

The Fair Credit Reporting Act (FCRA): Background Screening and Compliance

*A white paper on how to be compliant with FCRA
background screening requirements.*

The Fair Credit Reporting Act (FCRA): Background Screening and Compliance

Employers have increasingly turned to background screening for peace of mind and a way to decrease liability in the aftermath of heightened security risks, workplace violence incidents and negligent hiring lawsuits. Employers are using criminal court records, driving records and other consumer reports to hire safe, honest and qualified employees.

For a large number of employers, pre-employment background screening has become a permanent part of their hiring process. According to a 2004 study by Society for Human Resource Management (SHRM), eight out of ten employers complete criminal background checks on applicants before hiring them. This represents a 30% increase in background screening from 1996.

However, in this age of increased surveillance and security, applicant rights and the laws protecting individual freedoms could easily be forgotten. How do employers balance their need to know about applicants' backgrounds while simultaneously upholding individuals' rights? How does the federal Fair Credit Reporting Act (FCRA) affect employers who use background checks?

This white paper is a must read for employers concerned about selecting the right people while simplifying the legal aspects of background screening. You will gain an integral understanding of the FCRA provisions as they pertain to employers and background screening. Summaries of federal regulations amending the FCRA as well as easy-to-implement steps for compliance are also included in this white paper.

History of the FCRA

In order to grasp the general goals and intentions of the FCRA, it is worth taking a brief look at its history. The bill that would eventually become the FCRA was originally proposed as an amendment to the Truth in Lending Act in 1968. Although it did not gain the necessary number of votes to be enacted, it shed light on the growing need for legislation to address the abuses of consumer credit reporting and to protect the confidentiality of the information consumer reporting agencies collected. As

is still the case today, government and private agencies compiled and maintained an astonishing amount of information about individuals. Concerned citizens and legislators reasoned such convenient, unrestricted access to personal data made people susceptible to fraud and persecution.

The FCRA became effective on April 25, 1971 as one component of the federal Consumer Credit Protection Act. The FCRA regulates the activities of consumer reporting agencies, employers and others who use consumer reports. Moreover, the FCRA guarantees certain rights for individuals affected by background screening reports and other types of consumer reports. In the past decade or so, legislators have passed several amendments to strengthen the FCRA and make it applicable to modern times.

In essence, the focus of the FCRA is to protect Americans' privacy rights and to hold consumer reporting agencies accountable for the accuracy and fairness of credit reporting and other information. Section §602 of the FCRA states:

It is the purpose of this title to require that consumer reporting agencies adopt reasonable procedures for meeting the needs of commerce for consumer credit, personnel, insurance and other information in a manner which is fair and equitable to the consumer, with regard to the confidentiality, accuracy, relevancy, and proper utilization of such information in accordance with the requirements of this title.

The FCRA regulates the use of reports obtained from consumer reporting agencies. As such, the FCRA also regulates consumer reporting agencies, employers ordering background screening reports from third party providers and furnishers of consumer reporting information.

Key FCRA Terms

As with most laws, technical jargon is inherently a part of the FCRA. Therefore, before delving too deep into this white paper, it is important to define key FCRA terms to bridge understanding.

Employer Obligations Under the FCRA

In 1997, the FCRA was modified to increase the legal obligations of employers who use consumer reports/background checks. Congress amended the FCRA and expanded employers' screening duties out of concern for applicants unfairly denied employment because of incomplete or inaccurate consumer reports. According to the Federal Trade Commission's (FTC) "Using Consumer Reports: What Employers Need to Know," employers are responsible for 1) ensuring applicants are aware consumer reports may be used for employment purposes and agree to such use and 2) notifying applicants immediately if information contained in their consumer reports may result in a negative employment decision.

The main provisions of the FCRA pertaining to employers who use consumer reports are described below. Reputable background screening providers should be able to assist you with each of these FCRA requirements by providing sample forms, compliance consultation and adverse action notification services.

Notice and Disclosure

Prior to ordering background checks, the potential employer must notify applicants in writing that it may obtain a consumer report for employment purposes. The FCRA requires that this notice be a separate, clear and conspicuous document. It may not be included within an employment application.

It is a recommended best practice to have applicants sign the notice and disclosure as proof that they acknowledge and understand that the employer may complete background checks on them.

Authorization

In addition to providing notice, employers must obtain an applicant's or employee's written authorization before ordering background checks. Under the FCRA, employers have the option to combine the authorization with the notice and disclosure. However, if these two FCRA requirements are combined into one document, it

FCRA Terms

Consumer: individual.

Consumer Reporting Agency: a person, for monetary fees or dues, who regularly engages in assembling or evaluating consumer information for the purpose of providing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports. Background screening providers and credit bureaus (i.e., TransUnion, Equifax and Experian) are examples of consumer reporting agencies.

Consumer Report: any written, oral or other type of communication issued by a consumer reporting agency bearing on one or more of the following: 1) credit worthiness, 2) credit standing, 3) credit capacity, 4) character, 5) general reputation, 6) personal characteristics, 7) mode of living. Examples include, but are not limited to: criminal and civil records, credit reports, driving records and workers' compensation records.

Investigative Consumer Report: a consumer report about an individual's character, general reputation, personal characteristics or mode of living (i.e., reputation, habits, etc.) that is based on personal interviews with neighbors, friends or colleagues. Reference checks are considered investigative consumer reports when a background screening provider completes them.

Permissible Purpose: FCRA approved reason for obtaining consumer reports and/or investigative consumer reports. Under section §604 of the FCRA, consumer reports can only be furnished for the following reasons:

- Court order or subpoena
- In accordance with the consumer's written instructions
- Credit transactions involving the consumer
- Employment purposes
- Insurance underwriting
- License or government benefit eligibility
- Assessment of credit or prepayment risks by a potential investor or servicer
- A legitimate business need for the information in connection with a business transaction initiated by the consumer or to review an account to determine if the consumer still meets the terms of the account.

Person: any individual, partnership, corporation, trust, estate, cooperative, association, government or governmental subdivision or agency, or other entity.

Furnisher: source providing consumer report information to a consumer reporting agency

cannot include any other employment information and must be a stand alone, separate document and include a space for the applicant to sign the document.

To further help decrease liability risks, premier background screening companies may require employers to get their applicants' signature on an additional release authorization form. While not FCRA mandated, this release authorization gives courts, schools, government agencies and other furnishers the applicant's permission to provide background information to the consumer reporting agency.

Certification to consumer reporting agencies

Consumer reporting agencies require employers to certify they are FCRA compliant, will not misuse background screening information and will abide by federal and state equal employment opportunity regulations. This may be accomplished with a certification document or with a user agreement or contract between the consumer reporting agency and the employer. In turn, the consumer reporting agency must provide to its clients a copy of the "Notice to Users of Reports: Obligations of Users Under the Fair Credit Reporting Act."

Adverse action notification

Suppose an employer is recruiting for an accounting position and one of the top candidate's background screening results reveal s/he was convicted of embezzlement. In addition, the employer was disappointed with the candidate's interview performance and qualifications, so the hiring manager is thinking s/he might not hire the applicant. What are the employer's obligations under the FCRA?

Whenever employers are considering making an adverse or unfavorable decision "based in whole or in part" on an applicant's background screening results, the FCRA requires employers to notify applicants. In other words, if a consumer report has any influence on the employer's future decision, it must take the following steps:

1. Before making an unfavorable employment decision, send a pre-adverse action disclosure.

This is a preliminary notice to an applicant indicating information contained in his/her background screening report, if accurate, may cause employment to be denied.

Employers must include a copy of the applicant's background screening results and a copy of the FTC's "Summary of Your Rights Under the FCRA" document with the pre-adverse action disclosure.

2. If employers still wish to deny employment, they must send an adverse action notice within a reasonable period of time.

If an employer decides not to hire an applicant based in any part on the background screening results, the employer must so notify the applicant through an adverse action notice. An adverse action notice must include the following:

- Identify that an adverse action was taken (e.g., employment was denied) and the identity of the person/company who has taken that action;
- Name, address and telephone number of the consumer reporting agency who supplied the consumer report;
- Statement that the consumer reporting agency did not make the decision to take the adverse action and cannot give reasons why the employer made the adverse decision;
- Statement about the applicant's right to dispute the accuracy or completeness of his/her background screening results;
- Applicant's right to obtain a free background screening report from the consumer reporting agency upon request within 60 days.

The adverse action notice may be provided to the applicant orally, in writing or electronically. However, a best practice recommendation is to provide the notice in writing so that the employer has evidence that it complied with the FCRA adverse action requirement.

The FCRA does not specify the amount of time that must pass between sending the pre-adverse action and the adverse action notifications. An informal FTC opinion suggests that sending the adverse action notification five business days after the pre-adverse disclosure was sent is a reasonable amount of time but circumstances could dictate a longer time between notices.

FACT Act Amendments to the FCRA

In 2003, Congress enacted the Fair and Accurate Credit Transactions Act of 2003 (FACT Act or FACTA) to help combat identity theft, enhance consumer reporting accuracy and establish uniform credit reporting standards. Consequently, the FACT Act amended the FCRA in several significant ways.

New Summary of Rights document

In conjunction with the FACT Act, the Federal Trade Commission (FTC) created a uniform summary of rights document. Reputable background screening providers should be able to provide you with the most recent version of the summary of rights document.

Summary of Rights for Identity Theft Victims

Under the FACT Act, consumer reporting agencies must provide a copy of the FTC's summary of rights for identity theft victims when an applicant indicates he/she has reason to believe he/she was the victim of fraud or identity theft relating to credit, electronic fund transfers or other account transactions. This document is entitled "Remedying the Effects of Identity Theft" and explains the consumer's right to do the following:

1. Ask any one of the three nationwide credit bureaus (i.e., TransUnion, Experian, Equifax) to place "fraud alerts" on their files. That agency will then notify the other two agencies, which must then also place fraud alerts in the consumer's file.
2. Obtain free copies of the information in their files from all three of the nationwide credit bureaus.
3. Obtain documents relating to fraudulent transactions made or accounts opened using personal information.
4. Obtain information from a debt collector.
5. If consumers believe the information in their file is a reflection of identity theft, they can request consumer reporting agencies to block that information from their file.
6. Prevent businesses from reporting information to consumer reporting agencies if consumers have reason to believe the information is a result of identity theft.

Disposal of background screening records

Because identity thieves often acquire people's personal information from trash containers or "dumpster diving," the FACT Act enacted disposal

FACT Act Background Screening Regulations

- Requires employers to give applicants the FTC's version of the "Summary of Your Rights Under the FCRA" document.
- Created summary of rights for identity theft victims.
- Requires employers to properly dispose of background screening results.
- Enables individuals to dispute their background screening results with the original furnisher of the information.

standards to help prevent identity theft. Any business or individual who uses a consumer report for business purposes must properly dispose of sensitive financial and personal information contained in background screening reports. Personal information includes an individual's name, telephone number, address, Social Security Number (SSN), credit information, etc.

FTC guidelines state that shredding, pulverizing or burning paper records so consumer information is unreadable are acceptable examples of disposal methods. Electronically stored data must be overwritten, deleted or physically destroyed so that the electronic files cannot be read or reconstructed. When considering which disposal method to implement, the FTC advises employers to consider the sensitivity of the information, the nature and size of operations, the cost and benefits associated with different disposal methods and relevant technology changes.

Disputing background screening results

Applicants who wish to dispute the accuracy of consumer report information have the right to: 1) identify the specific information being disputed, 2) explain the basis for the dispute, and 3) include any supporting documentation to substantiate his/her claim. In turn, the consumer reporting agency must conduct a reasonable investigation, review relevant information provided by the applicant and complete the investigation within 30 days, free of charge. If the consumer reporting agency determines that the information in the applicant's consumer report was inaccurate, incomplete or could not be verified, it must correct or delete the information from the report. The consumer reporting agency also must notify the furnisher of that information that the information has been modified or deleted from the consumer's file.

Take Away Compliance Tips

Strict enforcement of the FCRA is the only way to accomplish its directives. Consequently, the FTC enforces the FCRA and employers found guilty of noncompliance may face fines or imprisonment. The FTC, certain federal agencies and states may sue employers for noncompliance resulting in potential civil penalties. Likewise, individuals can sue employers for damages for violation of the FCRA.

Both consumer reporting agencies and employers are held responsible for complying with FCRA regulations. However, using a reputable background screening provider is one way employers can reduce their liability. Premier vendors should provide employers with the means to be compliant with the FCRA as well as ensure their own compliance. Below are comprehensive best practices you can easily implement to facilitate FCRA compliance.

1. Give applicants the notice and disclosure document.

Before ordering a background check on applicants, employers must inform them in writing that a consumer report may be obtained for employment purposes. As previously mentioned, the notice and disclosure must be a separate and distinct document. As a best practice reminder, it is a good idea to have applicants sign the notice and disclosure document as proof they are aware of an employer's pre-employment screening practices.

2. Obtain applicants' written authorization prior to obtaining background checks.

Another FCRA requirement before employers can obtain a consumer report is to get the applicant's written authorization (i.e., signature) to do so. As previously mentioned, reputable background screening providers may advise you to use an additional release authorization form that is a separate, distinct document to make it easier to obtain records from educational institutions, employers, courts, etc.

3. Provide a copy of the FTC's "Summary of Applicant Rights Under the FCRA" to applicants.

Employers should give applicants a copy of the FTC's "Summary of Your Rights Under the FCRA" document. As a best practice, employers should consider giving applicants the summary of rights at the time they apply for a position.

4. Abide by Equal Employment Opportunity (EEO) hiring stipulations.

The Equal Employment Opportunity Commission (EEOC), which enforces EEO laws, requires employers to answer the following questions and weigh their responses before denying employment to an applicant based on his/her background screening results:

- Did the applicant actually commit the offense for which s/he was arrested?
- What is the nature and gravity of the offense?
- How long ago was the conviction and/or completion of sentence?
- What is the nature of the job being applied for?

It is illegal for employers to enforce a blanket policy which denies employment to applicants with a previous criminal record. The EEOC stipulates that employers can consider applicants' arrest information, convictions and misdemeanor offenses for employment purposes, however they cannot be the only criteria used to make hiring decisions. Instead, employers need to consider the whole picture about applicants, including interview performance, education, qualifications and more.

In addition, many states have laws restricting employers' use of arrest and/or conviction records when making employment decisions. Employers should consult legal counsel to determine whether and how they may use such information.

5. Comply with adverse action notification requirements.

If employers are considering denying employment or making an employment decision that will adversely affect applicants based in whole or in part on their background screening results, employers are obligated to notify applicants about the adverse decision.

The FCRA-mandated adverse action notification requirements are two-fold. First, a pre-adverse action disclosure must be sent to applicants informing them they may not be hired as a result of information contained in their background screening results. It also instructs individuals what actions they can take if they believe the results are incorrect. At that time, employers must provide the applicant with a copy of the

background screening results and a copy of the FTC “Summary of Your Rights Under the FCRA.” Then, if after a reasonable amount of time has passed since the pre-adverse action disclosure was issued, the employer still wishes to deny employment, the employer must send the applicant an adverse action notification. The FCRA requires that certain information be provided in the adverse action notice.

Conclusion

In today’s changing times, employers are expected to know as much as they can about applicants in order to make the best possible hiring decisions. Consequently, pre-employment background screening has emerged as a key way for employers to meet due diligence requirements to hire safe, qualified employees and reduce negligent hiring exposure. The U.S. Department of Homeland Security recommends background checks in most, if not all areas of employment. For more and more employers, complete, accurate background screening results can help reveal the truth about applicants. The FCRA helps employers gain reliable consumer report information to make informed hiring decisions. On the same note, individuals can rest easier knowing federal safeguards are in place to protect their personal privacy rights.

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Bottom Line

As with all laws, the question of whether to comply with the FCRA is not up for debate - it is mandatory. However, the right background screening provider can simplify employers’ obligations under the FCRA. The notice and disclosure form, the applicant’s written authorization and the summary of rights document build a foundation of checks and balances into employers’ background screening processes while simultaneously upholding core applicant rights.

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