BRYAN CAVE
A Broader Perspective
Bulletin

Data Privacy & Security Team

To: Our Clients and Friends June 14, 2012

FTC Cracks Down On The Collection Of Social Media Data For Employment Decisions

Many employers wonder whether they should use job applicants' public profiles on social-media sites, such as Facebook, to gain insight into their character and suitability for employment. Indeed a survey released this year indicates that in some industries, almost 40% of employers reviewed job candidates' profiles on social media sites before making employment decisions.

As the number of social media sites has increased some firms have made the process of checking a candidate's on-line reputation across multiple sites easier by compiling data across social media platforms into a single report. Ordering a candidates social media history is, in many companies, becoming as routine as ordering a credit report or a background check.

Most employers do not realize, however, that the Federal Trade Commission ("FTC") has taken the position that social media reports share something else with credit reports – they are covered under the privacy protections of the Fair Credit Reporting Act ("FCRA").

Earlier this week the FTC emphasized its willingness to proceed against companies that create, or use, social media reports for employment by filing a lawsuit in the Central District of California against Spokeo, a company which marketed social media reports to employers to use as "a factor in deciding whether to interview a job candidate or whether to hire a job candidate after a job interview." The FTC alleged that because the reports related to consumers' "character, general reputation, personal characteristics, or mode of living" and were used as a factor "in determining the consumer's eligibility for employment" they constituted a "consumer report" under the FCRA.

Requirements for Companies Providing Social Media Reports

According to the complaint, Spokeo failed to follow the FCRA's requirement that furnishers of consumer reports verify the identity of those companies which request reports, take steps to make sure that such companies intend to use the reports for a purpose permitted under the statute and institute procedures to verify the accuracy of the reports which it created. The FTC also alleged that Spokeo

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failed to inform its clients (i.e. Human Resource managers who purchased the reports) of their obligations under the FCRA. Spokeo has agreed to settle the lawsuit by entering a consent order, which, if approved, would settle the dispute by requiring Spokeo to pay a $800,000 civil penalty and to remain under Court supervision for the next 20 years.

Requirements for Employers Who Use Social Media Reports

Although the complaint focused on Spokeo's obligations as a company that compiles social media reports for employers, it suggests that the FTC believes that those companies which purchased the reports from Spokeo may also have violated the FCRA. As an employer's failure to comply with the FCRA can lead to private litigation, punitive damages and regulatory investigations, companies that use social media reports when making hiring decisions should double-check that they are in full compliance with the FCRA. Among other things, employers should:

- Obtain written authorization from job applicants before ordering a social media report,
- Before relying upon a social media report to take an adverse action, give the applicant a pre-adverse action disclosure that complies with the substantive requirements set forth in the FCRA, and
- After taking an adverse action, give the applicant an adverse action notice that complies with the requirements set forth in the FCRA.

For further information on this topic, please contact David Zetoony at 202-508-6030 or any member of the Bryan Cave Data Privacy & Security Team.

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