

# PUBLICATION

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## FCRA Class Action Suits on the Rise

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**It is a common practice for employers to check criminal backgrounds or credit ratings of potential, and sometimes current, employees. Background checks that provide this type of information are helpful to employers when evaluating candidates for employment, as such information can help safeguard a business and limit exposure to liability for negligent hiring. When an employer runs a background check, however, it must be sure to comply with the many requirements of the federal Fair Credit Reporting Act (FCRA).**

Before conducting a background check, the FCRA requires employers to: 1) obtain written permission from the individual to do the background check; 2) disclose to the individual in a written, stand-alone format that it might use information from the background check for employment-related decisions; and 3) certify to the company from which it is getting the report that it notified the individual and obtained their permission to get a background report, complied with the FCRA standards, and will not discriminate against the individual or otherwise misuse the information.

The FCRA imposes additional requirements when an employer takes an adverse action (such as not hiring a candidate or not promoting an existing employee) based on information obtained from the background check. *Before* the employer may take an adverse employment action, it must give the individual a notice that includes a copy of the report it relied on, as well as a notice of the individual's rights under the FCRA. *After* the employer takes an adverse employment action, it must tell the individual that he or she was rejected because of information in the report, provide that individual with the reporting company's contact information, and give them an opportunity to dispute the accuracy or completeness of the report.

Over the past year, there has been a substantial increase in lawsuits against employers claiming violation of consumer reporting laws related to background check practices. These lawsuits are usually class actions, and can involve millions of dollars in damages. FCRA class action suits are on the rise, and many large, national companies have recently been the target of these lawsuits.

In July, Big Lots was hit with a class action lawsuit that accused the retailer of running background checks on current and prospective employees without their knowledge or consent. Plaintiffs in the case allege that the company does not issue a stand-alone disclosure, and only requests authorization for background checks after the fact. Further, the disclosure and authorization form the plaintiffs eventually received was purportedly filled with extraneous information and did not meet the FCRA's requirement that the disclosure be clear and conspicuous.

A class action lawsuit was filed in September against Uber in a New Jersey federal court. The plaintiffs claim that Uber denied them jobs based on consumer reports, but failed to provide the applicants with a copy of the report prior to taking the adverse action. In addition, the background check paperwork allegedly contained extraneous, confusing language and required applicants to waive certain rights for the benefit of the employer.

Most recently, Chipotle has become the target of a class action lawsuit claiming violation of the FCRA. Plaintiffs allege that Chipotle buried the required disclosure in its application materials, where it was

surrounded by distracting and unrelated language. The plaintiffs further allege that the company failed to provide applicants with a summary of their rights under the FCRA.

The plaintiffs in each of these lawsuits seek statutory damages under the FCRA of \$100 to \$1,000 per violation per class member; for large, national companies, damages in these types of cases could easily be in the millions. And, although large companies have predominantly been the target of FCRA class action lawsuits, the increase in lawsuits under the FCRA signals that smaller companies will likely begin to face the same fate.

As demonstrated by these lawsuits, compliance with each requirement of the FCRA (and related state and local laws) is of critical importance to businesses in order to minimize legal risks and litigation costs. If you have questions about complying with the FCRA in your pre-employment practices or monitoring of current employees, consider consulting an attorney for guidance.