

Avoiding The Pitfalls Of Pre-Employment Background Checks

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A federal judge in the Middle District of Florida has allowed a class action to proceed against Amazon, on allegations that Amazon engaged in unfair pre-employment background check practices. The cases, *Hargrett v. Amazon* and *Austin v. Amazon DEDC LLC (Hargrett)*[1], which involve alleged technical violations of the Fair Credit Report Act, highlight the many and varied compliance challenges that employers face when conducting pre-employment background checks.

Employee Background Checks and the FCRA

Pre-employment background checks are often used by employers to screen job candidates for job functions that involve safety, security or trust interests. These checks typically include an examination of the candidate's past employment, and an assessment of the candidate's criminal and credit histories. As such, pre-employment background checks implicate privacy rights, as these checks sometimes involve employer access to a candidate's personal information.

Pre-employment background checks are governed by an ever-growing web of federal and state regulations. For example, many states have adopted so-called "ban-the-box" laws that place limits on the collection and use of a job candidate's criminal history. These state laws further limit when, in the hiring process, an employer may conduct a criminal background check. The U.S. Equal Employment Opportunity Commission has also issued enforcement guidelines concerning pre-employment background checks. Those guidelines prohibit an employer from conducting a pre-employment background check on a job applicant if the decision to conduct the check is based on the job applicant's race, national origin, color, sex, religion, disability, genetic information or age. Several states have adopted similar laws prohibiting discriminatory practices in the pre-employment background check context.

One of the more complicated laws that regulate the area is the Fair Credit Reporting Act[2]. The FCRA is a federal law intended to promote the accuracy, fairness and privacy of so-called "consumer reports" (which the FCRA defines broadly as any information about any person collected and reported by third-party agencies, including criminal history). The FCRA also regulates the use of such consumer reports in pre-employment background checks and other employment decisions. Among other restrictions, the FCRA prohibits an employer from procuring a consumer report for pre-employment background check purposes, unless:

1. A clear and conspicuous disclosure has been made in writing to the [job candidate] at any time before the report is procured or caused to be procured, *in a document that consists solely of the disclosure*, that a consumer report may be obtained for employment purposes; and
2. The [job candidate] has authorized in writing (which authorization may be made on the document referred to in clause (i)) the procurement of the report by that person.

15 U.S.C. §1681b(b)(2)(A) (emphasis added).

These highly technical and varied regulations require employers to be ever vigilant to ensure that their pre-employment background check procedures are compliant with applicable law.

Enter Hargrett

In Hargrett, the class action plaintiffs are individuals who sought employment at Amazon's fulfillment center in Ruskin, Florida in 2015. In connection with their employment inquiries to Amazon, the plaintiffs were required to apply for employment through an online, electronic application form. A "page" of that electronic application form was titled "Background Check Disclosure." The disclosure page explained to the plaintiffs that Amazon intended to conduct a criminal history background check, through a third-party vendor, in connection with their job applications. The disclosure page also asked the plaintiffs to authorize the background check by "clicking through" to a subsequent electronic authorization page. After selecting "I Accept" and "Save & Continue" on the disclosure page, the plaintiffs were directed to a "Background Check Authorization" page that asked the plaintiffs, by electronic signature, to authorize the background check, and to release Amazon from certain liability. The authorization page also contained paragraphs of information concerning several state laws that regulate background checks.

In their class complaint, the plaintiffs allege that Amazon violated the above-described provisions of the FCRA because Amazon failed to provide them with stand-alone disclosure or authorization forms, as required by 15 U.S.C. §1681b(b)(2)(A). Specially, plaintiffs allege that:

1. The background check disclosure was part of Amazon's general employment application form, and was not "in a document that consists solely of the disclosure;" and
2. The authorization form included "extraneous" information concerning other state laws and a release of claims, and was not solely related to an authorization required by the FCRA.

The plaintiffs do not contend that they suffered any monetary harm from the disclosure and authorization forms used by Amazon. Rather, the plaintiffs contend that Amazon, a sophisticated employer, was aware, or should have been aware, of the FCRA disclosure and authorization rules that require stand-alone forms. As such, the plaintiffs contend that they are eligible for statutory penalties as a result of Amazon's "reckless" or "willful" violations of these rules.

Amazon moved to dismiss the class complaint, contending that the plaintiffs lacked standing to sue because they had, admittedly, suffered no actual damages. On Jan. 30, 2018, the court rejected Amazon's argument, concluding, in part, that Amazon's alleged violations of the FCRA, albeit technical in nature, implicate "intangible damages" sufficient to establish a valid class complaint. As a result of the decision, the plaintiffs are permitted to proceed against Amazon on a class action basis. The case remains pending, and Amazon is now subject to a class action that may involve thousands of potential claimants.

The Takeaway

Pre-employment background checks have become a ubiquitous part of the hiring process. The Hargrett case highlights that even the most sophisticated employer can struggle with the varied and highly technical laws that govern this common employer function.

Partnering with third-party vendors that specialize in pre-employment background checks may be an important resource available to assist employers. However, as Hargrett demonstrates, it is the employer that is ultimately responsible for compliance. Employers are cautioned to have their own legal counsel review all forms, electronic applications and procedures used in their hiring process, and related to background checks, on a regular basis.

[1] Hargrett v. Amazon and Austin v. Amazon DEDC LLC, C.A. 8:15-cv-2456-T-26EAJ (M.D. FL.)

[2] Fair Credit Reporting Act, 15 U.S.C. §1681 et seq

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