preclude class certification.

FACTA'S PLAIN LANGUAGE EXEMPTS REPORTS RELATED TO CERTAIN EMPLOYER INVESTIGATIONS FROM MOST FCRA REQUIREMENTS

In 2003, President George Bush signed the FACTA,[25] which was enacted, in part, to allow employers to conduct workplace misconduct investigations by third parties, such as investigators, without being subject to the FCRA's onerous provisions. The FACTA amended the FCRA in response to, among other things, a controversial opinion letter from the Federal Trade Commission (FTC) which reached the novel conclusion that the FCRA regulates workplace misconduct investigations conducted by third parties, such as private investigators (*Vail* opinion letter).

The FACTA nullified the *Vail* letter by excluding misconduct investigations from the FCRA's more onerous provisions, including the need for the accused's advance consent to investigate. Although the FACTA addressed the concerns employers had about the *Vail* letter, the amendments to the FCRA actually went far beyond those concerns. Specifically, the FACTA's amendments to the FCRA excluded from the definition of consumer reports not only misconduct investigation reports, but also any reports used for "investigation" into "compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer," provided that the reports were not ordered for the purpose of investigating the employee's credit worthiness, credit standing, or credit capacity. As a result, for reports covered by the FACTA exemption, employers do not have to (1) notify the individual of the investigation, (2) seek consent from the individual, (3) provide the individual with a copy of the report, or (4) wait a "reasonable" amount of time between giving the individual a copy of the report and taking adverse action.

If adverse action is taken against the individual based at least in part upon a report that would otherwise be a consumer or investigative consumer report, the individual is entitled only to a summary of the "nature and substance" of the report. The FACTA does not prescribe the amount of information that must be disclosed, but permits exclusion of "the sources of the information acquired solely for use in preparing [the report]," (*e.g.*, the names of any witnesses).

The FACTA does not define several of its key terms. For instance, it does not define what constitutes an employer "investigation" prerequisite to the exemptions. Of course, plain language (dictionary) definitions of the word encompass a broad range of activity, from the "making of a search or inquiry" to a "systematic examination."[26] The FACTA also does not limit which preexisting written employment policies may be used as a basis for such an "investigation," thereby affording any resulting report an exemption from the relevant FCRA requirements.[27] Further, while the amendment requires disclosure of the nature and substance of the resulting report,

25 The relevant provisions are currently codified at 15 U.S.C. § 1681a(d)(2)(D) and § 1681a(y) (formerly 1681a(x)).

26 *See* "investigation, n." *Oxford English Dictionary (OED) Online* (March 2013), Oxford University Press. 15 May 2013 <http://www.oed.com/view/Entry/99038?redirectedFrom=investigation&>.

27 The FTC's non-binding publication, *40 Years of Experience With The Fair Credit Reporting Act, available at* http://www.ftc.gov/os/2011/07/110720fcrareport.pdf, states: "The term 'pre-existing written policies of the employer' means reasonable rules relating to the job," and that "[a] report qualifies under this section only if it bears on compliance with the policy."

it does not specifically require that the summary be in writing, nor does it specify an exact time period for providing the affected individual with the report's summary following the adverse action (though, presumably, not too long afterward). Likewise, the FACTA restricts circulation of the report to "the employer or an agent of the employer," and the exemption may be forfeited by making overbroad disclosures, but the FACTA does not define who may constitute an "agent" of the employer. (The report may be disclosed to government agencies and "as otherwise required by law.")

KEY DECISIONS SINCE ENACTMENT OF THE FACTA

There have been very few court decisions in the last 10 years applying the FACTA's provision for exemption of certain reports from the definition of "consumer report." The few decisions that have been rendered, however, shed some light on important aspects of the law that are not explicitly addressed by its text.

Whether An Employer's "Investigation" is For a Qualifying Purpose

Two decisions have addressed to what extent reports resulting from "investigations" beyond obvious circumstances like investigations of sexual harassment allegations are exempt from the definition of "consumer report." Both have read the exemption broadly.

In *Millard v. Miller,*[28] the plaintiff was terminated from her employment after sustaining a workplace injury. The parties proceeded to litigate the plaintiff's workers' compensation claim relating to the injury. The plaintiff sought and obtained a continuance in a scheduled independent medical examination related to the claim on the basis that she would be travelling to visit relatives on the day the examination was scheduled. The employer, however, believed that the plaintiff's representation was a ruse and that she had lied about her intended whereabouts to obtain the continuance. The employer then obtained a copy of the plaintiff's credit report, with the goal of using the information in the report to subpoena the records of her credit card companies. The employer reasoned that the credit card records would show whether the plaintiff had actually used the cards for a leisure shopping excursion rather than visiting her relatives as she had represented. The employer shared the report with its workers' compensation carrier responsible for the litigation of the workers' compensation claim.

The plaintiff claimed that the employer had violated the FCRA because it had not provided her with the required disclosure or obtained her authorization for the report prior to requesting the report. The employer filed a motion for summary judgment, arguing that those provisions of the FCRA did not apply because of FACTA. The court agreed with the employer, granted summary judgment in its favor, and held that the report the employer obtained was not a "consumer report" by virtue of the FACTA. The court was undeterred by the plaintiff's argument that the report could not have been obtained to investigate "misconduct relating to employment," because the employer by its own admission sought the report for use in litigating the plaintiff's workers' compensation claim and seeking information about her off-duty conduct. The court held that "misconduct relating to employment" should be interpreted broadly, keying in on the fact that the legislature chose to use the phrase "relating to" to encompass more than just those matters strictly related to on-the-job performance. As such, because the employer intended to use the report in the workers' compensation hearing, which by its nature involved an employment injury, the court held that the report was obtained to investigate "misconduct relating to employment."

Under the court's reasoning, the employer just had to show that it had a genuine belief the employee had committed misconduct; it did not have to prove the employee had actually committed misconduct, or that its chosen method of investigating the misconduct was the best method, to prevail. An employer should thus assess whether the *Millard* court's reasoning might be persuasive to other courts in similar situations when the employer is faced with a FCRA action alleging that the employer did not obtain a proper disclosure or authorization.[29]

In *Martin v. First Advantage Background Services Corp,*[30] the court considered whether routine criminal background check audits qualified for exclusion from the definition of "consumer report" under the FACTA as either "investigation of" compliance with laws

28 2005 WL 1899475 (W.D. Wis. Aug. 9, 2005).

29 It is also possible, for instance, that an employer faced with a FCRA class action alleging violations spanning a two-year period may have ordered reports during that time for varying purposes, including some under circumstances similar to those involved in *Millard*. In such cases, the employer might argue that individualized issues will predominate because the purpose of obtaining each report must be assessed on a case-by-case basis to ascertain whether the FACTA applies.

30 877 F. Supp. 2d 754 (D. Minn. July 13, 2012).

and regulations or "investigation of" compliance with "preexisting written policies of the employer."[31] There, the plaintiff had been previously employed by the employer. The employer later rehired him as a sales specialist in the employer's home mortgage department. Three months after the plaintiff's rehire, the employer ran a background check which disclosed offenses that had not been listed on the plaintiff's previous background checks during his prior employment with the company. The plaintiff was terminated as a result. He contended that the list of the offenses on the report was erroneous and provided records which he believed demonstrated these errors to the employer. The employer, however, stood by its decision to terminate the plaintiff's employment.

The plaintiff sued, claiming violations of the FCRA. The employer defended itself by asserting that the background check was used to investigate the plaintiff's compliance with federal laws and regulations governing individuals who are permitted to work for financial institutions. In the alternative, the employer argued that the report was used to investigate the plaintiff's compliance with the employment handbook policies, which provided that "any individual who doesn't meet the [Financial Institutions Reform, Recovery, and Enforcement Act] criteria, isn't bondable, or otherwise doesn't meet our background screening cannot be employed or continue employment." The employer argued that, under either theory, the FACTA would exempt the employer from the requirements of the FCRA that the plaintiff claimed were violated. The plaintiff countered that the court should construe the FACTA's exemptions to apply only to investigations of employee misconduct that was already suspected by the employer, *i.e.*, where the investigation is prompted by information that the employee may have engaged in misconduct. The court disagreed with the plaintiff based on the plain language of the FACTA. The court held the exemption plainly could apply if the report was ordered for the purposes that the employer claimed.[32]

Martin is a district court case and therefore not technically binding on other courts. The decision's reasoning is important, however, and employers subject to federal and state laws restricting whom they may hire based on criminal record history should argue its persuasive value to other courts as necessary. Financial industry employers, healthcare employers, and school employers are prime examples of employers that may not hire individuals if they have been convicted of certain offenses. Assuming that other courts would adopt *Martin's* reasoning, these employers could conduct routine criminal background audits of employees or applicants in positions covered by the legal restrictions without having to follow the FCRA's other requirements. For risk management purposes or to avoid internal confusion, of course, these employers will likely decide it is best to comply with the FCRA's general requirements when conducting all criminal background checks relating to all of their employees, even if not technically required to because of the FACTA.

Whether an Employer's Additional Motives for Investigating Compliance Affect FACTA's Application

In *Pearce v. Oral & Maxillofacial Assocs., LLC,*[33] a federal court in Oklahoma held that an investigation report obtained by an employer through a third-party investigation agency was exempted from the definition of consumer report under the FACTA amendments. There, the plaintiff was employed as a surgical assistant for a dentist. Three months after she was hired she alleged that the dentist began to sexually harass her. The plaintiff alleged she complained to management but nothing was done in response, so she filed discrimination complaints with state and federal agencies. The employer then conducted an internal investigation and found there was no merit to her allegations. The plaintiff filed more complaints with state and federal agencies, and the employer hired a third-party investigative agency to conduct an investigation into the allegations and create a report. The plaintiff claimed the second report was done solely to intimidate or embarrass her.

The plaintiff filed a variety claims, including under FCRA, contending that (a) the report authored by the investigative agency was a "consumer report," (b) the investigative agency failed to obtain the required certifications from the employer, and (c) the employer failed to provide a copy of the report to the plaintiff upon request. The court held that the plaintiff's traditional FCRA claims, based on the notion that the report authored by the investigative agency was a "consumer report," failed. The court explained that the employer

31 Some courts appear to be ahead of the parties in recognizing that the FACTA may apply to background checks used for employment purposes. For instance, in *Williams v. Telespectrum, Inc.*, 2006 U.S. Dist. LEXIS 101162, 7-8 (E.D. Va. Nov. 7, 2006), the district court noted the existence of the FACTA amendments to the FCRA in a case involving an employment-related criminal background check, but commented that: "[n]either party raised this section or addressed its potential application to this case. As such, the Court has no basis to find, and does not find, that any of the listed exclusions under the FACTA amendments applies."

32 Because the case was before the court on a motion to dismiss, which did not allow consideration of matters outside the complaint, and because all information relevant to the employer's decision to obtain the report was in the employer's possession, the court denied the motion to dismiss, indicating that some discovery would be necessary before the case could be dismissed. The case proceeded through discovery and, as of this writing, the parties have briefed summary judgment.

33 2010 U.S. Dist. LEXIS 133430 (W.D. Okla. Dec. 16, 2010).

ordered the report to investigate the plaintiff's allegations of misconduct and therefore the report fell within the exception from the definition of "consumer report" provided by the FACTA.[34] The court also held that any other alleged ulterior motives for ordering the report, such as to harass the plaintiff, did not affect the applicability of the exemption.

Assuming that other courts would follow the reasoning in *Pearce*, the decision would allow employers to avoid attempts by plaintiffs to state FCRA claims by simply asserting that the FACTA exemption does not apply because, although the employer ordered a report to investigate misconduct, other motives also played a role in the employer's desire to know if the employee engaged in misconduct. After all, no portion of the FACTA requires a "reasonable" investigation, just proof that the employer ordered the report as part of an "investigation" for the purposes enumerated by the FACTA.[35]

With Whom the Employer May Share the Report

The *Millard* case addressed above also contained a ruling regarding the persons with whom an employer can share a report obtained for one of the purposes covered by the FACTA exemption without losing the benefit of the exemption. There, the employer had shared the report it obtained with its workers' compensation carrier, which was responsible for the defense of the plaintiff's workers' compensation claim on the employer's behalf. The court held that the disclosure did not vitiate the protection of the FACTA exception, holding that the insurance carrier was the employer's "agent," under 15 U.S.C. § 1681a(y)(1)(D), and therefore the disclosure was allowed by the FACTA.

CONCLUSION

Now, more than ever, it is essential for employers that use background checks for employment purposes to take steps to ensure compliance with the applicable provisions of the FCRA. There has been a significant spike in litigation against employers for alleged willful violations of the FCRA, especially class action litigation against larger, national employers. When faced with a lawsuit alleging non-compliance with the FCRA, or with circumstances where compliance with FCRA's disclosure, authorization, and notice requirements could frustrate the employer's other legitimate objectives, employers should consider whether the FACTA amendments may apply.

In addition, because various other laws affect the use of background checks for employment purposes, such as Title VII of the Civil Rights Act of 1964 and state fair employment and fair credit reporting laws, employers should continue to be mindful of their obligations to comply with all of these laws. In fact, the Equal Employment Opportunity Commission has intensified its focus on employer use of both criminal records and credit reports for employment purposes and is prosecuting at least two class action lawsuits against employers under the theory that such use resulted in an unlawful "disparate impact" on protected class members in violation of Title VII.[36]

Several states have also enacted state fair credit reporting laws. Some of these state laws impose state-specific obligations on employers that use consumer reports for employment purposes. Although this report does not discuss those state law considerations, employers must be sure to comply with the federal FCRA and applicable state law.[37] This is especially true in California, which has two comprehensive statutes that separately regulate the use of credit reports and other background reports that contain all other types of information (*e.g.*, criminal and motor vehicle records).[38]

34 The report at issue in *Pearce* likely was not a classic background report, but more of a true report investigating allegations of workplace misconduct.

35 As noted above, the court in *Millard* implied that an employer simply had to have a genuine belief that an investigation of potential misconduct was appropriate for the FACTA exemption to apply; *Pearce* can be read to follow that reasoning to the extent that if this is established, even evidence of alleged "mixed motives" or other ulterior motives will not operate to undermine the application of the exemption.

36 *See generally* Rod M. Fliegel and Jennifer L. Mora, *Federal Court Dismisses EEOC Title VII Disparate Impact Suit Over Alleged Discriminatory Background Checks Without Trial*, Littler ASAP (Aug. 12, 2013), *available at* http://www.littler.com/publication-press/publication/federal-court-dismisses-eeoc-title-vii-disparate-impact-suit-over-alle; *Two New EEOC Criminal Record Lawsuits Underscore Important Strategic and Practical Considerations for Employers Conducting Background Checks*, *supra* note 2, http://www.littler.com/publication-press/publication/two-new-eeoc-criminal-record-lawsuits-underscore-important-strategic-a ; *The EEOC's Priorities Still Include Regulating the Use of Criminal Records by Employers*, *supra* note 2, http://www.littler.com/publication-press/publication/eeocs-priorities-still-include-regulating-use-criminal-records-employe ; *Conviction Records and Disparate Impact*, *supra* note 2.

37 An Oklahoma federal district court recently held that the FACTA preempted certain provisions in Oklahoma's fair credit reporting statute. *Pearce v. Oral and Maxillofacial Assoc. LLC*, 2011 U.S. Dist. LEXIS 37631, at *13 (W.D. Okla. April 6, 2011).

38 *See* Cal. Civ. Code § 1785 *et seq.* and Cal. Civ. Code § 1786 *et seq. See also* Rod M. Fliegel and Jennifer L. Mora, *California Joins States Restricting Use of Credit Reports for Employment Purposes*, Littler ASAP (Oct. 10, 2011), *available at* http://www.littler.com/publication-press/publication/california-joins-states-restricting-use-credit-reports-employment-purp.

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