

## Insights

### Watch Out: Consumer Financial Protection Bureau Keeping an Eye on Workplace Surveillance Technology

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The Consumer Financial Protection Bureau (“CFPB”) recently **responded** to a high volume of complaints regarding automated workplace surveillance technology. In its response, the CFPB indicated an intent to apply the protections of the Fair Credit Reporting Act (“FCRA”) to employee information gathered by workplace surveillance.

According to the CFPB, companies that use workplace surveillance tools when making hiring and firing decisions risk violating the FCRA because the FCRA applies to “both information used for the purpose of evaluating a consumer for employment initially and also to information used for ongoing employment purposes.” The information gathered and potentially shared with third parties may have profound implications on decisions unrelated to employment, such as home and car buying. As a result, the CFPB is embarking on an inquiry into the data broker industry—companies that collect, aggregate, sell, resell, license, or share personal information with others—and issues raised by new technological developments.

#### A. What Constitutes a Consumer Report

A consumer report is broadly defined in the FCRA as “any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for ... employment purposes.” Further, “employment purposes” is defined as “a report used for the purposes of evaluating a consumer for employment, promotion, reassignment or retention as an employee.”

#### B. FCRA Protections for Workers

The CFPB’s response states that workers themselves, in addition to government agencies, can enforce the FCRA in appropriate circumstances. The FCRA provides employees with the right to:

- Access all information in any form which would be relayed to a prospective employer, insurer, or creditor in making a judgment as to the worthiness of the individual’s application;

- Know what is in their consumer reports; and
- Dispute incomplete or inaccurate information.

Additional employee protections include requiring consumer reporting agencies to correct or delete inaccurate, incomplete, or unverifiable information and requiring companies to notify consumers before taking any adverse employment action based on the report.

### **C. Staying Compliant with the FCRA**

The CFPB intends to use the expansive language of the FCRA to hold businesses accountable for their use of employee surveillance data. In the age of evolving technology, "agencies that administer and enforce consumer protection statutes must ensure that the law is applied effectively to those changes." According to the CFPB, companies offering workplace surveillance technologies share a fundamental characteristic with consumer agencies: they collect and sell personal data. While there are certainly counterarguments to the CFPB's philosophy, companies using such technologies should measure their risk through this lens, in addition to other risk management considerations.

Our attorneys will continue to monitor guidance from the CFPB related to worker surveillance technologies under the FCRA. If you have questions about the CFPB's comment or how it may impact your organization moving forward, please contact **Shelley M. Jackson, Virginia A. Talley**, or another member of our **Labor and Employment Law Practice**.

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