FCRA notice amendment highlights consumer privacy concerns, technical compliance

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The Economic Growth, Regulatory Relief and Consumer Protection Act, 15 U.S.C.A. § 1681c-1, enacted in May 2018 and effective in September 2018, amended the Fair Credit Reporting Act to allow consumers to place and remove security freezes on their credit reports. The amendment also extends the period of time during which consumer reporting agencies must include a requested fraud alert in consumer files from 90 days to one year.

These changes to the FCRA — and particularly their effect on notification requirements — highlight the importance of complying with statutory notice-and-consent procedures given the recent increase in consumer and employee class-action lawsuits seizing on such issues. They also reflect broader consumer privacy concerns about the amount of control individuals have over their own personal financial information.

The FCRA, originally passed in 1970, is intended to protect consumers by ensuring the accuracy, fairness and privacy of consumer information maintained and used by CRAs and other entities, including employers. The statute regulates the collection, disclosure and use of consumer information. It also provides certain rights to consumers with respect to their information.

WHAT DOES THE AMENDMENT DO?

One of the recent amendment’s principal changes to the FCRA is its creation of a provision that enables consumers to request and remove security freezes on their credit reports free of charge. A security freeze prevents CRAs from disclosing a consumer’s credit information for a specified period of time. It is intended to prevent identity thieves from using consumer information to fraudulently open new lines of credit.

This entitlement is intended not only to give consumers more control over their credit data but also to prevent the accumulation of false information resulting from fraud from appearing on consumer credit reports. This, in turn, should reduce the prevalence of consumers facing negative consequences as the result of erroneous information contained in their credit reports.

Apart from creating an ability to request a credit freeze, the amendment also provides that consumers are entitled to receive notice of this right. Under the FCRA’s existing notice provisions, CRAs are required to provide consumers a summary of consumer rights, which describes the process for obtaining and disputing information contained in credit reports and a summary of consumer identity theft rights, which describes the rights of identity theft victims.

Now when a consumer receives a summary of these rights, CRAs must also provide consumers with a notice regarding the right to obtain a security freeze. This notice has been incorporated into the form summary of consumer rights, which is available from the Consumer Financial Protection Bureau at https://bit.ly/2O9NRY9.

HOW DOES THE AMENDMENT AFFECT EMPLOYERS?

The FCRA’s baseline requirements for employers include obtaining an individual’s written permission to use credit report information in making employment decisions, providing a description of how that information will be used, and adhering to that description.

Many employers are choosing to provide notice of the right to a security freeze as a preventive measure against the threat of class-action lawsuits alleging technical violations of the FCRA.

The FCRA also requires employers to give an individual a copy of their credit report if it decides to make an adverse decision related to the information contained in the credit report, such as deciding not to hire or to terminate the individual. The individual must also be given an opportunity to dispute the information contained in the credit report before the final adverse decision is made.

The amendment’s notice requirement regarding security freezes appears to expressly apply only to CRAs. However, many employers are choosing to provide this notice both because it is already incorporated into the form summary of consumer rights and as a preventive measure against the threat of class-action lawsuits alleging technical violations of the FCRA.

An employer’s failure to provide the notice related to security freezes when pre-adverse action notices are provided, even if arguably not required by the FCRA, still raises a potential for claimed violations of the FCRA. Such class-action matters have
been prevalent in recent years, even after *Spokeo Inc. v. Robins*, 136 S. Ct. 1540 (2016), clarified that claimed injuries must be “concrete and particularized” in order to satisfy the requirements of Article III standing.

The FCRA amendment underscores the law’s movement toward enabling consumers and employees to exercise greater control over their data.

Apart from matters involving the FCRA, class-actions involving alleged violations of other data privacy notice-and-consent statutes, such as the Illinois Biometric Information Privacy Act, 740 Ill. Comp. Stat. 14/1, continue to define the contours of what constitutes an injury sufficient to confer standing in cases involving data privacy and informational injuries.

**WHAT ARE THE TAKEAWAYS FOR EMPLOYERS?**

The FCRA amendment stands as a reminder for employers to remain aware of and comply with the FCRA’s notice-and-consent requirements. It also underscores increasing public concerns about data privacy and the law’s movement toward enabling consumers and employees to exercise greater control over their data.

**ABOUT THE AUTHOR**

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