

Complying with the Fair Credit Reporting Act (FCRA) in Four Easy Steps

Employers have become acutely aware that hiring a job applicant with an undesirable background, criminal record or falsified credentials can carry enormous economic and legal consequences. Many employers utilize pre-employment background screening to be more careful about who is hired in the first place.

Pre-employment background screening promotes a safe and profitable workplace, by protecting an employer from negligent hiring exposure, wrongful termination lawsuits, incidents of sexual harassment, financial loss, false claims, theft, workplace disruption or time wasted in recruiting and training the wrong candidate.

Background Investigation pre-employment screening is normally conducted by outside agencies called Consumer Reporting Agencies (CRA). Other than calling former employers for references, employers generally cannot conduct such screenings in-house due to the specialized resource and knowledge involved. In addition, firms risk legal liability if the procedures utilized to check on applicants infringe on legally protected areas of privacy.

A federal law called the Fair Credit Reporting Act (FCRA), however, governs pre-screening obtained from outside agencies. This law sets out various requirements and rules for pre-employment background reports, called Consumer Reports. This law was substantially amended on September 30, 1997, to provide greater privacy protection to consumers, and to ensure that information was accurate and complete.

A Consumer Report is much broader in scope than just a credit report. It affects a wide variety of information obtained concerning job applicants. A Consumer Report includes criminal and civil records, driving records, civil lawsuits, reference checks and any other information obtained by a Consumer Reporting Agency. By following the FCRA, an applicant's privacy rights are protected. For this reason, most legal experts advise employers to engage the services of an outside screening firm.

When engaging the services of a Consumer Reporting Agency, both the employer and the CRA must follow the four steps described in this report. Failure to do so can result in substantial legal exposures, including fines, damages, punitive damages and attorney's fees. Private investigators who engage in the business of pre-employment background screening are also covered by the FCRA.

STEP ONE

--An Employer must certify to the Consumer Reporting Agency that it will follow the FCRA (FCRA Section 604)

Prior to supplying a Consumer Report, an employer must certify to the Consumer Reporting Agency (CRA), that the employer will follow all the steps set forth in the Fair Credit Reporting Act. These include:

- That the employer will use the information for employment purposes only.
- That the employer will not use the information in violation of any federal or state equal opportunity law.
- That the employer will obtain all the necessary disclosures and consents as discussed below.
- That the employer will give the appropriate notices in the event that an adverse action is taken against an applicant based in whole or in part on the contents of the Consumer Report.
- That if a special type of consumer report is requested, called an Investigative Consumer Report that the employer will give the additional information required by law.

These requirements are explained further in a document prepared by the Federal Trade Commission entitled, "Notice to Users of Consumer Report." The FCRA requires a Consumer Reporting Agency to provide a copy of that document to every employer who requests a report.

STEP TWO

--An Employer must obtain a written Release and a separate Disclosure from a job applicant before obtaining a Consumer Report (FCRA Sections 604 and 606)

Before obtaining a Consumer Report from a Consumer Reporting Agency, the employer must obtain two separate documents:

- There must be a clear and conspicuous disclosure that a report may be requested. This must be provided in a "separate document." The purpose is to prevent the disclosure being buried in an employment application.
- The employer must obtain written consent from the applicant.

The Consumer Reporting Agency will normally provide employers with the forms needed for the Disclosure and Release.

Recently, the Federal Trade Commission (FTC) clarified that the release and disclosure can be on the same document, as long as the language does not distract from a clear and conspicuous disclosure that a report is being requested.

A special procedure is necessary where the employer requests a Consumer Reporting Agency to obtain employment references. Where the Consumer Reporting Agency is merely verifying factual matters, such as the dates of employment or salary, no special procedure is necessary. However, where the Consumer Reporting Agency is asking for information such as job performance, then that falls into a special category of consumer report called an, "Investigative Consumer Report."

When an Investigative Consumer Report is requested, there are some special procedures to follow:

- There must be a disclosure to the applicant that an investigative consumer report is being requested, along with a certain specified language. Unless it is contained in the initial Disclosure, the consumer must receive this additional disclosure within three days after the request is made.
- The Disclosure must tell the applicant that they have a right to request additional information about the nature of the investigation.
- If the applicant makes a written request, then the employer has five days to respond with additional information and must provide a copy of a document prepared by the Federal Trade Commission called, "A Summary of Your Rights under the Fair Credit Reporting Act (which your background agency should provide).

As a practical matter, a Consumer Reporting Agency should handle all of these requirements for an employer as part of their services.

STEP THREE

--If adverse action is intended as a result of a Consumer Report, then the applicant is entitled to certain documents (FCRA Section 604)

Where an employer receives a Consumer Report, and intends not to hire the applicant based upon the report in any way, and then the applicant has certain rights. Before taking the adverse action, the employer must provide the following information to the applicant:

- A copy of the consumer report
- The FTC document "A Summary of Your Rights under the Fair Credit Reporting Act." (This should be provided by the screening service.)

Here is a sample letter:

Dear Applicant,

A decision is currently pending concerning your application for employment at (the above employer)(this company). Enclosed for your information is a copy of the consumer report that you authorized in regard to your application for employment, together with a "Summary of Your Rights under the Fair Credit Reporting Act."

If there is any information that is inaccurate or incomplete, you should contact this office as soon as possible so an employment decision may be completed.

Sincerely yours,

The purpose is to give an applicant the opportunity to see the report that is being used against them. If the report is inaccurate or incomplete, the applicant then has the opportunity to contact the Consumer Reporting Agency to dispute or explain what is in the report. Otherwise, applicants may be denied employment without ever knowing they were the victims of inaccurate or incomplete data.

As a practical matter, by the time an applicant is the subject of a Consumer Report, an employer has spent time, money and effort in recruiting, and hiring. Therefore, it is in the employer's best interest to give an applicant an opportunity to explain any adverse information before denying a job offer. If there was an error in the public records, giving the applicant the opportunity to explain or correct it could be to the employer's advantage.

Even if there were other reasons in addition to the Consumer Report for not hiring an applicant, these rights still apply. If the intended decision was based in whole or part on the Consumer Report, the applicant has a right to receive the report. In a situation where the employer feels that they would make an adverse decision anyway, regardless of the report, the employer may still want to follow this procedure for maximum legal protection.

The question that arises is how long an employer must wait before denying employment based upon information contained in a Consumer Report. The Fair Credit Reporting Act is silent on this point. However, many legal authorities advise that an employer should wait a reasonable period of time before making the final decision. This period should be the time that would be needed for an applicant to meaningfully review the report and make known to the employer or the Consumer Reporting Agency any inaccurate or incomplete information in the Consumer Report. A Consumer Reporting Agency should be able to assist employers in complying with these requirements. This does not mean that an employer is required to hold the job open for a long period of time. After the first notice is given, and the applicant has had an appropriate opportunity to respond, an employer may either wait until there has been a re-investigation, or fill the position with another applicant. Most employers find as a practical matter that this provision of law does NOT impose any hardship or burden upon an employer. Even though in rare situations an employer may have questions on how to proceed, the clear advantages of a pre-employment screening program far outweigh any complications that can theoretically arise from compliance.

STEP FOUR

--Notice must be give to an applicant after an adverse action (FCRA sec. 615)

If after sending out the documents required in Step 3, the employer intends to make the decision final, the employer must take one more step. The employer must send the applicant a Notice of Adverse Action informing the job applicant that the employer has made a final decision, along with another copy of the FTC form "Summary of Your Rights under the Fair Credit Reporting Act."

The Notice of Adverse Action must contain certain information. The following is a sample letter that contains the necessary statements:

Dear Applicant,

In reference to your application for employment, we regret to inform you that we are unable to further consider you for employment at this time. Our decision, in part, is the result of information obtained through the Consumer Reporting Agency identified below.

The Consumer Reporting Agency did not make the adverse decision, and is unable to explain why the decision was made.

You have the right to obtain within 60 days a free copy of your consumer report from the Consumer Reporting Agency as identified below and from any other consumer reporting agency which complies and maintains files on consumers on a nationwide basis.

You have the right to contact the Consumer Reporting Agency listed below to dispute any information contained in the report that you believe may be inaccurate or incomplete. A copy of your rights under the "Fair Credit Reporting Act" is enclosed, entitled "Summary of Your Rights under the Fair Credit Reporting Act." (List the Consumer Reporting Agency's name, address and phone number below, including any 800/888 number.)

Many employers find it difficult to believe that Congress intended that an applicant be notified twice, both before an adverse action and after. However, the law clearly requires two notices. This is also the interpretation of the Federal Trade Commission Staff. The purpose is to give job applicants the maximum opportunity to correct any incomplete or inaccurate reports that could affect their chances of employment.

Prescribed Summary of Consumer Rights

The prescribed form for this summary is as a separate document, on paper no smaller than 8x11 inches in size, with text no less than 12-point type (8-point for the chart of federal agencies), in bold or capital letters as indicated. The form in this appendix prescribes both the content and the sequence of items in the required summary. A summary may accurately reflect changes in numerical items that change over time (e.g., dollar mounts, or phone numbers and addresses of federal agencies), and remain in compliance.

A Summary of Your Rights under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) is designed to promote accuracy, fairness, and privacy of information in the files of every "consumer reporting agency" (CRA). Most CRAs are credit bureaus that gather and sell information about you -- such as if you pay your bills on time or have filed bankruptcy -- to creditors, employers, landlords, and other businesses. You can find the complete text of the FCRA, 15 U.S.C. 1681-1681u, at the Federal Trade Commission's web site (<http://www.ftc.gov>). The FCRA gives you specific rights, as outlined below. You may have additional rights under state law. You may contact a state or local consumer protection agency or a state attorney general to learn those rights.

- You must be told if information in your file has been used against you. Anyone who uses information from a CRA to take action against you -- such as denying an application for credit, insurance, or employment -- must tell you, and give you the name, address, and phone number of the CRA that provided the consumer report.
- You can find out what is in your file. At your request, a CRA must give you the information in your file, and a list of everyone who has requested it recently. There is no charge for the report if a person has taken action against you because of information supplied by the CRA, if you request the report within 60 days of receiving notice of the action. You also are entitled to one free report every twelve months upon request if you certify that (1) you are unemployed and plan to seek employment within 60 days, (2) you are on welfare, or (3) your report is inaccurate due to fraud. Otherwise, a CRA may charge you up to eight dollars.
- You can dispute inaccurate information with the CRA. If you tell a CRA that your file contains inaccurate information, the CRA must investigate the items (usually within 30 days) by presenting to its information source all relevant evidence you submit, unless your dispute is frivolous. The source must review your evidence and report its findings to the CRA. (The source also must advise national CRAs -- to which it has provided the data -- of any error.) The CRA must give you a written report of the investigation and a copy of your report if the investigation results in any change. If the CRA's investigation does not resolve the dispute, you may add a brief statement to your file. The CRA must normally include a summary of your statement in future reports. If an item is deleted or a dispute statement is filed, you may ask that anyone who has recently received your report be notified of the change.
- Inaccurate information must be corrected or deleted. A CRA must remove or correct inaccurate or unverified information from its files, usually within 30 days after you dispute it. However, the CRA is not required to remove accurate data from your file unless it is outdated (as described below) or cannot be verified. If your dispute results in any change to your report, the CRA cannot reinsert into your file a disputed item unless the information source verifies its accuracy and completeness. In addition, the CRA must give you a written notice

telling you it has reinserted the item. The notice must include the name, address and phone number of the information source.

- You can dispute inaccurate items with the source of the information. If you tell anyone -- such as a creditor who reports to a CRA -- that you dispute an item, they may not then report the information to a CRA without including a notice of your dispute. In addition, once you've notified the source of the error in writing, it may not continue to report the information if it is, in fact, an error.
- Outdated information may not be reported. In most cases, a CRA may not report negative information that is more than seven years old; ten years for bankruptcies.
- Access to your file is limited. A CRA may provide information about you only to people with a need recognized by the FCRA -- usually to consider an application with a creditor, insurer, employer, landlord, or other business.
- Your consent is required for reports that are provided to employers, or reports that contain medical information. A CRA may not give out information about you to your employer, or prospective employer, without your written consent. A CRA may not report medical information about you to creditors, insurers, or employers without your permission.
- You may choose to exclude your name from CRA lists for unsolicited credit and insurance offers. Creditors and insurers may use file information as the basis for sending you unsolicited offers of credit or insurance. Such offers must include a toll-free phone number for you to call if you want your name and address removed from future lists. If you call, you must be kept off the lists for two years. If you request, complete, and return the CRA form provided for this purpose, you must be taken off the lists indefinitely.
- You may seek damages from violators. If a CRA, a user or (in some cases) a provider of CRA data, violates the FCRA, you may sue them in state or federal court.

The FCRA gives several different federal agencies authority to enforce the FCRA:

FOR QUESTIONS OR CONCERNS REGARDING:	PLEASE CONTACT:
CRAs, creditors and others not listed below	Federal Trade Commission Consumer Response Center - FCRA Washington, DC 20580 202-326-3761
National banks, federal branches/agencies of foreign banks (word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance Management, Mail Stop 6-6 Washington, DC 20219 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 202-452-3693
Savings associations and federally chartered savings banks (word "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Programs Washington, DC 20552 800-842-6929
Federal credit unions (words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 703-518-6360

State-chartered banks that are not members of the Federal Reserve System	Federal Deposit Insurance Corporation Division of Compliance & Consumer Affairs Washington, DC 20429 800-934-FDIC
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission	Department of Transportation Office of Financial Management Washington, DC 20590 202-366-1306
Activities subject to the Packers and Stockyards Act, 1921	Department of Agriculture Office of Deputy Administrator - GIPSA Washington, DC 20250 202-720-7051