

PRESENTED AT

23rd Annual Labor and Employment Law Conference

May 3-4, 2016
Austin, Texas

Navigating Employee Data Privacy in the Digital Age

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NAVIGATING EMPLOYEE DATA PRIVACY IN THE DIGITAL AGE

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Technological advances have made gathering information about job applicants and employees faster, easier, and more thorough – and all at the touch of a button. While many employers seek to benefit from these technologies, they should also consider the privacy risks such technologies pose as they delve deeper into the background and day-to-day life of potential and current employees. This paper provides an overview of select topics in the area of employee data privacy, including pre-employment background checks, employee monitoring, and handling sensitive applicant and employee data, as well as practical tips on how to navigate this rapidly-developing area.

I. PRIVACY ISSUES INVOLVING PRE-EMPLOYMENT BACKGROUND CHECKS

A. Background of the Fair Credit Reporting Act and Related Laws

The Fair Credit Reporting Act (FCRA), 15 U.S.C. § 1681 *et seq.*, is the federal law that regulates the practices of companies that maintain and provide consumer reports (known as “consumer reporting agencies” (CRA)), the entities that provide information to CRAs, and the users of consumer reports (such as employers).^{1,2} Congress’ stated purpose in enacting the FCRA is to “require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to confidentiality, accuracy, relevancy, and proper utilization of such information...”³ To serve that purpose, the FCRA imposes obligations on both the providers and users of consumer reports, and creates rights for the individuals who are the subjects of consumer reports.

B. The FCRA’s Regulation of Consumer Reporting Agencies

The FCRA applies when CRAs provide “consumer reports” to third parties. To better understand what that means, we need to look at how those terms are used.

What is a Consumer Reporting Agency? An organization is a “consumer reporting agency” (CRA) subject to the FCRA if it assembles or evaluates information about individuals for the purpose of selling “consumer reports” to third parties.⁴ The FCRA defines a CRA as:

any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or

¹ See Prepared Statement of the Federal Trade Commission Before the Equal Employment Opportunity Commission, *The Fair Credit Reporting Act and the Use of Consumer Reports in Employment* (Oct. 20, 2010), <https://www.ftc.gov/sites/default/files/documents/one-stops/credit-reporting/101020eeoctestimony.pdf>.

² Several states have state law counterparts to the FCRA. Texas’ state law counterpart is Title 2 (Competition and Trade Practices) of the Business and Commerce Code, and it closely tracks the FCRA. See TEX. BUS. & COM. CODE ANN. § 20.01, *et seq.* Many other states, namely California and New York, also have state counterparts. See, e.g., California Consumer Credit Reporting Agencies Act (CCRA), Cal. Civ. Code § 1785.1 *et seq.*; California Investigative Consumer Reporting Agencies Act (ICRAA), Cal. Civ. Code § 1785.1 *et seq.*; New York FCRA, Gen’l Bus. Law Art. 25 § 380.

³ 15 U.S.C. § 1681(b).

⁴ *Id.* § 1681a(f).

facility of interstate commerce for the purpose of preparing or furnishing consumer reports.⁵

What constitutes a Consumer Report? Two factors determine whether information constitutes a consumer report: (1) the type of information, and (2) the recipient's use of the information.⁶ The FCRA defines a "consumer report" as:

any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for (A) credit or insurance to be used primarily for personal, family, or household purposes; (B) employment purposes; or (C) any other [similar] purpose[s].⁷

What are Employment Purposes? The FCRA considers reports used for employment eligibility to be "consumer reports." The law more specifically defines a consumer report that is used for employment eligibility purposes as "a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee."⁸ The term "eligibility" is not defined in the FCRA and, importantly, federal courts vary on their interpretation of the word.⁹ The meaning of "eligibility" can be key in determining whether information used by an employer is a "consumer report." This gray area creates risk for employers that look at information provided by third parties as part of the hiring process.

Notably, the FCRA was amended in 2003 by the Fair and Accurate Credit Transactions Act (FACTA), which provides exemptions from the definition of "consumer report."¹⁰ "Consumer reports" do not include communications made to employers in connection with *investigations* of: (1) suspected misconduct relating to employment, or (2) compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any pre-existing policies of the employer.¹¹ The report also is not required to be disclosed to the accused or the complaining party.¹² If, however, the employer takes adverse action based on the report, it must disclose a summary of the report to the target of the investigation.¹³ The summary must include the nature and substance of the report, but it need not identify the individuals who have been interviewed or other sources of information.¹⁴ Moreover, the amendments to the

⁵ *Id.*

⁶ 15 U.S.C. § 1681a(d).

⁷ *Id.*

⁸ 15 U.S.C. § 1681a(h).

⁹ *Adams v. LexisNexis Risk & Info.*, Civ. No. 08-4708, 2010 U.S. Dist. LEXIS 47123, *26-*27 (D.N.J. May 12, 2010) (using the dictionary meaning to conclude that "eligibility" means "qualified to participate" and "worthy of being chosen," and rejected a proposed meaning of "entitled"); *Scharpf v. AIG Mktg.*, 242 F. Supp. 2d 455, 459-62 (D. Ky. 2003) (rejecting the argument that the FCRA applies to insurance eligibility determinations only after an application is submitted by the consumer).

¹⁰ FACTA, Pub. L. 108-159, 117 Stat. 1952.

¹¹ 15 U.S.C. § 1681a(y) (emphasis added).

¹² *Id.* § 1681a(y)(1).

¹³ *Id.* § 1681a(y)(2).

¹⁴ *Id.* § 1681b(2)(B).

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First appeared as part of the conference materials for the
23rd Annual Labor and Employment Law Conference session
"Navigating Employee Data Privacy in the Digital Age"