

Legal Alert

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QUESTION:

**WHY DID SCREENING JOB APPLICANTS COST
KMART \$3 MILLION?**

ANSWER:

**KMART OBTAINED CREDIT REPORTS ON JOB
APPLICANTS WITHOUT GETTING WRITTEN
PERMISSION FROM THE APPLICANTS.**

Should you check backgrounds before hiring?

Most employers obtain background information on prospective employees. Screening job applicants helps to protect the business and the public. Customers want to do business with safe and reliable people.

Employers must be careful in how they obtain and use background screening reports, however. If you refuse to hire criminals, the Equal Employment Opportunity Commission ("EEOC") may sanction you if your criminal background checks cause employment discrimination against protected minorities. Businesses must also comply with other government regulations in the hiring process.

What did Kmart do that was so bad?

Kmart "failed to comply with the disclosure and authorization requirements" of the Fair Credit Reporting Act. Kmart also "failed to comply with the pre-adverse action notification requirements...prior to taking adverse employment action." *Pitt v. Kmart Corp.*, No. 3:11-cv-697 (U.S. Dist. Ct., E. Dist. Va., 2013.) In other words, Kmart obtained credit reports on job applicants without written permission from the applicants in violation of 15 U.S.C. § 1681 b(b)(2). Kmart also apparently failed to give people copies of their credit reports and current copies of the "FCRA Summary of Rights" before deciding not to hire them.

One would think that Kmart caused a lot of harm to have to settle the case for \$3 million. In fact, no proof was presented that anyone was harmed by the wrongful conduct. There may have been as many as 64,500 claimants in the class action, however. Kmart wanted to avoid the burden and expense of the litigation!

So what does the Fair Credit Reporting Act require of would-be employers?

Employers may not secure consumer credit reports for employment purposes unless they clearly and conspicuously disclose in writing that credit reports “may be obtained for employment purposes.” Job applicants must authorize in writing that employers are permitted to secure the credit reports. 15 U.S.C. § 1681 b(b)(2).

“[B]efore taking any adverse action based in whole or in part on the reports,” the employer must provide the job applicant with a copy of the credit report and the most current version of the FCRA Summary of Rights prescribed by the Bureau of Consumer Financial Protection. 15 U.S.C. § 1681 b(b)(3).

Will the claimants get rich from the settlement with Kmart?

The parties getting paid are those job applicants who were sent notices required by 15 U.S.C. § 1681 b(b)(3) “on or after October 17, 2006 but on or before September 28, 2012....” In other words Sears and Kmart apparently sent the notices without the “most current version of the FCRA Summary of Rights.” The more than 27,000 claimants who were sent notices between October 17, 2006 and October 16, 2009 will each get a gross amount of about \$29.50 “with an expected net payment of \$18.00.” The approximately 37,152 people who were sent notices between October 17, 2009 and September 28, 2012 will each get a gross amount of \$59.00 “with an expected net payment of \$38.00.”

The reason for the smaller payments is a request by the claimants’ lawyers for as much as 30% of the \$3 million!

What should employers do about background checks?

Relying upon consumer credit reports for employment decisions seems like a bad idea. The reports usually contain too little information that is truly relevant to employment decisions. The cumbersome nature of all of the notifications required, including providing the credit report to the job-applicant, makes the credit report nearly obsolete for employment purposes.

Start with having applicants complete a carefully drafted employment application. Make sure that the employment application does not ask for information that would lead to discrimination against protected classes. Check the information provided for accuracy, but keep everything private and confidential. Be very careful to not violate any government regulations! You don’t want your company to be the next Kmart!

If you have questions about employment issues, please call me.

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