

The Fair Credit Reporting Act and the Use of Third-party Providers

Employers conducting background checks can run the check themselves or use a third party. However, it is nearly impossible for employers to gather some kinds of information independently, such as credit history and criminal records. As a result, most employers use third-party providers.

Employers using a third-party service provider, also known as a consumer reporting agency, must follow the rules established by the FCRA (*15 U.S.C. §§ 1681-1681x*, amended in 2003 by The Fair and Accurate Credit Transactions Act and in 2010 by the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010* (Dodd-Frank)).

The FCRA applies to the use of third-party service providers to obtain background information on applicants and existing employees. Its purpose is to encourage fairness, truthfulness and confidentiality in obtaining and using background check reports.

In general, the FCRA does not apply to employers using their own in-house staff and resources to conduct background checks. However, in-house background checks may be regulated by state law, as they are in California.

Consumer Reporting Agencies

The FCRA defines entities that regularly gather or evaluate information about individuals to provide reports about them to others as consumer reporting agencies (CRAs). CRAs include:

- Credit bureaus (such as Equifax, Experian and TransUnion).
- Private investigators.
- Collection agencies.
- Detective agencies.
- Internet and social media background screening services.

Communications Covered by the FCRA

The FCRA focuses on the exchange of information about people, including the exchange of information used for making employment decisions. Employment decisions subject to the FCRA include hiring, advancement, continued employment and reassignment. The FCRA refers to exchanges of information as consumer reports, and consumer reports include information about an individual's credit, character, reputation, personal attributes or lifestyle. Most commonly, consumer reports are credit reports. However, consumer reports need not include credit information. For example, criminal records and driving records are also consumer reports. Consumer reports are primarily written materials, but information communicated orally can also be regarded as a consumer report.

The FCRA imposes some limitations on the contents of consumer reports. When employers request consumer reports for employment purposes related to jobs that pay less than \$75,000 annually, the following information must be excluded:

- bankruptcies more than ten years old.
- Civil lawsuits, civil judgments and arrest records more than seven years old (or until the statute of limitations expires if that time period is longer).
- Paid tax liens more than seven years old.
- Delinquent accounts more than seven years old (except for government-sponsored student loans, which are subject to longer periods).
- Other adverse information (other than criminal convictions) more than seven years old.

There is no time limitation for reporting information on criminal convictions, as opposed to criminal arrests. The seven-year limit for reporting non-bankruptcy items of adverse information does not apply to neutral records, such as educational and employment records.

Individuals Covered by the FCRA

The FCRA covers consumer reports on both applicants for employment and current employees. Many courts and the Federal Trade Commission (FTC) have determined that the FCRA can also cover reports on independent contractors.

Employer Obligations under the FCRA

The FCRA imposes specific obligations on both CRAs and employers using their services. Employers' obligations include a rigorous set of notice, disclosure and consent requirements, both in conjunction with obtaining reports and taking adverse employment actions because of information in reports. The FCRA defines "employment purposes," in the context of a consumer report, as "employment, promotion, reassignment or retention as an employee" (15 U.S.C. § 1681a(h)).

This Note does not cover the special rules applicable to commercial driving companies requesting reports on drivers who have no physical contact with the company.

Consumer Report Obligations

When using consumer reports for employment purposes, employers must comply with relevant portions of the FCRA:

- Before obtaining a consumer report, the employer must notify the individual (using an easy-to-read document) that they may be obtaining the report. This disclosure must contain the FCRA notice only and must not address any other topics. For example, including the disclosure in a job advertisement or job application does not meet the requirements of the FCRA.

- The employer must obtain written consent from the individual before obtaining the consumer report.
- The employer must certify to the CRA that it will comply with disclosure and "adverse action" requirements of the FCRA and will not use the information provided to violate equal employment opportunity requirements. The CRA may supply a form for this purpose to the employer. The employer should review the form supplied to ensure that it does not impose more obligations than the statute.
- It is the CRA's obligation, not the employer's obligation, to notify the individual of his rights.

Adverse Employment Action Obligations

If a CRA supplies an employer with a consumer report or an investigative consumer report and the employer intends to take an adverse employment action based either entirely or in part on information in the consumer report, the employer must meet additional requirements. Adverse employment actions include decisions not to hire and other employment decisions that negatively impact applicants or employees.

The employer has obligations both before and after taking the adverse employment action:

- **Before the action.** The employer must provide the investigated individual with a copy of the consumer report and a summary of his rights under the FCRA (15 U.S.C. § 1681b(b)(3)). This summary may be obtained from the CRA, but should be reviewed by the employer for accuracy. Beginning January 1, 2013, the employer must use the new summary of consumer rights under the FCRA that includes contact information for the Consumer Financial Protection Bureau (CFPB). Dodd-Frank created the CFPB and transferred primary authority to publish rules and guidelines under the FCRA from the FTC to the CFPB. The employer does not need to provide any additional information about the adverse action at that time. Although the FCRA does not specify how long an employer must wait between obtaining a report and taking an adverse employment action, employers should give the investigated individual a reasonable amount of time to respond to the report's contents before proceeding with the adverse action. The FTC found that waiting five business days after supplying the required notice to the employee before taking an adverse employment action is reasonable.
- **After the action.** The employer must comply with another set of disclosure rules under the FCRA as amended by Dodd-Frank (15 U.S.C. § 1681m(a)). The employer may provide post-adverse action disclosures in writing, orally or electronically. Oral communications are not recommended; therefore, employers should maintain a written record. The employer does not need to offer additional information about the employment decision, but must provide the following information:
 - notice concerning the adverse action;
 - notice of the individual's credit score, if used in taking the adverse action, along with the range of credit scores under the credit reporting system used, the key

factors that adversely affected the credit score of the individual (the disclosure should not include more than four factors), the date the credit score was created and the name of the CRA that provided the credit score (as required by the Dodd-Frank amendment to FCRA);

- contact information for the CRA that provided the report, including name, address and phone number;
- a declaration that the CRA cannot provide specific information about the reasons underlying the adverse action and that it did not make the adverse action decision itself;
- notice of the individual's right (within 60 days) to request and acquire another copy of the consumer report at no charge from the CRA; and
- notice of the individual's right to contest the contents of the consumer report with the CRA.

If an employer obtains a report with negative information, but decides to make an employment decision for reasons completely unrelated to the report's contents, it is good risk avoidance practice to provide the investigated individual with:

- a copy of the report;
- notice of his rights; and
- an explanation that the report's contents were not relevant to the employment decision.

The employer does not need to offer any additional information about the employment decision.