

Illinois is now the eleventh state in the country to legalize recreational use of cannabis and related products. The Cannabis Regulation and Tax Act (P.A. 101-0027) (“the Act”) was passed by the Illinois legislature this spring and signed into law by Gov. Pritzker in June.¹ The Act substantively amends numerous provisions of Illinois law and changes many dimensions of the employment relationship.² This article examines how the Act’s expanded criminal record expungement provisions³ interplay with the federal Fair Credit Reporting Act (“FCRA”),⁴ which regulates those who *prepare* and those who *use* criminal background checks for employment purposes.

Up in Smoke? Expunged Cannabis-Related Criminal Records May Continue to Haunt Job Applicants

By Steven J. Uhrich, Esq.

The FCRA’s Protections for Prospective and Current Employees

The FCRA regulates the activities of consumer reporting agencies (“CRAs”), a category that includes companies that provide employment background checks (as well as those that provide traditional credit reports). The FCRA requires that CRAs “adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance, and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information.”⁵ This broad purpose is summed up in the general requirement that CRAs “follow reasonable procedures to assure maximum possible accuracy of information”⁶ included in “consumer reports.” Criminal background checks for employment fall within the ambit of the FCRA’s definition of “consumer report,” which includes information on a “consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.”⁷

1. The relevant amended statutory provisions are within 20 ILCS 2630/5.2.

2. See *The Illinois Cannabis Regulation and Tax Act: The Impact on Employers* at pp. 12-17.

3. See *The Illinois Cannabis Regulation and Tax Act’s Expungement Provisions* at pp. 12-17.

4. 15 U.S.C. §§ 1681-1681x.

5. 15 U.S.C. § 1681(b).

6. 15 U.S.C. § 1681e(b).

7. 15 U.S.C. § 1681a(d)(1).

The FCRA contains provisions designed to protect the rights of job applicants when employers obtain background checks about them.⁸ Those obligations go beyond the FCRA's baseline "reasonable procedures" requirement noted above. Indeed, when public records information likely to have an adverse effect on one's ability to obtain employment (e.g., a criminal record) is disclosed to a prospective employer, both the report's preparer (the CRA) and its user (the would-be employer) have specific duties because such information is likely to have a significant effect on employment decisions. A job applicant may be denied a job or fired as a result of an arrest record if the employer does not realize that the arrest never led to a conviction, that the arrest was due to a case of mistaken identity, that the arrest occurred when a personal foe filed a baseless criminal complaint, or, most relevant here, where the criminal record was expunged.⁹

Thus, when it comes to background checks that are obtained for employment purposes, the FCRA contains heightened requirements and additional specific procedures that the prospective employer and background check company must follow. When reporting potentially adverse public record information for employment purposes, the FCRA requires that the background check company (CRA) must do one of two things.¹⁰ First, a CRA may, at the same time that it provides the potentially adverse public record information to the would-be employer, send the consumer a notice that the CRA is reporting the public record information and that identifies (including name and address) the report's recipient.¹¹ Alternatively, the CRA may maintain "strict procedures" designed to ensure that potentially adverse public record information is "complete and up to date."¹² The statute provides that, "[f]or arrests,

indictments, convictions, suits, tax liens, and outstanding judgments, 'up to date' requires that the CRA reports the current status of the public item."¹³ That is, the "status of the item *at the time of the report*["¹⁴

The "user" of the consumer report (i.e., the would-be employer) is also subject to additional requirements when obtaining information used for employment purposes. First, the FCRA requires that employers who utilize a background check in connection with employment must give notice to the consumer (i.e., the employee/applicant) that it may use a consumer report for such purposes and obtain the applicant's written authorization to do so.¹⁵ The disclosure must be given to the consumer before the report is obtained, must be a document that consists solely of the disclosure, and must be clear and conspicuous.¹⁶ Courts have agreed with the FTC Staff Summary that the notice should not include any extraneous information.¹⁷ The employer must also receive written authorization from the consumer to obtain a background check.¹⁸

Second, the FCRA requires two distinct notices to be sent to the job candidate – at different times – if the contents of the background report prompt the employer to take adverse action against the job applicant. The first ("pre-adverse action") notice must be given prior to the employer taking any adverse action such as rejecting a job applicant or firing an employee due to information in a background check.¹⁹ The employer must send the consumer a copy of the report containing the adverse information along with this pre-adverse action notice.²⁰ The purpose of this notice is to give the consumer a chance to address any inaccuracies in their background check or provide an explanation regarding accurate information.²¹

8. The Illinois Human Rights Act and Criminal Identification Act impose separate and additional restrictions on employers and prospective employers when it comes to the use of criminal history records. See 775 ILCS 5/2-103; 20 ILCS 2630/12(a).

9. See *Roe v. Intellicorp Records, Inc.*, No. 12-cv-02567-YGR, 2012 WL 3727323, at *1 (N.D. Cal. Aug. 27, 2012) (CRA's inclusion of expunged record resulted in plaintiff being denied employment).

10. See 15 U.S.C. § 1681k(a).

11. 15 U.S.C. § 1681k(a)(1).

12. 15 U.S.C. § 1681k(a)(2).

13. See Federal Trade Commission, *40 Years of Experience with the Fair Credit Reporting Act: An FTC Staff Report with Summary of Interpretations* (the "FTC Staff Summary") § 613 item 4A available at ftc.gov.

14. 15 U.S.C. § 1681k(a)(2) (emphasis added).

15. See 15 U.S.C. § 1681b(b)(2).

16. *Id.*

17. See FTC Staff Summary § 604(b)(2) item 3B ("the notice may not include extraneous or contradictory information").

18. 15 U.S.C. § 1681b(b)(2)(A)(ii).

19. 15 U.S.C. § 1681b(b)(3)(A).

20. 15 U.S.C. § 1681b(b)(3)(A)(i).

21. *Robertson v. Allied Solutions, LLC*, 902 F.3d 690, 699 (7th Cir. 2018) (holding that job applicant denied copy of background report had Article III standing and holding that providing job applicants "the chance to review [a background report obtained about them] and present [their] side of the story . . . is the very reason why the FCRA obligates employers to produce a copy of the report before taking adverse action.")

About the Author



Steven J. Uhrich is the Illinois co-chair of the National Association of Consumer Advocates and principal of Uhrich Law, P.C., a consumer rights law firm. Steven is a former Equal Justice Works fellow who defended homeowners from foreclosure in the South Chicago neighborhood prior to moving to private practice.

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The second (“post-adverse” action) notice must be sent to the consumer within three days of an employer’s taking any adverse action.²² This notice informs the consumer, albeit a bit redundantly, that they have the right to obtain a copy of the background check and of their rights under the FCRA.

Expunged Records on Background Checks Are Actionable under the FCRA

According to the Illinois Sentencing Policy Advisory Council, around 770,000 records will qualify for expungement under the Act.²³ Illinois law defines “expunge” as “to physically destroy the records or return them to the petitioner and to obliterate the petitioner’s name from any official index or public record, or both.”²⁴ One would think that after expungement, there should be no chance that a record could rear its ugly head when an individual applies for a job. Unfortunately, that is not the case: criminal background checks often contain incorrect, sealed, or expunged information.²⁵ This includes criminal records that have been sealed or expunged, despite being barred implicitly by the FCRA.

The FCRA imposes duties on background check companies and employers meant to protect the rights of an individual dealing with stale or incorrect information reported about them. And while the FCRA does not specifically forbid the reporting of sealed or expunged records, it does require that background check companies follow reasonable procedures to ensure the maximum possible accuracy of whatever information they are reporting.²⁶ It follows that if a record is expunged, any reporting of it is stale and no longer accurately reflects the current public record for that individual.²⁷ Employers and background check companies who fail to abide by these FCRA requirements may be liable for statutory, actual, and punitive damages as well as attorney’s fees and costs.²⁸

Thus, in the coming years, anyone who encounters an Illinois cannabis-related criminal record should think twice lest they make any half-baked decisions.

22. 15 U.S.C. § 1681b(b)(3)(A)(ii); see also 15 U.S.C. 1681m(a).

23. Bill Hutchinson, ABC News, *Illinois poised to enact historic recreational marijuana bill that could clear convictions for 770,000*, June 3, 2019, available at <https://abcnews.go.com/US/illinois-poised-enact-historic-recreational-marijuana-bill-clear/story?id=63449800>.

24. 20 ILCS 2630/5.2(a)(1)(E).

25. Persis Yu, National Consumer Law Center, *Broken Records: How Errors by Criminal Background Checking Companies Harm Workers and Businesses* (2012), available at www.nclc.org.

26. 15 U.S.C. § 1681e(b).

27. See, e.g., *McNamara v. HireRight Sols., Inc.*, No. 13-cv-5215, 2014 WL 321790, at *5 (N.D. Ill. Jan. 29, 2014) (CRA may report criminal dispositions “until, of course, they are sealed or expunged – without fear of liability under the FCRA.”).

28. 15 U.S.C. §§ 1681n (regarding willful violations), 1681o (regarding negligent violations).