

New Regulations on Disposal of Consumer Report Information

By Michael J. Sciotti and Mary C. King

Overview

On December 4, 2003, the Fair and Accurate Credit Transactions Act of 2003, Pub L. 108-159, 117 Stat. 1952 ("FACT Act") was signed into law. The FACT Act amends the Fair Credit Reporting Act ("FCRA"), 15 U.S.C. §§ 1681 *et seq.*, by requiring that "any person that maintains or otherwise possesses consumer information, or any compilation of consumer information, derived from consumer reports for a business purpose to properly dispose of any such information or compilation."¹ Regulations were added, effective June 1, 2005, to assist businesses in complying with the record disposal rule imposed by the FACT Act.

Purpose

As set forth in the regulations, the purpose of § 216 of the FACT Act is to "reduce the risk of consumer fraud and related harms, including identity theft, created by improper disposal of consumer information."²

Who Is Affected

Any business, regardless of industry, that obtains a consumer report, or information derived from a consumer report, will be subject to the record disposal rule imposed by the FACT Act.³ Among the entities that possess or maintain consumer information for a business purpose are consumer reporting agencies, as well as landlords, government agencies, mortgage brokers, automobile dealers, utility companies, telecommunication companies, employers, and other users of consumer reports.⁴

Consumer Information

The FACT Act refers to disposing of information "derived from consumer reports."⁵ The phrase "derived from consumer reports" covers all information about a consumer that is derived from any consumer report(s), including information taken from a consumer report, information that results from manipulation of information taken from a consumer report, and information combined with other types of information.⁶ The Federal Trade Commission ("FTC") believes that there are various personal identifiers beyond a person's name that would bring information within the scope of § 216 of the FACT Act, "including but not limited to, a social security number, driver's license number, phone number, physical address, and e-mail address."⁷

"[I]nformation that does not identify individuals, such as aggregate information or blind data," is excluded.⁸

Proper Disposal of Consumer Information

The standard for proper disposal is a "reasonable measures" standard. Specifically, any person that maintains or possesses consumer information is required to "take reasonable measures to protect against unauthorized access to or use of the information in connection with its disposal."⁹ This is a flexible standard that does not require "covered persons to ensure perfect destruction of consumer information in every instance."¹⁰ The FTC expects that in taking "reasonable measures," entities covered by § 216 of the FACT Act will "consider the sensitivity of the consumer information, the nature and size of the entity's operations, the costs and benefits of different disposal methods, and relevant technological changes."¹¹ The FTC has also stated that "reasonable measures" are likely to include establishment of policies and procedures for disposal, as well as proper employee training.¹²

In order to provide additional guidance, the regulations also list examples of disposal measures that would be reasonable under § 216 of the FACT Act, including:

1. Implementing and monitoring compliance with policies and procedures that require the burning, pulverizing, or shredding of papers containing consumer information so that the information cannot practically be read or reconstructed.¹³
2. Implementing and monitoring compliance with policies and procedures that require the destruction or erasure of electronic media containing consumer information so that the information cannot practically be read or reconstructed.¹⁴
3. After due diligence, entering and monitoring compliance with a contract with another party engaged in the business of record destruction to dispose of material, specifically identified as consumer information, in a manner consistent with this rule.¹⁵

These examples are "illustrative only and are not exclusive or exhaustive," because they cannot take into account the unique circumstances of a particular entity.¹⁶ As the regulations do not mandate specific disposal measures, an entity may determine the most appropriate method of disposal. For instance, a small entity

26. *Id.* at 316-317.
27. *Id.* at 319 (quoting *Hoffman*, 535 U.S. at 149).
28. *Id.* at 319 (citing *Hoffman*, 535 U.S. at 151).
29. *Id.* at 319.
30. *Id.* at 322. Other courts have imposed blanket prohibitions on undocumented workers recovering lost earnings. *See, e.g., Veliz v. Rental Service Corp. U.S.A., Inc.*, 313 F.Supp.2d 1317, 1335-1336 (M.D. Fla. 2003) (where worker tendered false documents in violation of IRCA, worker's undocumented status precluded an award of lost wages); *Majlinger v. Cassino Contracting Corp.*, 1 Misc. 3d 659, 661, 766 N.Y.S.2d 332, 333-334 (Sup. Ct., Richmond Co. 2003) (*Hoffman* decision precluded undocumented worker from receiving lost earnings).
31. *Sanango*, 788 N.Y.S.2d at 322.
32. *Id.* at 320.
33. *Balbuena*, 13 A.D.3d at 285.
34. *Id.* at 286.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 287.
39. *Id.*
40. *Id.*
41. *Id.* at 288.
42. *Id.*
43. *Id.*
44. *Id.* (citing Rebecca Smith, Amy Sugimori, Luna Yasui, *Colloquium: Low Pay, High Risk: State Models for Advancing Immigrant Workers' Rights*, 29 NYU Rev. L. & Soc. Change 597, 598-600 (2004)).
45. *Id.* (citing Michael J. Wishnie, *Emerging Issues for Undocumented Workers*, 6 U. Pa. J. Lab. & Emp. L. 497, 507 (2004)).
46. *Sanango*, 788 N.Y.S.2d at 320.
47. *Id.*
48. *Id.*
49. *Id.*
50. *Nealy v. U.S. Healthcare HMO*, 93 N.Y.2d 209, 217 (1999).
51. *Florida Avocado Growers v. Paul*, 373 U.S. 132, 141 (1963).
52. *See Ray v. Atlantic Ritchfield Co.*, 435 U.S. 151, 157-158 (1978).
53. *See Balbuena*, 13 A.D.3d at 288 (citing *Montero v. Immigration & Naturalization Serv.*, 124 F.3d 381, 384 (2d Cir. 1997) (quoting HR Rep. No. 99-682(I), 99th Cong., 2d Sess., at 58, reprinted in 1986 U.S. Code Cong. & Admin. News, 5649, 5662) (“[i]t is not the intention of the Committee that the employer sanction provisions of the bill to be used to undermine or diminish in any way labor protections in existing law, or to limit the powers of federal or state labor relations boards, labor standards agencies, or labor arbitrators to remedy unfair practices committed against undocumented employees. . . .”).
54. *See Jie v. Liang Tai Knitwear Co.*, 89 Cal. App.4th 654, 663, 107 Cal. Rptr. 2d 682, 690 (Cal. App. 2d. Dist. 2001) (holding that IRCA does not preempt California state law that allows employees to sue for wrongful termination based on retaliation).
55. The most significant economic reality being the fact that undocumented workers readily and abundantly obtain work in the United States. *See Madeira v. Affordable Housing Foundation, Inc.*, 315 F.Supp.2d 504, 507 (S.D.N.Y. 2004) (upholding jury verdict of lost earnings to undocumented worker who sustained injuries at work site).
56. *Singh v. Jutla*, 214 F. Supp. 2d 1056, 1062 (N.D. Cal. 2002).
57. *Id.*
58. *See, e.g., Zimmer v. Chemung County Perf. Arts*, 65 N.Y.2d 513, 520 (1985); *see also Wise v. McDonald Ave, LLC*, 297 A.D.2d 515, 516, 748 N.Y.S.2d 539, 540 (1st Dep't 2002) (“The purpose of Labor Law § 240 is to protect workers by placing the ultimate responsibility for safety practices at building construction jobs where such responsibility actually belongs, on the owner and general contractor.”) (internal quotations and citations omitted)).
59. *Balbuena*, 13 A.D.3d at 288 (citing Smith, et al., 29 NYU Rev. L. & Soc. Change at 598-600).
60. *Sanango*, 788 N.Y.S.2d at 320.
61. *See Partridge v. Waterloo Cent. School Dist.*, 12 A.D.3d 1054, 1055, 784 N.Y.S.2d 767, 768 (4th Dep't 2004) (core objective of Labor Law § 240 is to prevent workers from falling and sustaining injuries); *Tsatsakos v. Citicorp*, 295 A.D.2d 500, 501, 744 N.Y.S.2d 475, 476 (2d Dep't 2002) (accord).
62. ___ A.2d ___, No. 2004-232, 2005 WL 497214 (N.H. 2005).
63. *Id.* at *5.
64. *Id.* at *1.
65. *Id.* at *5.
66. *Id.* at *6.

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For Your Information

Marjorie F. Gootnick, former Chair of the Section, is the President of the National Academy of Arbitrators for 2005-2006. She has also been reappointed to the Foreign Service Grievance Board by Secretary of State Condoleezza Rice.

Levy Ratner, P.C. announces that **Kevin Finnegan** has joined the firm as senior counsel and will chair their election law and campaign finance department.