

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

In the aftermath of heightened security risks, workplace violence incidents and negligent hiring lawsuits, employers have turned to background screening for peace of mind and a way to decrease liability. 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 the 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, 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.

FCRA Terms

Consumer: individual.

Consumer Reporting Agency: a person, for monetary fees or dues assembling or evaluating consumer reports for 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 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: contains more detailed, personal and subjective information than a standard consumer report and may include information about an individual's character, general reputation, personal characteristics or mode of living (i.e., reputation, habits, etc.). Investigative consumer reports are 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
- A business transaction initiated by the consumer

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

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 necessary forms, compliance consultation and adverse action notification services.

Notice and Disclosure

Prior to ordering background checks, applicants must be notified in writing that your organization may obtain a consumer report for employment purposes. The FCRA requires this notice to be a separate, clear and conspicuous document. This is true even if it is part of an employment application packet.

This notification is specifically referred to as the Disclosure to Employment Applicant Regarding Procurement of a Consumer Report or the notice and disclosure. It is a recommended best practice to have applicants sign the notice and disclosure as proof they acknowledge your organization may complete background checks on them.

Authorization

Second, employers must obtain applicants or employees' written authorization before ordering background checks. Under the FCRA, the authorization does not have to be a separate document, but the notice and disclosure must still be provided to applicants as a separate, distinct document.

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 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 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 legal 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, which consumer reporting agencies provide to employers. The certification document should include the "Notice to Users of Reports: Obligations of Users Under the Fair Credit Reporting Act." Employers sign this document to give their legal commitment to uphold the provisions of the FCRA as well as equal employment opportunity laws.

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 your future decision, you 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. The notice must contain the name and address of the person to whom such information is being reported. It also explains what course of action the applicant can take if s/he believes the background screening results are incorrect. S/he will have the opportunity to dispute and correct any inaccuracies with the furnishers of the consumer report information.

Under the FCRA, pre-adverse action disclosure can be issued to current employees or applicants orally, in writing or electronically. However, FTC Commentary recommends providing adverse action notification in writing so that employers have evidence they took reasonable steps to comply with the FCRA.

Employers must include copies of the applicant's background screening results and a copy of the FTC's "Summary of Your Rights Under the FCRA" document with the adverse action disclosure. Adverse action disclosures must also include:

- Name, address and phone 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 is contemplating an adverse decision
- Statement about the applicant's right to dispute the accuracy or completeness of his/her background screening results and his/her right to obtain a free background screening report from the consumer reporting agency upon request within 60 days

2. If employers still wish to deny employment, they must send an adverse action notice within a reasonable period of time. The FCRA does not specify the amount of time that must pass before sending the adverse action notification. Nevertheless, an informal FTC opinion has suggested, although certain circumstances may differ as to the reasonableness of the timing, sending the adverse action notification five days after the pre-adverse disclosure is a reasonable amount of time.

As with the pre-adverse action disclosure, adverse action notification may be provided to applicants orally, in writing or electronically and must cover the same points as the pre-adverse action disclosure. Again, to minimize liability, the FTC recommends written communication. However, to minimize confusion when sending the adverse action notice, employers may mention background screening results and the FTC’s summary of rights document were omitted since they were already included with the pre-adverse action disclosure.

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

For the greatest legal protection, employers generally give applicants a copy of the “Summary of Your Rights Under the FCRA” before ordering background checks on them. The summary of rights document explains what course of action individuals can take if they wish to dispute the findings of background screening reports.

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.**

In conjunction with the FACT Act, the Federal Trade Commission (FTC) created a uniform summary of rights document. According to the FTC, employers are permitted to distribute summary of rights documents that are “substantially similar” to the FTC’s version. Meaning, employers can change the formatting or layout of the document (i.e., making it two columns or changing fonts), but cannot alter text. 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 document whenever applicants indicate they have reason to believe they were victims of fraud or identity theft relating to credit, electronic fund transfers or other account transactions. This document bears the official title “Remedying the Effects of Identity Theft” and entitles consumers to the following:

1. The right to 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 your file.
2. The right to obtain free copies of the information in their files from all three of the nationwide credit bureaus.
3. The right to obtain documents relating to fraudulent transactions made or accounts opened using personal information.
4. The right to 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. The right to 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 standards to help prevent identity theft. As of June 1, 2005, all employers with one or more employees 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), etc.

FACT Act rules do not address when employers need to get rid of the information, but rather how the information should be destroyed. FTC guidelines state shredding, pulverizing or burning paper records so consumer information is unreadable as acceptable examples of disposal methods. When considering which disposal method is best for your organization, 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.

This rule also applies to electronically stored data. Information stored electronically, such as computer discs or hard drives, must be overwritten, deleted or physically destroyed such that electronic files cannot be read or reconstructed.

Disputing background screening results

The FACT Act revised section §623 (8) of the FCRA granting applicants the right to dispute their background screening results with the original furnisher of the information. Applicants who wish to dispute the accuracy of consumer report information will need to: 1) identify the specific information being disputed, 2) explain the basis for the dispute, and 3) include all supporting documentation requested by the furnisher to substantiate his/her claim. In turn, furnishers of consumer report information must conduct a reasonable investigation, review relevant information provided by the applicant and complete the investigation within 30 days. If the furnisher confirms the information in the applicant's consumer report was inaccurate, it must promptly notify each consumer reporting agency who obtained the original erroneous consumer report and provide each consumer reporting agency with any applicable corrections.

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 deliberate 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 documented 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. While this practice is not required under the FCRA, it may add a level of legal protection for employers.

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

For most types of background checks, the FCRA requires employers to give applicants a copy of the FTC's "Summary of Your Rights Under the FCRA" document along with the notice and disclosure. As a best practice, employers should consider giving applicants the summary of rights whenever 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.

For more information on how to be compliant with EEO background screening regulations and to obtain ADP's "Background Screening Results: Hiring Decisions and Compliance Considerations" white paper, please visit <http://www.adphire.com/whitePapers.htm>.

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 legally obligated to notify applicants about this.

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. Second, if a reasonable amount of time has passed since the pre-adverse action disclosure was issued and employers still wish to deny employment, an adverse action notification must be sent to applicants.

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 now recommends background checks in 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.

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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