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Whole Foods Hit With FCRA Class Action for Background Checks

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Whole Foods Market was just inducted into a growing club where no one actually wants to be a member. The giant food retailer is the latest target of a class action law suit for alleged violations of the Fair Credit Reporting Act (FCRA). Whole Foods is in good company, joining other reluctant club “members”—national companies like [Disney](#), [Domino's Pizza](#), [CVS](#), [K-Mart](#).

One of the big trends we are following in 2014 is the deluge of [FCRA-related employment background screening lawsuits](#). The suits are on the rise due to the widespread adoption of employment background checks by companies over the past 10-15 years, which has justifiably raised awareness about the screening process. FCRA litigation is still fairly new to the trial bar. With statutory damages, attorney's fees, punitive damages and costs as well as actual damages, these class actions are much more lucrative than individual plaintiff cases. This week the trend continues.

Whole Foods was sued on February 7, 2014 in the California District Court for allegedly using **invalid authorization forms** in the background screening process. The complaint also challenges Whole Food's online application process, claiming that the company routinely ordered background checks **prior** to obtaining valid consent. According to the [Complaint](#), on or about April 7, 2011, the Plaintiff submitted an online job application. As part of the process, the Plaintiff had to sign off, agreeing to a form labeled “Consent.” The Plaintiff claims that the form had **extraneous information**, including a release of liability for companies receiving or providing information for the background check.^[1]

It gets worse. In addition to the release of liability, the document allegedly contained several other questionable paragraphs. Language that really should not be on a consent form. Things like an admission that the applicant has not knowingly withheld any information, an acknowledgement that the application for employment does not create an employment contract, and a statement that the applicant waives the receipt of a copy of any public record.

While the Plaintiff conceded that he was asked to sign a different, and seemingly valid, consent form later in the process, according to the complaint *that* form was not signed until **after the background check was already run**.

The purported class includes thousands of job applicants who executed online authorization forms as part of the Whole Foods online employment application between February 7, 2009 and the present. The Plaintiff is alleging willful violations of the FCRA, which could trigger statutory damages between \$100 and \$1000 per violation, and punitive damages as well as the standard remedies including costs and attorney's fees available under the FCRA.

Two very basic [FCRA](#) concepts are at work here.

1. The FCRA requires a signed authorization and disclosure from the applicant, sometimes referred to as a "Consent" form. No matter what you call it, **the form must consist solely of the required authorization and disclosure—no extraneous information can be attached or included.**
2. The authorization and disclosure form(s) **must be executed and signed by the applicant prior to requesting or conducting a background check.**

The fact that the authorization form is an online form is not the problem. With the popularity of applicant tracking systems (ATSs) and web-based job sites, more and more companies are moving to electronic forms. But companies need to proactively review and understand what those forms say. Sometimes a company is provided with a canned form designed by a software company, intended for other purposes, or sometimes forms are drafted by people within the organization who are not familiar with the FCRA. And trying to "fix" the problem later in the process with a valid form may be too late, especially if the job applicant has already been moved through the system and a background check has been ordered by an automated function of the ATS.

Employers take note. Make no mistake—these cases are going to keep coming. Now is the time for some preventive maintenance on your screening program. Here are a few key tips to avoid your membership into the FCRA Class Action Club:

- Make sure that you **have applicants sign an authorization and disclosure, documenting written consent for the background check.** Electronic and paper forms are both o.k.
- Confirm that the form is **signed prior to ordering the background check.** Provide a mechanism for the applicant to date the form.
- Consult with legal counsel or an expert on **what language can be included on the form.** While "authorization" and "disclosure" are two separate requirements under the FCRA, it's o.k. to combine those two requirements on one form.
- **Don't include extraneous information**, like a disclaimer, release of liability, or acknowledgments on the form.
- Consider **state requirements** that may have specific rules for the authorization and disclosure form.
- Bring together the different stakeholders within your organization to **make sure you are getting the background screening process right.** The HR department, recruiting, procurement, legal counsel, and information technology departments may all have a stake in this process.

Your [screening partner](#) should be able to provide you with compliance solutions to help you comply with the Fair Credit Reporting Act. Meanwhile, stay tuned. We will be tracking this and other pending FCRA cases.

[\[i\]](#) "I hereby authorize Whole Foods Market to thoroughly investigate my references, work record, education and other matters related to my suitability for employment and, further, authorize the references I have listed to disclose to the company any and all letters, reports, and other information related to my work records, without giving me prior notice of such disclosure. In addition, I hereby release the company, my former employers and all other persons, corporations, partnerships and associations from any and all claims, demands or liabilities arising out of or in any way related to such investigation or disclosure."

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