

The Fair Credit Reporting Act and Background Checks —Common Employer Questions & Tips

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When an employer is considering a job applicant, it likely wants to investigate the person's work history, education, criminal record, financial history, medical information, among others. This type of background check is known as a consumer report and is regulated by the Federal Trade Commission (FTC) through the Fair Credit Reporting Act (FCRA).

Although this post is directed toward FCRA compliance upon hiring an employee, the same provisions below apply to current employees and retention decisions.

The FCRA is a lengthy, complex set of laws that can be quite daunting to employers. Here are some common issues regarding the FCRA and how to comply with its provisions, along with practical tips for employers.

Notice to the Applicant and Consent to Obtain Consumer Information

Three steps must be completed by an employer **before** it can obtain an applicant's consumer report:

- (1) Inform the applicant that his/her/their consumer report may be used by the employer for decisions related to employment. This notice must be in writing in a standalone document (e.g., a separate written disclosure rather than buried in an employment application) with clear and visible language.
- (2) Obtain the applicant's consent, in writing, to gain access to his/her/their consumer report. The consent section can be included on the document containing the notice provision mentioned in step number one above. According to the FTC, if an applicant declines to provide permission, an employer may reject that person's application.
- (3) Certify to the consumer reporting agency that it: (a) has properly notified the applicant and obtained consent to access the consumer report, (b) will comply with the FCRA's conditions on use for adverse actions, if applicable, and (c) will not use the information in the consumer report to violate any federal or state equal employment opportunity law or regulation.

Negative Information Discovered in the Consumer Report

If an employer discovers information in the consumer report that could disqualify the applicant for the position, before making a final decision or taking any action, the employer must send the applicant a copy of the consumer report and the "Summary of Consumer Rights," which informs the applicant on how to contact the consumer reporting agency.

This gives the applicant the opportunity to review the report and correct any mistakes with the consumer reporting agency before a final employment decision is made.

Decision to Not Hire the Applicant Based on Consumer Report

If an employer decides not to hire the applicant based on information revealed by the consumer report, it must provide certain information to the applicant within three business days of that decision. The notification can be made orally, electronically, or in writing, and must contain:

- (1) Notice that the employment decision has been made based in whole or in part on a consumer report received from a consumer reporting agency.
- (2) The name, address, and phone number of the consumer reporting agency that supplied the applicant's information.
- (3) A statement clarifying that the consumer reporting agency did not make the decision to not hire the applicant and is not aware of the reasoning for the adverse decision.
- (4) A statement informing the applicant that he/she/they have the right to dispute the accuracy and completeness of any information in the report and can get an additional free report from the consumer reporting agency if he/she/they submit a request within 60 days of the employer's decision.

Practical Tips

Apply the company's background check policy equally to all applicants

Not only does a company have to comply with the FCRA when conducting background checks, but also federal and state anti-discrimination laws. It's illegal to check the background of applicants and employees when that decision is based on a person's race, national origin, color, sex, religion, disability, genetic information (including family medical history), or age (40 or older). Additionally, apply the same standards to everyone when evaluating the information gained from background checks.

All background reports must be securely disposed of

This includes burning, pulverizing, or shredding paper documents and disposing of electronic information so it cannot be read or reconstructed.

Taking adverse action

While not explicitly prescribed by the FCRA, courts and FTC guidance suggest five days is a reasonable period to wait after notifying the applicant about the discovery of information that may disqualify him/her/they from employment and before making the final decision.

State and local background check laws

Be aware of and check the laws of the states where the company employs and hires individuals. The laws of certain states limit the consideration that employers can give to certain criminal record history in the hiring process. For example, California does not allow employers to consider or seek information about certain types of criminal records, including an arrest or a detention that did not result in a conviction.

Provide clear, separate notice

Ensure the notice to the applicant is a standalone written document. Do not simply include it as part of the job

application. Make the language as clear as possible.

Work with your employment lawyer for further questions surrounding the Fair Credit Reporting Act and employee background checks.

Your Key Contacts



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