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BACKGROUND CHECKS FOR STUDENT PROGRAM ADMISSION, CLINICAL ROTATION PLACEMENTS AND INTERNSHIP/EXTERNSHIPS: CONSIDERATIONS FOR SCHOOLS AND HEALTHCARE INSTITUTIONS

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INTRODUCTION

Before allowing students admission to a medical program or placing students in a clinical rotation or internship/externships involving onsite patient care, many schools and/or healthcare institutions require prospective students to meet certain criteria, which includes, but is not limited to completing and passing background checks. These checks come in a variety of forms, but most generally include an investigation into a student's criminal history, license verification (if applicable), and whether the student is precluded from performing patient care services because of their placement on a healthcare exclusions or other sanctions list.

This white paper discusses considerations that schools and healthcare institutions should consider when conducting background checks on students, especially when using a third party, such as a background check company/consumer reporting agency, to do so.

SOME BACKGROUND IN THE FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act ("FCRA") was enacted in 1970 to protect consumers generally. Although it references "credit" in the name, this is a misnomer because it applies much more broadly and to a variety of contexts. It is a remedial statute that courts are required to read in a liberal manner in order to effectuate the congressional intent underlying it. *Cortez v. Trans Union, LLC*, 617 F.3d 688 (3d Cir. 2010). Ambiguities in the text of the FCRA are "liberally construed in favor of the consumer." *Jones v. Federated Fin. Reserve Corp.*, 144 F.3d 961, 964 (6th Cir. 1998). To protect consumers and their privacy, the FCRA strictly regulates the flow of consumer information from consumer reporting agencies to recipients of information ("users") by, among other things, requiring informed consent for certain types of reports, mandating certain notices be given to consumers when adverse action is taken based in whole or in part on their reports, and ensuring that reported information is accurate, complete and timely.

What is a "Consumer Reporting Agency"?

The FCRA applies when a "consumer reporting agency" ("CRA") provides to a user information that constitutes a "consumer report" within the meaning of the Act. The FCRA defines a "consumer reporting agency" as:

> [A]ny 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 facility of interstate commerce for the purpose of preparing or furnishing consumer reports.

15 U.S.C. § 1681a(f).

What is a Consumer Report?

The FCRA defines a "consumer report" as:

> [A]ny 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 purpose authorized under section 604 [§ 1681b]*.

15 U.S.C. § 1681a(d)(1)(A)-(C). As the broad definition shows, a consumer report is much broader than credit reports and can encompass criminal history, sanctions list information, sex offender registry information, employment and education credentials, license verification, and many other things.

The definitions of consumer report and consumer reporting agency, however, are circular. Specifically, if the third-party that prepares the background information is not a "consumer reporting agency," then the information does not qualify as a "consumer report." And the opposite is true - if the information the third-party prepares is not a "consumer report," then the third-party is not a "consumer reporting agency." The answer to this typically turns on whether the background information is prepared for a "permissible purpose."

What is a "Permissible Purpose"?

As noted above, one enumerated permissible purpose is "employment purposes." 15 U.S.C. § 1681a(d)(1)(B). Subparagraph (C) then refers to purposes set out in Section 604 which include, among others an eligibility purpose, "[i]n accordance with the written instructions of the consumer to whom it relates" and to a person which the consumer reporting agency has reason to believe "otherwise has a legitimate business need for the information - (i) in connection with a business transaction that is initiated by the consumer …" 15 U.S.C. § 1681b(a)(3)(F)(i). Because section 603(d)(1)(C) (§ 1681a(d)(1)(C)) refers to any "purpose authorized under section 604" (often described as "permissible purposes" of consumer reports), some of which overlap with purposes enumerated in section 603, sections 603 and 604 must be construed together to determine what are "consumer reports" and "permissible purposes" under the two sections.

Simply put, anytime there is an eligibility purpose for one of the permissible purposes, employment, insurance or any of the other ones enumerated, the FCRA may apply. Although the law is somewhat uncertain as it relates to students being considered for program entry or placement in a clinical rotation, there are two possible ways in which these students arguably fall under the permissible purposes identified above: (a) employment purpose(s); and/or (b) in connection with a business transaction initiated by the consumer. In the specific context of these prospective students, it is important to note that if a prospective student is denied admission to or placement in a clinical program because of his or her, for example, criminal history obtained from a third-party, that student's ability to obtain future employment might be impacted. Thus, while prospective students or program applicants might not meet the common sense view of "employee," the practicalities of the situation might compel a regulator or court to bring these applicants under the "employment purposes" umbrella. And, even if it can be successfully argued that background information about student

applicants is not for "employment purposes," those same regulators and courts might then put the student applicants under the "business transactions" umbrella. Both permissible purposes are discussed below.

EMPLOYMENT PURPOSES

Section 604(a)(3)(B) (15 U.S.C. § 1681b(a)(3)(B)) lists "employment purposes" as a permissible purpose. Section 603(h) (15 U.S.C. § 1681a(h)) defines "employment purposes" to include "promotion, reassignment or retention," as well as to evaluate a job applicant. Thus, there is no doubt that a report provided by a consumer reporting agency that is used or is expected to be used or collected in whole or in part in connection with these purposes is a consumer report. Does the term, however, apply to clinical rotation program that students must complete in order to have a specific career?

While the answer is not perfectly clear, the Federal Trade Commission ("FTC"), which shares responsibility for enforcing the FCRA with the Consumer Financial Protection Bureau ("CFPB"), takes a very broad view of this permissible purpose. More specifically, the FTC takes the position that the FCRA applies to independent contractors and volunteers. In 2011, the FTC wrote:

> Because the term "employment purposes" is interpreted liberally to effectuate the broad remedial purpose of the FCRA, *it may apply to situations where an entity uses individuals who are not technically employees to perform duties*, [including] a title insurance company that obtains consumer reports on individuals with whom it frequently enters into contracts to sell its insurance, examine title, and close real property transactions…

***See* FTC "40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary Interpretations" ("Staff Report") at p. 32.**

Confusion stems from the fact that district courts in Iowa, Ohio, and Wisconsin have questioned the FTC's reasoning and published opinions to the contrary. These courts turned to the common-law definition of employees to hold that the FCRA requirements did not apply to non-employees. *See Smith v. Mutual of Omaha Insurance Company*, 2018 WL 6921119, *4 (S.D. Iowa 2018); *Johnson v. Sherwin-Williams Co.*, 152 F. Supp. 3d 1021, 1026-27 (N.D. Ohio 2015); *Lamson v. EMS Energy Marketing Service, Inc.*, 868 F. Supp. 2d 804, 816 (E.D. Wis. 2012).

On the other hand, in 1975, the Fourth Circuit held in *Hoke v. Retail Credit Corp.*, 521 F.2d 1079 (4th Cir. 1975), that the FCRA's employment provisions applied to the state Board of Medical Examiners' request for consumer reports on physicians applying for a state medical license. Notably, the *Hoke* decision was based on a common law definition of "employee" that has since been set aside by Supreme Court precedent. That said, while *Hoke* may be of limited value, more recent California decisions appear to remain persuaded by the FTC's position, and have expressly rejected the reasoning from *Lamson*, the first federal court decision to disagree with the FTC. For example, in *Prescott v. HireRight Solutions, Inc.*, the court found that the plain text of the FCRA did "not limit the pre-adverse action notice requirements to employers" and held that the provision applied to other entities. 2014 WL 12781292, *8 (C.D. Cal. 2014).

Importantly, as the issue relates to medical program and clinical rotation applicants, the court in *Dunford v. American DataBank, LLC*, 64 F. Supp. 3d 1378 (N.D. Cal. 2014), declined to expressly follow *Lamson*, holding that the applicability of the FCRA's employment provisions to contracted work remained an open question. *Dunford* involved consumer reports prepared about applicants for a nursing program at a local community college and used to evaluate admission into a clinical

internship. While on the one hand, the students were not paid, did not receive W-2 forms, purchased some of their own supplies, and were not licensed nurses, on the other hand, the internships spanned two years, they were covered by workers' compensation insurance and liability insurance, and by the end of the internship, they were performing virtually the same duties as the paid nurses. Based on this evidence, the court found a triable issue as to whether the FCRA's employment provisions applied to these non-employees.

In sum, while a few federal court decisions have held the FCRA may ***not*** apply to independent contractors, the FTC disagrees and it is possible the agency would disregard those decisions. If a court or the FTC concludes that student admission or program placement reports are prepared for employment purposes, then the more onerous provisions in the employment-purposed sections apply (as discussed below). This is a question that schools and hospitals should at least be aware of when evaluating their background screening programs.

BUSINESS TRANSACTION INITIATED BY A CONSUMER

Even if one were to successfully argue that the information reported to schools and healthcare institutions does not fall under the "employment purposes" permissible purpose, a separate argument can be made that the FCRA applies to clinical programs under the theory that they are used in connection with a business transaction initiated by the consumer (i.e., a student seeking entry into a clinical rotation program, participating in an internship/externship, acceptance into a clinical program with a school or healthcare institution, etc.). The FTC notes in its Staff Report a variety of examples, including tenant screening or a report about a consumer's bad check history used in connection with a transaction the consumer initiated. FTC Staff Report at pp. 47-48.

In previous commentary, the FTC interpreted the scope of § 1681b(a)(3)(E), the predecessor to § 1681b(a)(3)(F), to extend beyond the scope of the purposes enumerated in the other subsections of § 1681b(a)(3). *See* 16 C.F.R. Pt. 600, App. (Comment to Section 604)("Permissible purposes related to section 604(3)(E) are limited to transactions that consumers enter into primarily for personal, family or household purposes (excluding credit, insurance or employment, which are specifically covered by other subsections discussed above)."); *see also id.* (Comment to Section 604(3)(E) ("Relation to Other Subsections of Section 604(3)) ("The issue of whether credit, employment or insurance provides a permissible purpose is determined exclusively by reference to subsection (A), (B), or (C), respectively."); *id.* ("Legitimate Business Need") ("Under this subsection, a party has a permissible purpose to obtain a consumer report on a consumer for use in connection with some action the consumer takes from which he or she might expect to receive a benefit that is not more specifically covered by subsections (A), (B), or (C). For example, a consumer report may be obtained on a consumer who applies to rent an apartment, offers to pay for goods with a check, applies for a checking account or similar service, seeks to be included in a computer dating service, or who has sought and received over-payments of government benefits that he has refused to return.").

As mentioned above, whether and to what extent the FCRA applies to student reports should not be taken lightly and should be evaluated. Student and clinical rotation applicants can only be granted admission, an internship or externship or placement in a clinical program if they successfully complete certain contingencies, including a background check that often includes criminal history, sanctions and exclusions checks and other information. If a student cannot pass the screening, his or her eligibility for admission or the rotation is at least in question, which means the FTC or a court might possibly view the medical program or healthcare facility as having a "legitimate business need" for the information "in connection with a business transaction that is initiated by the consumer."

What is the Process for Users to Obtain and Use Consumer Reports?

The FCRA's employment provisions contain more procedural requirements than there are for other types of FCRA-regulated reports, including the "business transaction" permissible purpose described above. Indeed, for the latter, the user of the report should obtain the subject's consent and, if the user takes adverse action against someone because of information in their report (e.g., deny an internship or program application), it should provide the subject with an adverse action notice that advises of the decision and includes a variety of information mandated by the FCRA (described below).

The FCRA's primary requirements on employers may be divided into two categories: requirements that employers must follow (1) before they obtain a consumer report from a consumer reporting agency, and (2) if they take "adverse action" against an individual based in whole or in part on information contained in the consumer report.

Before an employer may procure a consumer report from a consumer reporting agency, it must make a "clear and conspicuous" written disclosure to the individual, in a document consisting "solely" of the disclosure, that a consumer report may be obtained. The applicant or employee must provide written consent before the employer can obtain the report. The employer also must certify to the consumer reporting agency that it has a "permissible purpose" for the report, and that it has complied and will comply with relevant FCRA provisions and state and federal equal opportunity law. If the employer intends to procure an "investigative consumer report" on an applicant or employee, the employer must also provide a separate disclosure and allow the applicant or employee to request information about the "nature and scope" of the investigation, to which the employer must respond in writing within five days from either the date of the request or when the report was obtained, whichever is later.

After the employer obtains the report, the employer must follow certain requirements if it intends to take "adverse action" against the applicant or employee based in whole or in part on the contents of the report. In the context of a consumer report used for employment purposes, an adverse action broadly includes "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee."

Before taking adverse action against the applicant or employee, the employer must provide a "pre-adverse action" notice to the individual, which must, at a minimum, include a copy of both the consumer report, the Consumer Financial Protection Bureau's (CFPB) Summary of Rights, and any additional notices required by state or local law (e.g., ban-the-box and state employment or fair credit reporting laws).

Once the employer is prepared to take the adverse action against the applicant or employee, it must then provide an adverse action notice to the individual, which must include, in addition to any state or local requirements:

- The name, address and telephone number of the consumer reporting agency that provided the report to the employer;
- A statement that the consumer reporting agency did not make the adverse decision and is not able to explain why the decision was made;
- A statement setting forth the applicant's or employee's right to obtain a free disclosure of his or her report from the consumer reporting agency if the applicant or employee makes a request for such a disclosure within 60 days; and
- A statement setting forth the applicant's or employee's right to dispute directly with the consumer reporting agency the accuracy or completeness of any information contained in the report that the consumer reporting agency provided to the employer.

Can Users Share Consumer Information with Others?

In the event that a user were to share background checks with third parties, those third parties could also be deemed "users" and obligated under the FCRA to meet all of the applicable requirements. Failure to do so would expose the third party to the liability addressed below. Similarly, the sharing entity (especially if combining with other information) could meet the definition set forth earlier of a "consumer reporting agency," causing a whole host of other regulatory requirements. Even when only a brief "summary" of overall information is shared with a third-party, a sufficient conveyance of information in connection with an employment purpose may trigger additional obligations under the FCRA.

What are the Remedies for a Failure to Comply with the FCRA?

The FCRA affords a private right of action against a user for "negligently" or "willfully" failing to comply with any of the FCRA's requirements. A civil action must be brought by the earlier of: (1) two years after the date of discovery by the plaintiff of the violation; or (2) five years after the date on which the violation that is the basis of the alleged liability occurred.

Under the FCRA, plaintiffs can seek damages for negligent non-compliance or willful noncompliance. To prove willfulness, plaintiffs must show reckless disregard for the law. The damages available for willful noncompliance are actual damages or statutory damages of not less than $100 and not more than $1,000, attorney's fees, and punitive damages. Most class actions under the FCRA allege willful violations so that statutory damages are at issue, which are generally easier to calculate than actual damages given that actual damages arguably involve a specific individualized inquiry into each potential class member's damage. The damages for negligent noncompliance are: actual damages and attorney's fees (neither punitive damages nor statutory damages available). Any person who knowingly and willfully obtains a consumer report under false pretenses also may face criminal prosecution. Given these enormous potential damages, schools and hospitals should evaluate their programs to understand their responsibilities under the law.

CONCLUSION

As discussed above, the FCRA raises a number of compliance issues for any entity that orders and makes decisions based on consumer reports. Notably, there also may be state and local issues to consider. That said, we recognize that schools and healthcare institutions have their own unique screening processes, programs, and methodologies, and thus, we recommend connecting with experienced counsel about possible obligations under applicable law, including the FCRA.