



Employer Education Series:

Background Screening and Employer Compliance with the FCRA

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The information in this document is presented for general educational purposes and is provided solely for the convenience of its readers. It is not a substitute for legal advice. Consultation with qualified legal counsel is recommended for all matters of employment law.

This document addresses US federal requirements as found in the Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq. related to the procurement and use of consumer reports and investigative consumer reports (also known as background reports) for employment purposes. Although the FCRA also addresses the use of Consumer Reports/Investigative Consumer Reports for purposes other than employment, such use is outside the scope of this document. Additionally, this document does not address background screening requirements found in State law, International law, or regulated industries.

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Section 1: Introduction

The purpose of this document is to present educational information about compliance with federal law when employers obtain background reports from a background screening company. It specifically addresses the US Federal Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq.¹ Employers should be aware, however, that legal requirements exist at the state and international level and compliance is required. Further, employers in regulated industries (such as transportation, financial services, healthcare, etc.) are subject to industry laws and regulations.

Dispelling the Myths

Common misconceptions exist about background screening, information sources, procedures, and requirements to obtain these reports. The information below addresses some of the most significant misconceptions. Therefore, contrary to some popular opinion:

- The federal Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681 et seq. applies to all background screening, not just screening which includes credit.
- Unless it is a case of suspected wrong doing, an applicant must always receive disclosure and authorize the background investigation – even if the background report will only contain public information.
- The criminal record databases maintained by the US Federal Bureau of Investigation are not available to background screening companies. Likewise, these databases are not available directly to employers unless the employer is in a regulated industry where such a check is required.
- Many background checks cannot be done instantly. Contact with schools, employers, state agencies, and references are often required. Similarly, record searches at county courthouses must often be done in person to obtain up-to-date information.

Definitions

The official definition of many of the following terms is provided in the FCRA. The following conversational definitions are provided to establish a common understanding of these terms as used in this document.

- **Adverse Action:** A negative employment action such as not hiring an applicant; not promoting or not retaining an employee.
- **Authorization:** Obtaining written permission from the applicant/employee for the background investigation to be conducted.
- **Background Check:** Usually refers to one item of information in a background report; i.e., one academic background check, one employment background check, one driving record check. However, sometimes this term is also used to describe the background report in its entirety.

¹ The Fair Credit Reporting Act can be found at: <http://www.ftc.gov/os/statutes/031224fcra.pdf>

- **Background Investigation:** Another term for background report or background check.
- **Consumer:** The person who is the subject of the background report; the person who is seeking employment, retention, or promotion by an employer.
- **Consumer Financial Protection Bureau/Agency:** Created under The Dodd-Frank Wall Street Reform and Consumer Protection Act in 2010, federal agency that holds primary responsibility for regulating consumer protection with regards to financial products and services.
- **Consumer Report:** Under the FCRA, one of two official names for a background report. The other name is “investigative consumer report.” Most often the distinction between a “consumer report” and an “investigative consumer report” is that a “consumer report” contains only factual information while an “investigative consumer report” contains some opinions.

Example: “Was s/he employed by your company?” This calls for a factual response.
 “How did s/he perform on the job?” This calls for an opinion.

- **Consumer Reporting Agency:** Another name for a background screening company.
- **Disclosure:** Refers to the document and the process of informing an applicant/employee that s/he will be the subject of a background report.
- **Employment Purposes:** Hiring an applicant; promoting or retaining an employee.
- **Fair Credit Reporting Act (FCRA):** The primary federal law that governs the preparation, dissemination, and use of background reports for employment purposes.
- **Federal Trade Commission (FTC):** The government agency responsible for the administration of the FCRA. This agency has issued many non-binding opinions interpreting the FCRA.
- **Final Adverse Action:** Referring to the document and the process when a negative employment decision is made, the applicant/employee receives notice of the decision.
- **First Notice:** Another name given to pre-adverse or preliminary adverse action.
- **Investigative Consumer Report:** Under the FCRA, one of two official names for a background report. The other name is “consumer report.” Most often the distinction between a “consumer report” and an “investigative consumer report” is that a “consumer report” contains only factual information while an “investigative consumer report” contains some opinions.
 Example: “Was s/he employed by your company?” This calls for a factual response.
 “How did s/he perform on the job?” This calls for an opinion.
- **Notice to Users of Consumer Reports:** Obligations of Users under the FCRA.² Prepared by the Federal Trade Commission, this document must be provided by the background screening company to employers before background screening information is provided to the employer. This version was revised for 2013 to include information about the CFPB.
- **Permissible Purpose:** Under the FCRA, this is a legal purpose for obtaining a background report.

- **Preliminary Adverse Action:** Referring to a document and the process when a negative employment decision is being considered, the applicant/employee receives notice, a copy of his/her background report, and A Summary of Your Rights under the Fair Credit Reporting Act. This is also referred to as “Pre-Adverse Action” and “First Notice.”
- **Remedying the Effects of Identity Theft:**³ Prepared by the Federal Trade Commission, this document must be given to applicants/employees who believe they are the victim of identity theft. This version was revised for 2014 to include information about the CFPB.
- **Second Notice:** Another name for “Final Adverse Action.”
- **A Summary of Your Rights under the Fair Credit Reporting Act:**⁴ Prepared by the Federal Trade Commission, this document must be attached to a background report being provided to an applicant/employee. This version was revised for 2015 to include information about the CFPB and is commonly referred to as the “Summary of Rights.”
- **User Certification:** A document provided by the background screening company which must be signed by the employer before the screening company will provide background reports to the employer. This is a requirement under the FCRA.
- **User of Consumer Reports:** An employer who, as part of an employment decision, considers the information in a background report.

Summary of Process

Following are the key steps that an employer must take to obtain a background report on an applicant/employee.⁵

1. Employer discloses in writing⁶ to applicant/employee that s/he will be the subject of a background report as part of the employment selection/promotion/retention process.
2. Employer provides disclosure and obtains signed authorization for preparation of a background report from applicant/employee.
3. Employer provides information about the applicant/employee to the background screening company and requests background screening.
4. Background screening company conducts the background checks which were requested by employer and prepares background report.
5. Background screening company provides background report to the employer and, if requested by applicant/employee, provides copy to applicant/employee.

² See Appendix 1.

³ See Appendix 2.

⁴ See Appendix 3.

⁵ In cases of suspected misconduct or illegal activity by an employee and with the exception of credit information, disclosure and authorization is not required. Limited disclosure after the fact, however, is required.

⁶ Alternate methods of providing disclosure are permitted for those positions under the authority of the US Secretary of Transportation and positions subject to safety regulations by a State Transportation Agency.

6. Employer reviews completed background report and determines if any information will adversely impact employment decision. If no adverse impact results from information in the background report, the employer will proceed with other steps in the employment process.

NOTE: Steps 7-10 are used only when an employer is considering an adverse employment action.

7. If employer is considering an adverse employment action based in whole or part on information in the background report, the employer⁸ must: a) notify applicant/ employee, b) provide a copy of the background report, and c) provide "A Summary of Your Rights under the Fair Credit Reporting Act." (This process is sometimes called "Pre-Adverse Action" or "Preliminary Adverse Action" or "First Notice.")
8. Applicant/employee contacts background screening company if s/he disputes any information in background report.
9. Background screening company re-investigates any disputed items of information and issues updated report to employer and applicant/employee.
10. Employer reviews updated report and makes final employment decision. If the employment decision is adverse, a notice of adverse action is sent to applicant/employee.⁹ (This process is sometimes called "Final Adverse Action.")

The key steps in this process which are the responsibility of the employer are addressed in greater detail in Section 3 of this document.

⁷Alternate methods of obtaining authorization are permitted for those positions under the authority of the US Secretary of Transportation and positions subject to safety regulations by a State Transportation Agency.

⁸ Per the FTC, this may be done by the background screening company on behalf of the employer. FTC Opinion Letter from William Hayes, FTC Staff Attorney, to Michael Rosen; June 9, 1998.
<http://www.ftc.gov/os/statutes/fcra/rosen.htm>

⁹ See Footnote 6.

Section 2: Becoming a User of Background Reports

When a background screening company provides background reports to an employer, the employer becomes a “client” or “customer” of the background screening company and a “user” of background reports. Before background screening companies may provide background reports to a client (the employer), the screening company is legally required to take reasonable steps to ensure the employer is a legitimate business entity and will use the background information in a legal manner. In doing so, the background screening company will likely:

- Require business documents from the employer evidencing the employer’s status as a legitimate business entity. This may be a business license, articles of incorporation, bank references, etc.
- Check stock exchange membership, business listings, state licensing boards, and other professional entities.
- Visit (or have their agent visit) one of the employer’s offices or facilities. The background screening company may take photos of the exterior of the facility, as well as in the interior. If taken in the interior, no confidential areas or information will be included in the photos.

NOTE: The onsite visit may not be required in the case of publicly traded companies.

Once the background screening company has authenticated the employer, the screening company is required to obtain the employer’s signature on a “User Certification.” Under the FCRA, the User Certification must include the following items:

1. The employer will provide disclosure to the applicant/employee before procuring a background report.¹⁰
2. The employer will obtain written authorization from the applicant/employee before procuring a background report.¹¹
3. The employer will not use the information in the background report in violation of any federal or state equal opportunity laws.
4. The employer will request and use the background report only for a permissible purpose.
5. The employer will follow adverse action procedures if a negative employment action is considered.
6. The employer has received a copy of Notice to Users of Consumer Reports: Obligations of Users under the FCRA.

Depending on the background screening company, the User Certification may include other items such as international, state, information source, and business requirements. The User Certification must at a minimum, however, include Items 1-6 above.

The background screening company must retain a copy of the employer’s signed User Certification.

¹⁰ See Footnote 5.

¹¹ See Footnote 5.

Section 3: Detailed Process and Requirements

This section expands upon Items 1, 2, 7, and 10 found in Section 1, “Summary of Process.” These four items are key responsibilities of the employer in the background screening process. For reference purposes, these four items are repeated at the beginning of the relevant subsection. In addition, some optional activities and common procedures are included.

3.1 Optional – Initial Notice

Initial Notice is making it known to all employees and applicants that the employer conducts background screening. If Initial Notice is used, it must be provided to all employees and applicants in order to not appear discriminatory. It is recommended that such notice occur prior to requesting written authorization for background screening. Some methods for Initial Notice include:

- Signs in Human Resources
- Letters or notices to current employees
- Statement on the company’s website
- Statement in advertising, job postings, or other recruiting tools

3.2 Required – Disclosure to Applicant/Employee

Summary Step 1 (from Section 1, Summary of Process): Employer discloses in writing to applicant/employee that s/he will be the subject of a background report as part of the employment selection process.

Before a background report for employment purposes may be procured from a background screening company by the employer, disclosure must occur.¹² Disclosure is the act of informing the applicant/employee that s/he will be the subject of a background investigation. The disclosure must be in writing.¹³ It must be “...in a document that consists solely of the disclosure” or the “...authorization may be made on the [disclosure] document...”¹⁴

The employer must retain the original document. It is recommended that the applicant/employee be offered a copy of the document. Although not required, “A Summary of Your Rights under the Fair Credit Reporting Act” may be provided to the applicant/employee at this time. However, note that the Summary of Rights document must still be provided to the applicant/employee whenever a copy of the background report is provided to the applicant/employee.

As noted in Definitions on Page 4, a “Consumer Report” deals with facts while an “Investigative Consumer Report” also includes opinions. If the background report to be procured is an “Investigative Consumer Report,” special language must be included in the disclosure. Per the FCRA, the document must clearly and accurately disclose to the applicant/employee that inquiries about “...information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made...”¹⁵

¹² See Footnote 5.

¹³ See Footnotes 6.

¹⁴ Fair Credit Reporting Act (FCRA), 15 U.S.C. 1681b(b)

¹⁵ Ibid § 1681d(a)

The applicant/employee must be notified no later than three days after the employer requests an Investigative Consumer Report that such report has been requested from the screening company. The notification must include the fact that s/he has the right to obtain additional information as to the nature and scope of the investigation requested and must include "A Summary of Your Rights under the Fair Credit Reporting Act."

Many employers include the Investigative Consumer Report language in their standard disclosure document, thereby eliminating the need for a second disclosure. If the employer is going to wait a significant amount of time between the disclosure and requesting an Investigative Consumer Report, a second disclosure is recommended.

3.3 Required – Written Authorization

Summary Step 2 (from Section 1, Summary of Process): Employer obtains signed authorization for preparation of a background report from applicant/ employee.

As noted above, the FCRA permits the authorization be combined with the disclosure. Further per the FTC, the disclosure and authorization may also be used to collect identifying information about the applicant/employee.¹⁶ Regardless of whether combined with the disclosure or as a standalone document; the authorization must be signed¹⁷ by the applicant/employee before a background report may be procured from a background screening company.

The employer may wish to include language in the authorization which states the authorization is valid throughout the term of employment. This allows the employer to procure background reports on the employee without obtaining a new authorization for each background report. This is particularly helpful for those employers who conduct annual checks such as driving or criminal.

The employer may be required to provide a copy of the authorization (or combined disclosure and authorization) to the background screening company when requesting a background investigation. The FTC has opined that the background screening company is not required to have a copy of the authorization in their possession.¹⁸ From a practical standpoint, however, the background screening company is likely to need to provide a copy of the authorization to one or more information sources. For purposes of efficiency, most background screening companies will recommend the authorization be provided at time of background screening request.

¹⁶ FTC Opinion Letter from Cynthia Lamb, FTC Investigator, to Richard Steer; October 21, 1997. <http://www.ftc.gov/os/statutes/fcra/steer.htm>

¹⁷ See Footnotes 6 and 7.

¹⁸ FTC Opinion Letter from Shoba Kammula to Stephen Kilgo; July 28, 1998.

3.4 Optional – Subject Notification

A Subject Notification is a notice advising the applicant/employee that a background check has been ordered. This notification is not required under federal law, however, it is recommended in cases when significant time has elapsed between disclosing to and obtaining authorization from the applicant/employee and the initiation of the background. If Subject Notification is provided, it is recommended that the employer also use the notice to remind the applicant/employee that s/he previously received disclosure and provided authorization.

3.5 Required – Adverse Action Procedures (Pre-Adverse Action)

Summary Step 7 (from Section 1, Summary of Process): If employer is considering an adverse employment action based in whole or part on information in the background report, the employer: a) notifies applicant/employee, b) provides a copy of the background report, and c) provides “A Summary of Your Rights under the Fair Credit Reporting Act.” (This process is sometimes called “Pre-Adverse Action” or “Preliminary Adverse Action” or “First Notice.”)

An adverse employment action includes not hiring an applicant, not promoting an employee, not retaining an employee, or any other action which has an adverse impact on the individual’s employment status. Whenever an adverse action is being considered based in whole or part on information in the background report, no actual adverse action may be taken until the applicant/employee is so advised. In doing so, the employer must inform the applicant/employee that adverse action is being considered. Further, the employer must provide the applicant/employee with a copy of his/her background report, a copy of “A Summary of Your Rights under the Fair Credit Reporting Act,” and a reasonable period of time to dispute the accuracy or completeness of information in the report.

The FCRA does not specify how long an employer must wait after the pre-adverse action notice before actually taking adverse action. According to the FTC, employers should “...keep in mind the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken.”¹⁹ Thus, the applicant must have a meaningful opportunity to review the information and to respond. The FTC has suggested five business days as a reasonable amount of time.²⁰ If the employer falls under the auspices of the US Department of Transportation, three business days should be allowed.

Although not required by the FCRA, it is recommended that the pre-adverse action notice be provided to the applicant/employee in writing. The Summary of Rights must be in substantially the same form as that designed by the FTC. As shown in Appendix 3, this is currently a two page document.

¹⁹ FTC Opinion Letter from William Haynes, FTC Staff Attorney, to Harold Hawkey; December 18, 1997. <http://www.ftc.gov/os/statutes/fcra/hawkeycb.htm>

²⁰ FTC Opinion Letter from Clarke W. Brinckerhoff, FTC Staff Attorney to Erick Weisberg; June 27, 1997. <http://www.ftc.gov/os/statutes/fcra/weisberg.htm>

3.6 Required – Adverse Action Procedures

Summary Step 10 (from Section 1, Summary of Process): Employer reviews updated report and makes final employment decision. If the final employment decision is adverse, a notice of adverse action is sent to applicant/employee. (This process is sometimes called “Final Adverse Action” or “Second Notice.”)

If the employee/applicant is denied employment, promotion or is dismissed based in whole or in part on information contained in the background report, s/he must be given a written notice of adverse action. This notice may be given only after the employer has followed the required pre-adverse action process and the applicant/employee has had the opportunity to dispute.

The adverse action notice does not need to include the specific reason for the adverse action, but must:

- State that the adverse action is based either in whole or part on information contained in the background report provided by the background screening company
- State that the Consumer Reporting Agency (the background screening company) did not make the adverse employment decision and does not know the basis for the decision.
- Include the name, address, and toll free number of the background screening company.
- State that the applicant/employee has the right to obtain another free copy of his/her background report within the next 60 days.

Note: If a background report is obtained without disclosure and authorization because of suspected wrongdoing and adverse action is taken, only a summary of the background report need be provided and certain sources may be redacted.

The FTC has opined that a background screening company may fulfill the employer's adverse action notification duties and send adverse action notices on behalf of the employer. However, the employer remains responsible for any duty imposed by the FCRA and may be subject to liability if the duties are not performed by the background screening company.²¹

²¹ FTC Opinion Letter from William Hayes, FTC Staff Attorney, to Michael Rosen; June 9, 1998. <http://www.ftc.gov/os/statutes/fcra/rosen.htm>

Section 4: Other Considerations

Reporting Limitations

Employers should be aware that the FCRA (as well as state law) place limitations on information that can be reported by a background screening company. The application of these limitations will likely be transparent to the employer.

Section 605 of the FCRA prohibits a background screening company from reporting the following:

- Bankruptcy cases that antedate the report by more than 10 years
- Paid tax liens that antedate the report by more than seven years
- Accounts placed for collection or charged to profit and loss that antedate the report by more than seven years
- Civil suits, civil judgments, and records of arrest that antedate the report by more than seven years
- Any other adverse information, other than records of convictions, which antedate the report by more than seven years.
- Any arrest record older than seven years

For employees reasonably expected to earn \$75,000 or more per year, the above time limits do not apply.

Employers should also be aware that in addition to the limitations found in the FCRA, a number of states place limitations on what information may be reported by background screening companies. Information commonly prohibited includes arrest records, convictions that antedate the report by a specified numbers of years, dismissed cases, and discharged cases.

As of this writing, the following states have reporting limitations or special requirements related to background reports and their content beyond those of the FCRA. Specific requirements vary and include: 1) reporting and/or use limitations for CRAs and/or employers, 2) the inclusion of a checkbox on the disclosure/authorization for the applicant to request a copy of their background report, and 3) the prohibition of reporting arrests which did not lead to conviction.

| | | | |
|----------------------|---------------|----------------|--------------|
| Arizona | Indiana | Montana | Oregon |
| Arkansas | Iowa | Nebraska | Pennsylvania |
| California | Kansas | Nevada | Rhode Island |
| Colorado | Kentucky | New Hampshire | Tennessee |
| Connecticut | Louisiana | New Jersey | Texas |
| Delaware | Maine | New Mexico | Utah |
| District of Columbia | Maryland | New York | Vermont |
| Florida | Massachusetts | North Carolina | Virginia |
| Georgia | Michigan | North Dakota | Washington |
| Hawaii | Minnesota | Ohio | Wisconsin |
| Illinois | Missouri | Oklahoma | |

As noted earlier in the Introduction, a discussion of US State law requirements related to background screening for employment purposes is beyond the scope of this document.

Equal Employment Opportunity

According to the Equal Employment Opportunity Commission, an employer's practice of excluding applicants from employment based on conviction or arrest records may have a disparate impact on certain minority segments of the population. Exclusion of applicants based on conviction records is prohibited unless the employer can show business necessity. To establish business necessity, an employer must be able to show that it considered: 1) the severity and age of the offense or offenses, 2) evidence of rehabilitation, and 3) job relatedness.²²

Additional Resources

As with all matters of employment law, employers are strongly encouraged to consult with qualified legal counsel regarding their employment screening program.

Numerous resources are also available online that provide additional information about background screening for employment purposes. Some of these are:

- US Federal Trade Commission at: www.ftc.gov
- Consumer Financial Protection Bureau www.consumerfinance.gov
- The National Association of Professional Background Screeners at: www.napbs.org
- U.S. Equal Employment Opportunity Commission at: www.eeoc.gov
- Find Law at: www.findlaw.com
- Society for Human Resource Management at: www.shrm.com
- U.S. Department of Labor at: www.dol.gov

Appendix 1: Notice to Users of Consumer Reports: Obligations of Users under the FCRA

https://onesourcebackground.com/wp-content/uploads/Notice-to-Users_FCRA.pdf

Appendix 2: Remedying the Effects of Identity Theft

<https://www.onesourcebackground.com/wp-content/uploads/Remedying-the-Effects-of-Identity-Theft.pdf>

Appendix 3: A Summary of Your Rights under the Fair Credit Reporting Act

<https://www.onesourcebackground.com/wp-content/uploads/Summary-of-Rights-FCRA.pdf>