



## Class Action Trends in Virginia: Employment Background Reports

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Forty percent of the consumer class actions filed in Virginia in 2014 alleging violations of the Fair Credit Reporting Act ("FCRA") relate to background reports for employment purposes. With one exception, all of the cases are against consumer reporting agencies. The exception is a lawsuit against an employer. Every one of the employment-related cases seeks certification of one or more nationwide classes that could include thousands of consumers.

### Claims against Consumer Reporting Agencies

The FCRA claims in the lawsuits against consumer reporting agencies consist of one or more of the following alleged violations. The frequency of each class claim alleged in the cases is shown in parenthesis.

- The failure to notify the consumer, at the time a consumer report was furnished for employment purposes, that public record information is being reported and the name and address of the person to whom such information is being reported. (6)
- The failure to disclose to a consumer who has requested a copy of his consumer file all information in the consumer file including credit scores, other risk scores or predictors, except the first 5 numbers of his social security number if a truncated number has been requested. (3)
- The failure to disclose to the consumer who has requested a copy of his consumer file the sources of the information appearing in the consumer file. (3)
- The inclusion in a consumer report used for an employment position paying less than \$75,000 per year of criminal history information (other than convictions) that were more than 7 years old. (2)
- The failure to investigate a dispute until the consumer completed proprietary forms of the consumer reporting agency. (1)
- The written response to a consumer's request for his consumer file failed to disclose that the consumer reporting agency is not required to remove accurate derogatory information unless the information cannot be verified or is outdated. (1)

These allegations accuse consumer reporting agencies of either failing to have, or not following, the correct procedures under the FCRA in the following three areas:

1. what to disclose to consumers when a consumer report is furnished to an employer;

2. scrubbing outdated information from the consumer reports; and
3. providing the entire consumer file in response to a consumer's request.

### **Claims Against Employers**

In 2014, one class action was filed against an employer. The lawsuit alleges that the employer failed to notify the consumer, in writing, that a consumer report had been obtained for employment purposes and to provide a copy of the consumer report at least 5 days before taking adverse action based in whole or in part on the content of the consumer report. In addition, the lawsuit claims that the employer failed to provide the consumer with a summary of the consumer's rights under the FCRA.

### **FCRA Class Actions Focus on Technical Violations**

These FCRA class actions seek to recover statutory and punitive damages for the class members. Statutory damages for a willful violation of the FCRA can range from \$100 to \$1,000 per violation. Plaintiffs' counsel are not attempting to recover actual damages because the individualized nature of such claims makes class certification unlikely. Thus, these cases focus on technical violations of the FCRA for which actual damages are not claimed. In making their claims, Plaintiffs' counsel treat each violation of a subpart of a statute as a separate violation and the basis for a separate class.

### **Conclusion**

Attorneys representing consumers are finding that the technical requirements of the FCRA are not being followed by consumer reporting agencies who provide background reports to employers and by employers who use those reports. All but one of these cases filed in 2014 were filed by the same law firm.

The number of FCRA cases being filed is a reminder that the best deterrent is a robust compliance program.

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