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Nationwide Shifts in Background Checks: New York's Credit Ban, Virginia's Sealed Records Law, and Federal FCRA Reform

SPEAKERS

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In this episode of *FCRA Focus*, hosts Kim Phan and Dave Gettings are joined by colleague Tim St. George to unpack major legislative developments impacting employment background screening. They discuss New York's new statewide ban on the use of consumer credit history in most hiring and employment decisions, Virginia's upcoming requirements for background screening businesses, and emerging federal proposals that could reshape FCRA liability, reseller obligations, and the reporting of criminal and credit information. The conversation highlights notable litigation trends, preemption and First Amendment issues, and practical steps for employers, CRAs, and resellers navigating rapidly evolving state and federal requirements.

Transcript

***FCRA Focus* — Nationwide Shifts in Background Checks: New York's Credit Ban, Virginia's Sealed Records Law, and Federal FCRA Reform**
Hosts: Kim Phan and Dave Gettings
Guest: Tim St. George
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Kim Phan (00:05):

Hello everyone. Welcome back to *FCRA Focus*, a podcast of the Troutman Pepper Locke law firm. I'm your host, Kim Phan, along with my co-host, Dave Gettings. We're joined today by a special guest, our partner Tim St. George, to discuss the latest developments in employment background checks, including but not limited to the latest out of New York. Tim is a nationally recognized expert on issues relating to the Fair Credit Reporting Act and employment background screening, as well as class action litigation. He currently teaches the basic and advanced FCRA certification courses for the Professional Background Screening Association, which is the leading trade association for background screening companies and employers conducting screening. Tim further serves as outside general counsel for several background screening companies. However, before we get into Tim and his expertise on what is going on in the world of background checks, let me remind you to visit and subscribe to our blogs, TroutmanFinancialServices.com and ConsumerFinancialServicesLawMonitor.com. And while you're at it, head on over to Troutman.com and add yourself to our consumer financial services email list that'll allow you to get invitations to our webinars, receive our alerts, and other advisories that we send out from time to time. But while we make lots of free content available to our listeners, if you cannot get enough FCRA, I would encourage you to explore our subscription-based tracker service, which provides information on federal and state regulatory

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and legislative developments, as well as summaries of FCRA case law on a weekly basis, and offers you the opportunity to join other subscribers to our monthly roundtable discussions. These tracker services can also cover other topics, including debt collection and privacy and data security. Now, jumping right back in, Tim, welcome.

Tim St. George (01:53):

Thank you. It's my pleasure to be here. I always enjoy coming on the FCRA Focus podcast and talking with the both of you.

Kim Phan (01:59):

It's our pleasure to have you. I understand that you recently posted to our CFS Law Monitor blog about a recent development in New York, an enactment of a statewide ban that has, I understand, pretty limited exceptions that prohibit employers from using consumer credit history in their hiring and employment decisions. Can you tell us more about this?

Tim St. George (02:22):

Yeah, I'd be happy to. So New York, whether it's New York State or New York City, retains its status as one of the vanguard states in terms of limiting the reporting of information. We've seen that in the criminal space, we've seen it in the tenant screening space, most recently in New York City with the 2025 adoption of the Fair Chance for Housing Act. So New York is always active in the space, and it's never a real surprise to see additional legislation coming out of New York State. And this is a statewide prohibition that went into effect just under a month ago on April 18, 2024. So the law is now live, and it prohibits, with limited exceptions, employers from using a consumer's credit history in hiring and making any other employment-related decisions. And this provision of law amended the state's general business law to make it an unlawful discriminatory practice for employers to request or rely on an applicant or employee's credit information when making employment decisions. So the default rule in New York is that when you are hiring, those hiring decisions need to be made independent of a consumer's credit history. And perhaps unsurprisingly, consumer credit history is very broadly defined. It includes creditworthiness, credit standing, capacity, or payment history. So it would cover traditional consumer credit reports and identification of trade lines. It would cover credit scores. It also covers information obtained directly from the individuals, like their number of credit accounts, late payments, credit limits. It would also include going on PACER and finding things like bankruptcies, judgments, and civil liens.

Tim St. George (04:05):

So the law is very broad in its scope. As I mentioned, it does have certain limited exceptions. Employers can use consumer credit history where state or federal law or a regulated organization largely within the securities industry requires it. So there are certain types of jobs, for instance, working with national banking associations or working with securities, where consumer credit checks are mandatory in order to hold those positions. There also are exceptions for individual peace and police officers and certain law enforcement functions that have an investigative focus and certain positions that are appointed by the state. So unless you're working in the financial services or securities space or law enforcement, so the vast majority of employment positions, this law is going to affect your ability to use consumer credit information. And as the employment screening provider, this should be

top of mind for you as well in terms of the type of information that you deliver to your users. Should you be delivering this type of information that they can't legally consider in the first place? Because the law is so brand new, there is no current information on enforcement priorities. There's no judicial interpretations of these provisions, which are quite broad. There haven't been any First Amendment challenges litigated to this yet. The law is very, very fresh, but it's certainly a very important compliance development for anyone doing employment screening in the State of New York.

Dave Gettings (05:39):

Tim, a lot of times in these states, when we have state laws passed, there's an exception if the employer can show that the credit check or the criminal record is substantially related to the job functions. Is there any sort of catch-all exception here? I'm assuming no, but wanted to confirm.

Tim St. George (05:52):

There is not. I mean, I think the New York legislature has largely defined the exceptions to, in their view, encompass the scope of instances where credit history could be reasonably related to employment. So there is no further catch-all safe harbor for when credit history would be reasonably related to employment outside of the narrow exceptions that are provided. I mean, this is essentially the New York State's legislature policy judgment that credit information is generally irrelevant to employment decisions outside of the narrow accepted industries.

Kim Phan (06:31):

Well, that seems like a [chuckle] judgment, of course, by them. But you mentioned this is still so new that there haven't been any sort of legal challenges to this new prohibition or ban. Would you anticipate that this would be the type of thing we might see a legal challenge, maybe from a trade association or other?

Tim St. George (06:48):

It certainly is a candidate. I mean, I could foresee two types of challenges here. The first would be just sort of a traditional First Amendment challenge. This law is so broad in its scope in terms of what it prohibits and to whom the information cannot be reported, that it certainly gags companies from reporting all manner of information, including a lot of information that would be in the public domain. Like again, think civil judgments, liens, bankruptcies from being reported to employers. And especially for information that's in the public domain, it's generally very difficult to restrict the dissemination of that information in any way. So I could certainly see a viable First Amendment challenge. I could also see there being FCRA preemption-related challenges to this. Obviously, the FCRA has its own specific reporting scheme under Section 1681c in terms of what can be reported and considered and for how long. And that generally includes information that's adverse on the credit side for seven years, bankruptcies up to 10 years. This law obviously is more restrictive, which courts typically are finding to be allowed, but there are a number of preemption arguments that I think could be available here. The Second Circuit has not issued any significant FCRA preemption decisions that I'm aware of, so it would be fertile ground to challenge within that circuit. So I could see some challenges being mounted because this is such a dramatic restriction on what can be reported within an entire category of information to almost every employer.

Kim Phan (08:24):

Well, it definitely sounds like New York has chosen a very paternalistic approach here, replacing the judgment of employers with their own. Is New York the only state taking this approach? Is there other activity amongst other states that you're seeing in this area?

Tim St. George (08:39):

In the credit space, New York is out in front. This is the most sweeping legislation that we've seen in the credit space to date. But there are certainly legislative developments occurring in other states in the screening space. And I did want to highlight one of those because it's close to home. I practice in Richmond, Virginia. Dave's located in Virginia, Kim's located in Richmond, just down the hall from me. So we wanted to pay special mention to some legislation that just got passed in Virginia. So this legislation is going to take effect on July 1st of 2026. So you have six weeks to ramp up your compliance from today's recording date. Not too much time to the extent you're not already aware of this. And this tackles a much narrower issue. And this deals with criminal screening and it deals with the reporting of sealed or expunged records. So if you are operating a "business screening service" in Virginia, so think essentially any background check company, and you are transmitting criminal or traffic records, you must register with the Virginia State Police in order to start receiving notifications of sealed records. And once you are registered and once those sealed or expunged records are transmitted to you by the Virginia State Police, then you have to promptly delete those records from your systems. And like New York, the definitions here are very broad. And there is a new private cause of action as well. A business screening service is defined as any entity that gathers or disseminates Virginia criminal or traffic history records.

Tim St. George (10:21):

So it's arguably even broader than the definition under the federal FCRA. I think assembly and evaluation. And you have to do this registration and you have to comply. And if you don't comply, then consumers have a private right of action where they can seek a $1,000 statutory penalty along with actual damages. And there's actually this kind of really interesting additional language in the bill about how shortly after receiving any demand or lawsuit, the business being sued or being demanded can seek to cure the violation and essentially do a very early settlement offer, which can then cut off attorney's fees moving forward. So there's some interesting things to think about and review to the extent you find yourself on the wrong end of a consumer complaint or lawsuit in this regard. But again, this is part of a broader legislative effort to limit the impact of criminal record reporting, whether it's in a tenant screening space or whether it's in the housing space. I mean, this bill is itself agnostic in terms of the specific industry that is being targeted. It's screening generally, regardless of the context in which the screening is occurring.

Tim St. George (11:32):

And so we've gotten some questions, how do I register with the Virginia State Police? What is this going to look like in practice? And the shorter answer is, again, nobody really knows just yet because the Virginia State Police has not started disseminating this information. It's unclear at this time in what format the records will be delivered, the electronic processes in which this whole apparatus will be accomplished. But it is something that needs to be taken seriously. Again, I'll also mention, just from a local politics perspective, Virginia is also on the brink of

passing a class action mechanism. Virginia currently is one of two states, it's Virginia and Mississippi nationwide, that don't currently allow for class actions. But we have a Democratic-controlled legislature and a Democratic governor. A class action bill has been passed. It has been sent to the governor for signature. She has made some edits for the legislature to consider. But we are on the brink of the passage of that law. So again, the stakes are being raised in Virginia on a couple of levels.

Kim Phan (12:35):

I hear private right of action and statutory damages and I shudder. Dave, do you have any thoughts? Are you seeing litigation in this area that… I'm not a litigator, so hearing from you on what you're seeing with regard to these state laws and what litigation has arisen would be, I think, very interesting to our audience.

Dave Gettings (12:55):

Yeah, not a ton, well, especially in New York and Virginia yet, given how new they are. But we are continuing to see a lot of FCRA litigation regarding sealed and expunged records and the notion that even if you're reporting a record accurately, if it's been sealed, then you're not allowed to report it under 1681e(b). And I think there's some real weaknesses in that argument. I think the reporting continues to be accurate, but we're definitely seeing those cases on a federal level, and I expect them to pick up on the state level, given… Especially, for example, the new Virginia law.

Kim Phan (13:29):

Speaking of the federal level, we've talked a lot today about what's going on in the states. Is there activity in this area on the federal government, maybe something that might be more clearly preemptive of some of these state laws?

Tim St. George (13:41):

Yes, Kim, there is certainly activity. There's nothing I'm aware of that has yet reached the point of passage. With our dysfunctional federal legislature at the moment, it's tough to get anything through.

Dave Gettings (13:55):

Which I will point out, I think was the framers' intention and design, that it'll be dysfunctional, so. [chuckle]

Tim St. George (14:00):

We may have reached levels that exceeded the framers' intention and design, but fair enough. Legislation is not easy to pass these days, but there are a number of interesting bills that are percolating in the House that if they did gain traction, especially looking towards the midterms, would be pretty interesting in the screening space. So we've got a bill called the Housing First Act, which would prohibit reporting arrest and non-conviction records in tenant screening reports. Again, this would be at the federal level, so preemption arguments would really not be available. And that, of course, if it happened, would be a very dramatic reduction in criminal reporting. For

instance, non-conviction records could include pending criminal proceedings, and it's always difficult for me to articulate exactly why someone would think that there's not an interest in a pending proceeding. Arrest records, of course, have been a little bit more heavily scrutinized because they can even be pre-charge. But all this information, of course, currently is fully reportable under the federal FCRA for up to seven years. So that would be a very dramatic reduction in the criminal screening space in terms of what could be reported and what could be considered.

Tim St. George (15:14):

There's also some more narrow legislation. This is similar to some of the types of COVID-related reporting restrictions that we saw during the pandemic, but there's some legislation working its way through that would prohibit reporting adverse information on federal employees who had credit negatively impacted during the government shutdowns, which continue to happen with greater frequency, whether it's the government as a whole or whether it's DHS. Obviously, those employees had some negative financial consequences during the periods of the shutdown for reasons that were not directly attributable to them. They were just sort of caught in the crosshairs. I could see the latter bill gaining some traction because it does have more bipartisan appeal. And while both of those bills are generally Democratic-sponsored and thus would have a very tough road ahead of them in the current Congress, I mean, if the midterms flip the House or perhaps even the Senate, you might see some more activity in that regard. There's a couple other bills that I wanted to mention that are specific to the FCRA and that, again, would be very impactful if they passed. They are H.R. 8141, which is called the Fair Credit Reporting Reseller Accuracy Act, and H.R. 5775, which is the FCRA Liability Harmonization Act. The Reseller Act would attempt to put an end to reseller litigation under Section 1681e(b) in the circumstances where resellers are just being sued for accurately reporting the information they got from another CRA. So think of instances where an employment screener or a tenant screener resells consumer credit information that was received from one of the national credit reporting agencies, and the NCRA and the employment screening or tenant screening company are both sued in tandem.

Tim St. George (17:05):

There's an argument that Dave and I have made over and over again that this is unfair. The reseller has maintained reasonable procedures by working with a reputable vendor. But this would specifically amend Section 1681e(b) to bring it into conformance with some of the other reseller exemptions that are expressed in the FCRA, like the dispute-related exemption under 1681i, to say a reseller acts reasonably as a matter of law when it accurately reports information obtained from another consumer reporting agency. So that would be a very welcome development for resellers generally, regardless of the specific screening space.

Dave Gettings (17:44):

Yeah, and Tim, I'll just comment on that. I've got a little bit of background knowledge on that bill and people pushing for it. And so yeah, I agree with you. I think it would be a huge benefit for resellers because it explicitly limits liability when you're reporting information from the originating CRAs, just as it should be. And I think right now that bill was referred to committee in the House maybe around end of March. But the one aspect that makes me somewhat more optimistic potentially, even though there's a lot of dysfunction, is it's got multiple sponsors, including one Democrat and two Republicans. So maybe it's possible with both parties sponsoring the bill, it's got

a greater chance of success. But it would be a huge deal for resellers and it's really how the law should be.

Tim St. George (18:27):

Yeah, I agree. It does have bipartisan sponsorship, which is unique in this day and age. It was also the subject of a congressional hearing. It happened back in April, where both sides of the aisle and both sides of the V for purposes of litigation were represented. So it has been the subject of some discussion, but so far it hasn't advanced, but it's one to keep an eye on. The other one that I mentioned, the FCRA Liability Harmonization Act, this would target the remedies that are allowed under the FCRA. So as Dave and Kim and everyone working in this space knows, the FCRA has no cap on damages. So there's no cap on punitives, there's no cap on actual damages, there's no cap on statutory damages. Whether that be a cap in a specific monetary figure or whether it be limited to a percentage of a defendant's net worth, there are no caps except to the extent that there are constitutional limits on the amount of damages that can be awarded. And this Liability Harmonization Act would amend the civil liability provisions to cap statutory damages in class actions, eliminate punitive damages, and eliminate attorneys' fees. And the reason why it's called the Harmonization Act is it would attempt to bring the FCRA's damages regime into conformance with a number of other federal consumer protection laws like EFTA and the FDCPA. So it's not like an unprecedented move here to do this. I mean, it would be a highly significant outcome if it passed, but there is certainly precedent at the federal level for having a damages scheme limited in the ways that are advanced by this bill. So this bill would be very significant. I expect that it'll meet heavy opposition from the plaintiffs' bar as a whole and consumer advocates because, again, it would be a very significant revision of the FCRA and really limit the remedies, and accordingly, it would practically limit the litigation that's filed under the statute. So, like the other bill, remains to be seen what will happen of this. This was also the subject of the congressional hearing that I mentioned. It hasn't progressed much farther at this point, but there's a chance, and we'll see what happens with this bill, too. So that's what I see interesting happening at the federal level. No actual legislation yet, but a lot of interesting things that are percolating and we'll keep an eye on.

Kim Phan (20:58):

Well, we'll all keep our fingers crossed. As our time together on the podcast winds down, Tim, Dave, any last thoughts on this topic that you want to make sure our audience hears?

Tim St. George (21:07):

My only comment would be that while podcasts are great, there's no substitute for the type of legislative monitoring that just is necessary in this day and age. These laws are significant. They pose significant risk, and it's a patchwork. I mean, you have legislation at the city, state, and federal level, which can really create a lot of compliance headaches that really do need to be the subject of considered thought because the penalties are substantial, particularly in view of class action mechanisms. So make sure that you've got your ear to the ground on these things. Check in with your attorneys, have legislative trackers, make sure compliance is paying attention because this is just par for the course these days. With less and less happening at the federal level, more and more is happening at the state level, and that's just a lot more difficult to keep track of.

Dave Gettings (22:05):

Yeah, and on that point, Tim, I would just focus also on implementation dates because some of these laws have very quick implementation dates, so don't think it's gonna take a long time. Other regulations at the federal level, for example, we've seen have had very delayed implementations, even pausing implementation. So when looking at these laws, it's always good to pay close attention to the implementation date or the effective date.

Kim Phan (22:29):

Thank you, Tim, for being on with us. Dave and I are privileged to be able to work with and bring onto the podcast experts like you. And thanks to our audience for tuning in to today's podcast. If you enjoyed today's episode, please let us know by leaving a review on your podcast platform of choice. And of course, stay tuned for our next episode of this *FCRA Focus* podcast. Thank you all for listening.

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