**Reporting Expunged or Sealed Cases in Commercial Background Checks**

**Violates the Fair Credit Reporting Act**

The Fair Credit Reporting Act (the FCRA) governs the accuracy of criminal background checks prepared by commercial screeners. While there is not much case law holding that the FCRA prohibits commercial screeners from reporting expunged or sealed cases, there is little doubt that it does.

Two FCRA provisions apply:

* Commercial screeners must use “reasonable procedures” to insure “maximum possible accuracy” of the information in the report. 15 U.S.C. §1681e(b).
* A commercial screener reporting public record information for employment purposes which “is likely to have an adverse effect on the consumer’s ability to obtain employment” must either notify the person that the public record information is being reported and provide the name and address of the person who is requesting the information at the time that the information is provider to the user or must maintain strict procedures to insure that the information it reports is complete and up to date. 15 U.S.C. §1681k.

Numerous FCRA class actions have been brought under one or both of these provisions to challenge a commercial screener’s reporting of expunged or sealed cases.

* *Henderson v. HireRight Solutions, Inc.*, No. 10-459 (E.D. Pa. 2010).
* *Robinson v. General Information Services, Inc.*, No. 11-7782 (E.D. Pa. 2011).
* *Roe v. Intellicorp Records, Inc.*, No. 1:12-cv-2288 (N.D. Ohio 2012).
* *Giddiens v. LexisNexis Risk Solutions, Inc.*, No. 2:12-cv-02624-LDD (E.D. Pa. 2012).
* *Stokes v. RealPage, Inc.*, No. 2:15-cv-01520-JP (E.D. Pa. 2015).

All of these cases were settled, with the settlement typically requiring the discontinuation of the use of stale data or the screener to change its practice to verify data.

Only one reported case clearly addresses whether a commercial screener violates the FCRA by reporting an expunged or sealed case, although in dicta. In *McNamara v. HireRight Solutions Inc.*, 2014 WL 321790 (N.D. Ill. Jan. 29, 2014), the Court considered whether the screener had complied with the FCRA given how it had reported a case in which the person had received a diversionary sentence under Illinois law. HireRight reported the disposition as “pled guilty-found guilty” and the sentence as “supervision terminated satisfactory,” which was concededly accurate. But the plaintiff objected because it did not report a subsequent order discharging him as a defendant and dismissing the disorderly conduct charge against him. The statutory scheme permitted the outcome to be expunged or sealed two years after discharge and dismissal, but that record-clearing had not yet occurred. In rejecting the plaintiff’s position, the Court concluded:

McNamara simply does not have a clean record. He did not rid himself of his guilty plea or the Circuit Court's finding of guilt by completing his supervision, and ***HireRight may continue to report both dispositions—until, of course, they are sealed or expunged***—without fear of liability under the FCRA.

The commercial screening industry does not dispute that its members should not report expunged or sealed cases – if they know they have been expunged or sealed. Instead, they sometimes contend that they have not violated the FCRA when reporting criminal cases post-expungement or sealing because they are unaware that cases in their databases have been expunged or sealed. For more information on this issue, including steps that advocates can take to avoid expunged or sealed cases showing up on background checks, *see* Sharon M. Dietrich, “Ants under the Refrigerator? Removing Expunged Cases from Commercial Background Checks,” *Criminal Justice* (American Bar Ass’n Section of Criminal Justice, Winter 2016).

Finally, there is concern that reporting an expunged or sealed case could be considered “technically accurate,” because there was once a case that was publicly reportable. But the weight of authority is against this technical accuracy approach. *See* *Smith v. HireRight Solutions, Inc.,* 711 F. Supp. 2d 426, 433 n. 5 (E.D. Pa. 2010). Moreover, as one commentator has written, “[b]ecause Section 1681k(a)(2) requires that reports be complete and up to date, a [commercial screener] that reports a criminal record but left out a subsequent expungement would be foreclosed from using the technical accuracy approach as a defense.” Noam Weiss, “NOTE: Combating Inaccuracies in Criminal Background Checks by Giving Meaning to the Fair Credit Reporting Act,” 78 *Brooklyn Law Rev.* 271, 295 (Fall, 2012).

Bottom line: If a commercial screener has reported an expunged or sealed case and should have known better (if it had refreshed its data, verified the case’s existence by checking courthouse records, etc.), the FCRA is implicated, and a case can be made that both 15 U.S.C. §1681e(b) and 15 U.S.C. §1681k have been breached.

A recent ruling may have an unwanted impact, though. In *Aldaco v. RentCrow, Inc.*, 921 F.3d 685 (7th Cir. 2019), the Seventh Circuit ruled that what constitutes a “conviction” for purposes of the FCRA is defined by federal law, not state law. According to the court, a state criminal case terminates in a “conviction” if there has been a guilty plea, even if the ultimate outcome is a dismissal after completion of a diversionary program. *Id.* at 689. Would the outcome here have been different if Ms. Adalco’s criminal case had been expunged – relief she could have sought in state court but did not? Following this decision, arguments from counsel for the background screening industry that an expunged or sealed conviction does not cease to be a “conviction” for FCRA purposes – and can continue to be reported – can be anticipated. In responding to such an argument, one might note that the *Aldaco* claim arose under 15 U.S.C. §1681c c(a) (limiting the time during which non-convictions can be reported), not under 15 U.S.C. §1681e(b) (accuracy claims) or §1681k (strict procedures/up-to-date information). Also, one might look to state record-clearing law for any right for the client not to reveal an expunged or sealed case.

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