



Eye On The Law

REMINDER – EMPLOYEE BACKGROUND CHECKS (ALL TYPES) ARE COVERED BY THE *FAIR CREDIT REPORTING ACT* – RECENT COURT RULINGS, BENCH VERDICTS AS WELL AS JURY AWARDS ARE VERY PRO PLAINTIFF

Connecticut's New Law on Erased Criminal Records

RETURN TO WORK UPDATE: WHAT ARE OTHER EMPLOYERS DOING?

Fair Credit Reporting Act (“FCRA”) Claims – on the Rise with Specialist Plaintiff Attorneys

FCRA has become a hotbed for litigation in recent years. Many employers are unaware of and inadvertently violate the Act's provisions. In addition, claims under the FCRA can be relatively easy to prove and Courts have consistently rejected logical proximate cause defense motions/claims that argue ***“IT'S NOT MY FAULT; IT'S THE REPORTING AGENCY'S OR SOMEONE ELSE'S” – ESSENTIALLY IF YOU ARE PART OF THE CAUSAL CHAIN OF AN INCORRECT CREDIT REPORT AND YOU HAVE NOT ACTED APPROPRIATELY UNDER FCRA – YOU CAN BE ON THE HOOK FOR ALL DAMAGES.***

Testing logical legal theories in this area, particularly against a practitioner who handles only these cases is ill advised and has led to monstrous million dollar awards and jury verdicts –

even in Federal Courts in the Northeast. This is due to the fact that damages (even for just negligence) awarded include:

- Direct loss – salary, fixing false reports; Indirect Loss – emotional distress

If the action is deemed willful then damages include:

- statutory damages ranging from **\$100 to \$1000 per violation**, **punitive damages** and **attorneys' fees**.

This is also an area of the law where class action lawsuits are becoming more common.

HOW DO EMPLOYERS AVOID THIS EXPOSURE SINCE MOST CONDUCT SOME FORM OF A BACKGROUND CHECK IN THE HIRING PROCESS?

To decrease the potential for liability under the FCRA, employers should be aware of the very specific obligations they have relating **to obtaining credit reports, driving records or criminal background checks** for employees and prospective employees.

- First, the employer must provide the employee or prospective employee with notice informing him or her that 1. A background check **will be conducted** and 2. Obtain a written authorization for the background check to be completed. **The individual must also be advised of his or her right to obtain a copy of the credit report, driving record or criminal background report in the event any adverse action is taken based on the report.**
- Second, if the employer decides to take any action based on the results of the record or report (**not hire the employee or terminate an existing employee**), **prior to taking such action**
 - the employer **MUST** provide the individual with a copy of the credit or background report and give him or her an opportunity to correct any errors. It is recommended that the individual be given at least 5 business days to do this. The employer must also provide notice to the employee or prospective employee of his or her [rights under the FCRA](#).
- Third, if any adverse action is taken, the employer **must provide the individual with contact information for the consumer reporting agency which provided the information to the employer so that the individual may request the information in his or her file and dispute any inaccurate information.**

Consumer reporting agencies, which are companies that provide credit or other background information on an individual to a third party for a fee, also have specific obligations under FCRA. First and foremost, they are required to follow reasonable procedures to ensure the accuracy of the information contained in the reports. This may include checking several identifiers. **Additionally, these agencies must take steps to ensure that erased criminal records do not appear on the report.** This means making sure that

the source where the criminal records are obtained is up to date so that **recently pardoned or erased records** are not included.

This will be increasingly important to Connecticut employers in light of the state's new law on erased criminal records.

New CT Law on Erased Criminal Records

Earlier this year, the State Legislature passed, and the Governor signed a bill erasing broad categories of criminal convictions. Under the provisions of [Public Act 21-32](#), certain types of criminal convictions are to be automatically erased in January 2023. The new Connecticut law also makes it a prohibited discriminatory practice for an employer to **discriminate against any person "in compensation or in terms, conditions or privileges of employment on the basis of that person's erased criminal history record information."** Erased criminal records include those relating to cases where the accused has been found not guilty and when charges in a criminal case have been pardoned or decriminalized after the conviction. These new laws make it imperative that the consumer reporting agency that provides you with criminal background reports is making a diligent effort to ensure that erased criminal record information is not included in the reports. **If this information is included in a report and an employer takes action against an existing or prospective employee based on that information, the employer could be held liable under the Fair Credit Reporting Act.**

As a reminder, existing Connecticut law prohibits an employer from requesting information about a person's criminal history on an initial application for employment, except in very limited circumstances. In those limited circumstances where the question is allowed, if the employer chooses to include the question on their initial application, the application must also contain a notice advising the applicant (1) that he or she is not required to disclose the existence of any erased criminal history record information, and (2) a description of what types of information constitutes erased criminal history record information.

RETURN TO WORK/VACCINATION UPDATE

In the last edition of Eye on the Law, we told you that the Biden administration directed the Department of Labor to develop an emergency rule to require all employers with 100 or more employees to ensure their employees are fully vaccinated or show a negative test result at least once a week. We recently learned that Attorneys General from 24 states have brought a lawsuit or have plans to bring a lawsuit to try to prevent enforcement of any such rule. Arizona's Attorney General, Mark Brnovich was one of the first to file a lawsuit over the vaccine-or-testing mandate. In a [statement on the Arizona Attorney General's website](#), he said the office is "asking the District Court of Arizona to declare the Biden Administration's vaccine and testing policies unconstitutional and return the power of healthcare decisions back to citizens where it belongs."

In other news on the vaccine front, last week the Court of Appeals for the Second Circuit issued an order preventing New York City Schools from enforcing a vaccine mandate on school employees. The vaccine mandate, which does not include a testing option, was supposed to go into effect on Monday, September 27. Then, this past week, the Court lifted the stay, which allows the mandate to go into effect. According to [some news reports](#), just over 80% of city school employees have been vaccinated, which leaves approximately 28,000 unvaccinated school employees.

Private companies are also struggling with decisions on vaccine mandates and returning employees to the office. **Microsoft** recently announced that they are delaying employees' return to the office *indefinitely*. Jared Spataro, a corporate vice president with the company explained the move in a blog post: "Given the uncertainty of COVID-19, we've decided against attempting to forecast a new date for a full reopening of our U.S. work sites." He said that the company will wait for public health guidance on when it is safe to return and then give workers a 30-day transition period to prepare. Microsoft employs approximately 100,000 workers in the U.S.

Apple has delayed its mandatory return-to-work date until at least January 2022. While rideshare giant **Lyft**, which has locations throughout the U.S., and software company **Asana**, which has offices in San Francisco and New York, recently notified employees that they would not return to their offices until February 2022. Other companies have returned employees to their offices but with new restrictions. Both **Morgan Stanley** and **Citigroup** are requiring all persons entering their New York offices, which includes employees and vendors, to be vaccinated.

Closer to home, **The Hartford** announced that it has indefinitely delayed an expected October 4 return to the office. While, **Travelers**, which is one of the State's largest employers, announced that its return to the office, which was originally slated for mid-September, would be delayed by "at least one month."

On the subject of employee vaccinations, several Connecticut companies, including Stamford-based **Charter Communications**, Farmington-based **Otis Worldwide** and New Britain-based, **Stanley Black & Decker** are recommending but not requiring COVID-19 immunizations. **Xerox** is requiring all of its U.S. employees to sign a document attesting to their vaccination status and, if they are vaccinated, to tell the company the date of their last vaccination and the type of vaccination they received. Those who are not vaccinated must have an approved exception (based on disability or religion). **Xerox** advised employees that a failure to provide accurate information on vaccination status could lead to termination.



Please congratulate Tracy for completing (acing) a 13 week paralegal program run and taught by attorneys associated with Boston University. She finished with a 4.0 average while working with all of you at the same time.

If you have concerns about these CREDIT REPORTING ISSUES or any other workplace or litigation issues, please contact David Ryan at david.ryan@ryan-ryan.net or by telephone at 860.460.7139 (mobile) or 203.752.9794 (office).