

# The Legal Intelligencer

THE OLDEST LAW JOURNAL IN THE UNITED STATES 1843-2015

PHILADELPHIA, WEDNESDAY, OCTOBER 14, 2015

VOL 252 • NO. 63

An ALM Publication

## EMPLOYMENT LAW

# Reliance on Third-Party Background Check Consistent With FCRA

BY SID STEINBERG

*Special to the Legal*

While most companies check an applicant's background before hiring, cases under the Fair Credit Reporting Act (FCRA), which apply when a third party conducts the check for the prospective employer, are rare. *Ramos v. Genesis Healthcare LLC*, No. 15-52 (E.D. Pa. Oct. 1, 2015) (Kearney, J.), provides guidance to employers as to how reports under the FCRA can be used.

### THIRD PARTY CONDUCTS BACKGROUND CHECK

Doris Ramos, an occupational therapist, applied to Genesis Healthcare LLC for employment in July 2014, according to the opinion. Genesis provides skilled nursing care and rehabilitation therapy to patients. Genesis requires that applicants pass a background screening before they are hired. Genesis contracts with General Information Services (GIS) to conduct this screening, which includes a criminal background check.

When Ramos applied to Genesis, she signed a "consumer authorization"



**SID STEINBERG** is a principal and chair of Post & Schell's employment and employee relations and labor practice groups. Steinberg's practice involves virtually all aspects of employee relations, including litigation experience defending employers against employment discrimination in federal and state courts. He also represents employers before federal, state and local administrative agencies, and regularly advises employers in matters including employee discipline, labor relations, and the creation or revision of employee handbooks. He can be reached at [ssteinberg@postschell.com](mailto:ssteinberg@postschell.com).

permitting, most importantly, GIS to request information about her and to share that information with Genesis, the opinion said. More specifically, the authorization permitted GIS to investigate her "education, work history ... criminal record ... credit history and any other information with public or private information sources." This type of authorization is required when a third party is retained to conduct a "consumer report" as defined by the FCRA.

### DISCREPANCIES IN BACKGROUND REPORT

Following Ramos' initial interview, Genesis' staffing manager, Nikita Shepard, made an offer of employment conditioned on "receipt of a satisfactory background record, consistent with state and federal laws," the opinion said. A few days later, GIS provided Genesis with a "pre-screen report" on Ramos revealing, in relevant part, that she had prior convictions. Genesis instructed GIS to proceed with the background screen so that it could "review all information prior to making a decision," the opinion said. GIS completed its screening, which advised Genesis that Ramos had three prior criminal convictions, including one felony conviction that involved injury to a child, the opinion said.

### OFFER WITHDRAWN

Genesis reviewed the report and, after documented consideration, graded Ramos as "does not meet" its qualification standards. Genesis communicated this to GIS, which, in accordance with the FCRA, sent

Ramos a letter advising her that she had “the right to dispute the accuracy or completeness of any information contained in the report by contacting GIS directly.” Genesis’ Shepard contacted Ramos directly to discuss the report, during which conversation Ramos explained that she had been charged with a felony but had pleaded guilty to a lesser offense. Although Ramos followed up with a further explanation, Genesis, again, considered her submission but confirmed that it would not offer her a position, the opinion said. GIS also told Ramos of Genesis’ decision not to offer her employment based upon information contained in the “consumer report.”

Ramos brought suit against both Genesis and GIS. She alleged that Genesis had violated the FCRA by inaccurately reporting information in her background report and denying her a reasonable opportunity to contest (what she claimed to be) inaccurate information in the report. She alleged that GIS had misreported her criminal conviction and, as a result, Genesis had revoked its offer of employment.

## STANDING AFFIRMED

Initially, the court found that Ramos had standing to bring her claims under the FCRA against Genesis, despite not alleging any actual injury. It noted, however, that this term, the U.S. Supreme Court will review whether “Congress may confer Article III standing [based upon a bare violation of a federal statute]” where the plaintiff “suffers no concrete harm,” in *Spokeo v. Robins*, 742 F.3d 409 (9th Cir. 2014), cert. granted, 135 S. Ct. 1892 (2015).

The court next rejected Genesis’ argument that the background investigation was not a “consumer report” under the FCRA, but rather fell into

---

*Ramos alleged that Genesis had violated the FCRA by denying her a reasonable opportunity to contest (what she claimed to be) inaccurate information in the report.*

---

one of the act’s exemptions because the investigation was obtained to comply with Pennsylvania state law (which prohibits certain health care providers from hiring persons convicted of a felony involving injury to a child). The court found that the exclusion is limited by the term “investigation” and that “background checks are not ‘investigations’ but are required, by [the company’s] written policy, as an employment condition.” Further, the court noted that the Federal Trade Commission has recently issued guidance that background checks are covered by the FCRA.

## GENESIS DID NOT ‘JUMP THE GUN’

Finally, the court found that Genesis had complied with the FCRA’s requirement that, “before taking an adverse action” based upon a consumer report (like a background check performed by a third party), an employer must provide the applicant with a copy of the report and a notice of rights.

The “rights” include “an opportunity to contest inaccurate information and to avoid an adverse decision ... based on erroneous information.”

Ramos claimed that it classified her as “does not meet” (the company’s qualifications) before it sent her the report and its notice of intent to take an adverse action—thereby depriving her of a “real opportunity” to contest the report. The court rejected this argument, finding that “a preliminary decision to take an adverse action does not trigger the FCRA’s notice obligation.” That is, “the formation of intent” is not the adverse action itself. The “action” requiring notice “does not occur until the decision is communicated or takes effect.” In this case, Genesis was able to show that Ramos’ explanation, both oral and written, was considered and that the final decision, i.e., the “adverse action,” was not implemented until after it heard Ramos’ explanation. The court found it critical that Genesis was able to provide evidence that its initial classification was preliminary and that the final decision was made days later.

The case highlights a prospective employer’s obligation to comply with the FCRA when it outsources its application background checks. It also emphasizes the importance of documenting how hiring decisions are made—particularly when the results of a background check are dispositive. •