

# The Devil You Don't Know - Might Not Be So Bad! Good News for Driver Credit and Background Checks

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In this era of driver and employee shortages, employers of all kinds - motor - carriers, freight intermediaries and shippers, should be aware of a byzantine array of federal statutes that could confer liability upon them, for simply making employment inquiries. It is particularly important in these days of nuclear verdicts (combined with driver shortages), to ensure that motor carriers hire - and are able to retain - high quality, experienced commercial drivers. To do that, it is also imperative that motor carriers are able to thoroughly vet and ascertain the background and qualifications of putative drivers. Consequently, motor carriers use various third-party services, such as HireRight, to obtain information on the driver's past employment, driving history, and other pertinent information. This is a critical function, both for preserving the driver workforce, but also for minimizing the risk of catastrophic motor vehicle accidents, and commensurate punitive damage awards, based upon a driver's background and history.

One of these federal statutes in that array is the Fair Credit Reporting Act. 15 U.S.C. §1681 (the "FCRA"). The FCRA is a statutory scheme governing the creation, maintenance, and disclosure of consumer reports. Generally speaking, there are three categories of persons subject to the FCRA: (1) "furnishers" of information, who are persons that provide credit information to consumer reporting agencies; (2) "consumer reporting agencies" ("CRAs") that prepare, maintain, and disseminate consumer reports; and (3) end "users" of consumer reports. *See, e.g., Branch v. Fed. Home Loan Mortg.*, No. 5:04-cv-859, 2005 U.S. Dist. LEXIS 59054, \*6-7 (E.D.N.C. July 25, 2005). The FCRA imposes different obligations upon each category of persons and provides a private cause of action for certain violations. So, for example, a Plaintiff could allege that his employer provided inaccurate credit information to the CRAs. *See, e.g., Banga v. Experian Info. Solutions, Inc.*, No. 09-C-04867, 2013 U.S. Dist. LEXIS 144999, \*2 (N.D. Cal. Sept. 30, 2013) ("Furnishers of information (*i.e.*, creditors) report account information to Experian called 'trade lines,' which consist of data such as account number, account status, payment information, and balance information.").

A recent case brought under the FCRA against a motor carrier, is extremely helpful to that process, and provides further insulation as to liability for motor carriers - and others in the transportation schematic for such critical inquiries. In *McKenna v. Dillon Transp.*, 6<sup>th</sup> Cir. 2024 (***Library Services get cite***), plaintiff Frank McKenna, a truck driver, was involved in an overturned truck accident on January 5, 2017. His employer, Dillon Transportation, a motor carrier, subsequently fired him, pursuant to its internal policies. Dillon also later submitted a "DAC Report" relating to McKenna to a company called HireRight.

HireRight is a consumer reporting agency that collects information about truck drivers. It then provides that information to employers who are considering hiring particular drivers. Pursuant to a

subscription for HireRight's services, motor carriers like Dillon can use background checks on driver applicants. They can also provide HireRight with that information, based upon their experience with the driver. Consequently, Dillon provided to HireRight a report about McKenna. That report stated that he had an unsatisfactory safety record, noting that he had been involved in an accident. This information was available to anyone who would view HireRight's report. However, in this particular case, no motor carriers *had* requested McKenna's DAC Report. Nonetheless, McKenna brought suit against Dillon, alleging a cause of action for defamation and tortious interference with a business relationship, based upon the HireRight Report.

In the lawsuit, McKenna contended that, to the extent that the report implied that he was responsible for the MVA, and had an unsafe driving record overall, it was defamatory and that it resulted in his inability to secure subsequent employment. At the trial court level, Dillon responded that these claims were completely preempted by the FCRA. McKenna contended though, that a DOT regulation, 49 CFR §391.23, applied instead of the FCRA, and thus permitted his defamation claim. The trial court granted summary judgment in favor of Dillon, finding that McKenna's claims *were* preempted by the FCRA, and McKenna appealed.

On appeal, the court first considered the predominant issue, *i.e.*, *did* the FCRA federally preempt McKenna's defamation claim. The court noted that the FCRA provides that a "person shall not furnish any information relating to a consumer to any consumer reporting agency that the person knows or has reasonable cause to believe that the information is inaccurate." 15 USC §§ 1681S-2(a)(1)(A). The FCRA also prohibits states from imposing a requirement or prohibition "with respect to any subject matter regulated under," *i.e.*, a broad statutory preemption parameter.

The court found that the preemption clause of the FCRA *applied* to McKenna's claim. The court noted that the trial court had found, correctly, that under the FCRA, McKenna was a "consumer" and that HireRight was a "consumer reporting agency" and the Dillon was a "furnisher or provider of information." The court explained that "consumer reporting agency" generally includes companies like HireRight, that sell self-employment - history reports. *See Maiteki v. Martin Trans. Ltd.*, 828 F.3<sup>rd</sup> 1272, 1273 (10<sup>th</sup> Cir. 2016) (HireRight is a "consumer reporting agency"). Consequently, on its face, the FCRA barred McKenna's state law cause of action.

However, McKenna contended that a *different* source of law authorized his lawsuit, positing that CFR §391.23(a)(2), which requires motor carriers to investigate a driver's safety performance history with DOT regulated employers when they hire that driver, somehow gave him a cause of action for defamation. However, the court noted that *another* statutory preemption clause also negated *that* argument, 49 USC §508. That statutory section provided that "no action for defamation, invasion of privacy or interference with a contract is based upon the furnishing or use of safety regulations issued by the Secretary [of the DOT] may be brought against (1) a motor carrier requesting the safety performance, records of an individual under consideration for employment as a commercial motor vehicle driver... or a person who has complied with such a request." *Id.* (*emphasis added*).

The court thus found that the statutes *did not* conflict with one another, but one (the FCRA) simply provided more protection for motor carriers like Dillon in these situations than the other, more specific provision. The court then gave both statutes full effect, rather than interpreting one as precedential over the other, and concluded that *either one* would suffice to preempt Dillon's claims.

This decision is helpful to motor carriers and others checking driver employment records.

*It provides a double-barreled bar to any troublesome state law claims relating to the background check and hiring process of commercial motor drivers. Also, it facilitates the free flow of information, to ensure that the safest commercial drivers are operating commercial motor vehicles on our public highways. Finally, it should be precedentially potent ammunition to nip any similar claims in the bud!*

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