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RECENT LITIGATION AND SETTLEMENTS REQUIRE UPDATES TO FCRA END-USER CERTIFICATION PRACTICES

Due to new theories relied upon by plaintiffs in recent Fair Credit Reporting Act (FCRA)[1] litigation, consumer reporting agencies (CRAs) will likely have to modify their processes for obtaining required certifications from end users, requiring such certifications to be made each time a report is procured as a best practice.

Specifically, Section 604(b)(1) of the FCRA states that a CRA may furnish a consumer report for employment purposes only if:

> "[T]he person who obtains such report from the [CRA] certifies to the [CRA] that (i) the person ***has complied*** with paragraph (2) [by providing 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 for employment purposes], and the person will comply with paragraph (3) with respect to the consumer report if [such pre-adverse action notification requirements become] applicable; and (ii) information from the consumer report will not be used in violation of any applicable Federal or State equal employment opportunity law or regulation…"

Several recent lawsuits brought by plaintiffs' attorneys are targeting the "has complied" language above to make a timing argument, arguing that the FCRA requires the employer to make the above certification to the CRA only after it has provided a specific consumer with the "standalone" disclosure and before it obtains a consumer report on that consumer. Historically, CRAs have attempted to comply with these certification obligations by including a "blanket" one-time certification upfront in the client agreement at the onset of the relationship, whereby the end user makes a general certification to the CRA that it will comply with the FCRA's disclosure and authorization

1 15 U.S.C. §§1681 et seq.

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requirements, and if applicable, with the adverse action requirements for all reports it orders.

However, recent cases have made this practice particularly risky as plaintiffs' attorneys gain momentum with the theory that a blanket certification made before the consumer is provided with a standalone disclosure does not satisfy the FCRA's obligations.

> In various cases against CRAs, plaintiffs have alleged that a blanket certification at the beginning of the client relationship does not satisfy Sec. 604(b)(1)'s "has complied" language because it occurs before the fact.

For example, in *Syed v. M-I, LLC et al,*[2] a California federal court allowed a claim to proceed against a CRA for allegedly furnishing a consumer report to an employer without obtaining proper certification from the employer that it has complied with its obligations under the FCRA, in violation of Section 604(b)(1). The CRA unsuccessfully argued that it interpreted § 604b)(1) as allowing it to obtain a one-time "prospective, blanket certification" from the employer at the onset of the relationship. After the plaintiff survived a motion to dismiss, with the court finding that the plaintiff's reading of the statute was reasonable and could state a claim, the parties agreed to a $1.6 million class settlement on behalf of 65,654 class members.

Similarly, in *Stone v. Sterling Infosystems,*[3] a plaintiff alleged that under Sec. 604(b)(1), a CRA must obtain a certification from any person it furnishes a consumer report to, stating that such person "has complied with paragraph (2) [i.e. has provided the applicant with a standalone disclosure] with respect to the consumer report, and the person will comply with paragraph (3) [adverse action requirements] with respect to the consumer report if paragraph (3) [of Section 604(b)] becomes applicable."

Additionally, in *Evans et al. v. Accurate Background Inc.,*[4] another CRA was hit with a proposed class action in California federal court alleging that the CRA violated the FCRA by performing consumer background checks for employment purposes without first properly obtaining the end-user certifications required by the FCRA. The plaintiff alleged that the CRA required all of its clients to sign a customer agreement prospectively certifying that they will comply with the FCRA, which the plaintiff argued does not satisfy the statute's "has complied" language.

Thus, in order to avoid potential exposure and costly litigation under Sec. 604(b)(1), CRAs would be well-advised to implement a step within their report ordering and procurement processes that obtains the required certifications from end-users after the end user has made a standalone disclosure to a specific consumer but before the report is delivered and becomes available to the end user.

In light of the above, BIG has added a step to its client extranet site that will require you to make the required FCRA certifications before you can procure a screening report. Please contact your account manager or sales executive if you have any questions.

2 No. 1:14-cv-00742 (E.D. Cal., Jan. 26, 2016).
3 No. 1:16-cv-01703 (N. D. Ohio, July 1, 2016).
4 No. 8:16-cv-00188 (C.D. Cal., Feb. 4, 2016).

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