

FCRA-Compliance

Using Consumer Reports: What Employers Need to Know (April 2005)

Your advertisement for cashiers nets 100 applications. You order criminal-history reports on each applicant because you plan to eliminate candidates with inappropriate criminal histories. What are your obligations?

You're considering a number of your long-term employees for major promotions. Can you check their criminal-history reports to ensure that you consider only financially responsible individuals?

A job candidate has given you authorization to obtain a credit report. The applicant has a poor credit history. Although you consider the applicant's credit history to be a negative factor, it's the applicant's lack of relevant experience that's more important to you. You turn down the application. What procedures must you follow?

As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention - as long as you comply with the Fair Credit Reporting Act (FCRA). The FCRA (including Sections 604, 606, and 615) spells out your responsibilities when using consumer reports for employment purposes.

Congress designed the FCRA primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. Amendments to the FCRA significantly increase the legal obligations - which went into effect September 30, 1997 - of employers who use consumer reports. Congress expanded employer responsibilities out of concern that inaccurate or incomplete consumer reports could cause employers to deny jobs or promotions unjustly. The amendments ensure (1) that individuals are aware that employers may use consumer reports for employment purposes and agree to such use, and (2) that employers notify individuals promptly if information in a consumer report results in a negative employment decision.

What is a consumer report?

A consumer report contains information about an individual's personal and credit characteristics, character, general reputation, and lifestyle. The FCRA covers a report if a consumer reporting agency (CRA) - a business that assembles such reports for other businesses - prepares the report.

Employers often do background checks on applicants and get consumer reports during their employment. Some employers want only an applicant's or employee's credit-payment records; others want driving records and criminal histories.

Employers often ask applicants to provide references. But does the FCRA cover the verification of references? That depends on who does the verification. The Act does not cover references verified by employers, but it does cover references verified by

employment or reference-checking agencies (or other CRAs). Section 603(o) provides special procedures for reference checking; otherwise, checking references may constitute an investigative consumer report subject to additional FCRA requirements.

Key provisions of the FCRA

Written notice and authorization

Before you can order a consumer report for employment purposes, you must notify the individual in writing - in a document consisting solely of this notice - that you are using the report. You must also get the person's written authorization before you ask a CRA for the report. (Special procedures apply to the trucking industry).

Sample Authorization and Release Form

Adverse action procedures

If you rely on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion - be aware that:

Step 1: Before you take the adverse action, you must give the individual a pre-adverse action disclosure that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" - a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.

Step 2: After you've taken an adverse action, you must give the individual notice - orally, in writing, or electronically - that you have taken the adverse action. The notice must include:

- the name, address, and phone number of the CRA that supplied the report
- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it
- a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished and his or her right to an additional free consumer report from the agency upon request within 60 days

Certifications to consumer reporting agencies

Before giving you an individual's consumer report, the CRA will require you to certify that you are in compliance with the FCRA and that you will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

In 1998, Congress amended the FCRA to provide special procedures for mail, telephone, or electronic employment applications in the trucking industry. Employers do not need to make written disclosures and obtain written permission for applicants subject to state or federal regulation as truckers. Finally, no pre-adverse action disclosure or Section 615(a) disclosure is required. Instead, the employer must, within three days of the decision, provide an oral, written, or electronic adverse action disclosure consisting of:

1. a statement that the employer has taken adverse action based on a consumer report
2. the name, address, and telephone number of the CRA
3. a statement that the CRA did not make the decision
4. a statement that the consumer may obtain a copy of the actual report from the employer if he or she provides identification

In 2003, President Bush signed into law the Fair and Accurate Credit Transactions Act of 2003 (FACTA) to combat the increasing threat of identity theft and its effect on consumers and users of consumer reports. The new law allows consumers to make one call to receive advice, trigger a nationwide fraud alert, and protect their credit standing. The law establishes a nationwide system of fraud alerts for consumers to place in their files. CRAs that receive such alerts from consumers must follow procedures to ensure that any future requests are by the true consumer, not an identity thief posing as a consumer.

In practice...

You advertise vacancies for cashiers and receive 100 applications. You want criminal-history reports on each applicant because you plan to eliminate those with criminal histories inappropriate for the position. What are your obligations?

You can get criminal-history reports - one type of consumer report - if you notify each applicant in writing that you may request a criminal-history report and if you receive the applicant's written consent. Before you reject an applicant based on criminal-history report information, you must make a pre-adverse action disclosure that includes a copy of the criminal-history report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if criminal-history report information affected your decision.

You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that you consider only responsible individuals for the position.

What are your obligations?

You cannot get consumer reports unless you've notified the employees that you may obtain reports and have their written permission. If the employees gave you written permission in the past, you need only make sure that the employees receive or have received a "separate-document" notice that you may obtain reports during the course of their employment - no more notice or permission is necessary. If you have not given your employees notice, and/or if they have not given you permission, you must notify the employees and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a pre-adverse action disclosure. The employee must

also receive an adverse action notice once you have selected another individual for the job.

A job applicant gives you the okay to get a consumer report. Although the applicant has a criminal history, the applicant's lack of relevant experience carries more weight in your decision not to hire.

What's your responsibility?

In any case where information in a consumer report is a factor in your decision - even if the report information is not a major consideration - you must follow the procedures mandated by the FCRA. In this case, you must provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you must provide an adverse action notice.

The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant because his or her credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another because the credit report shows only one credit account and you want someone who has shown more financial responsibility.

Summary of Your Rights

Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices - even when the information isn't negative.

The applicant has the right to receive a copy of their background check from IntelliCorp Records Inc. Applicants may use our Applicant Authorization and Release Form for a copy of their report.

Noncompliance

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

For more information

The FTC works for the consumer to prevent fraudulent, deceptive, and unfair business practices in the marketplace and to provide information to help consumers spot, stop, and

avoid them. To file a complaint, or to get free information on any of 150 consumer topics, call toll-free, 1-877-FTC-HELP (1-877-382-4357), or use the online complaint form. The FTC enters Internet, telemarketing, and other fraud-related complaints into Consumer Sentinel, a secure, online database available to hundreds of civil and criminal law enforcement agencies worldwide.

Federal Trade Commission for the Consumer
1-877-FTC-HELP
www.ftc.gov

IntelliCorp's Toll-Free FCRA Hotline
866-202-1436