

I. Fair Credit Reporting Act and the Use of Background Checks.

Note about this brief. This summary provides information about the law – generally. It is designed as a public service, but it is not intended to be legal advice. Legal information is not the same as legal advice -- the application of law to an individual's specific circumstances. To make sure your understanding of the information is correct, and that the concepts are correctly applied to your specific situation, we recommend you consult a lawyer.

A. What is the FCRA?

The Fair Credit Reporting Act (“FCRA” or the “Act”) imposes certain requirements on employers who perform background checks for employment purposes. The purpose of this summary is to address the potential coverage of the FCRA to member organizations and specifically discuss what the Act requires.

The FCRA is a wide-ranging statute that applies to credit applications, credit reporting, and other areas, in addition to the employer-employee relationship. However, for the purpose of this discussion, the focus is on the requirements of the FCRA that potentially apply to member organizations’ employment procedures and actions.

B. Does the FCRA Apply to Your Organization?

The FCRA applies anytime an employer uses a “consumer reporting agency” to provide a “consumer report” on a candidate for employment or a current employee. The terms “consumer reporting agency” and “consumer report” can be misleading because they imply some sort of commercial transaction instead of an employment relationship. However, for our purposes, a “consumer reporting agency” is simply any individual or company that an employer uses to run a background check on a potential candidate for employment or a current employee. A “consumer report” is simply the communication a consumer reporting agency provides to the employer after it completes the background check. Therefore, if an employer uses a company or individual to run background checks on potential or current employees, then the process is covered by the FCRA. The size of the employer does not matter.

For those who like to know the actual definition of terms, the “formal” definition of a “consumer reporting agency” is “any person which, for monetary fees, dues, or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties. . . .” 15 U.S.C. § 603(f). In turn, the term “consumer report” means “any written, oral, or other communication on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for . . . employment purposes Id. at §603(d)(1).

The FCRA does not apply if an employer performs its own background checks “in-house.” An example would be if a company’s hiring manager goes to the local police department to request a criminal records check of a candidate for employment. However, it is

fairly rare for a small or mid-size employer to have either the time or the resources to conduct such searches without the use of a third-party.

The important thing to remember is that, if you or your company uses any service to run a background report or do an investigation on an individual's background for any employment-related purpose (except for an exception applicable to certain investigations as discussed below), then you need to comply with the FCRA.

C. What Does the FCRA Require?

For employers' purposes, the FCRA is a notification and disclosure law. This means that the Act requires employers to provide certain information to a candidate for employment or a current employee and get authorization before utilizing another person or company (consumer reporting agency) to run a background check (consumer report) on him or her. What disclosures are required depends on the reason for the background check, the type of background check to be completed, and what actions are taken as a result of the background check. The specific requirements of the FCRA are set forth and described below.

1. Certification from Employer to Consumer Reporting Agency (Form "A").

This requirement applies to the person or company providing a background check for an employer. However, since the consumer reporting agency will be asking the employer to sign a certification, it is helpful to understand this requirement. Specifically, the consumer reporting agency is not allowed to provide a consumer report (the background check) to a company for employment purposes until and only if:

a. The employer certifies to the consumer reporting agency that: i) the employer has made the required disclosures to the individual to whom the report relates and will provide additional disclosures if an "adverse employment decision" is made based upon the consumer report (these requirements are discussed below); and ii) the employer will not use the information provided in violation of any applicable federal or state equal employment opportunity law or regulation; and

b. The consumer reporting agency provides, along with the consumer report, a summary of the consumer's (the individual about whom the report relates) rights under the FCRA.

In most situations, if an employer is using a well-established company to perform its background checks, the company will provide the employer a certification and ask that the employer sign it before any consumer reports are created. An example of such a certification is attached.

2. Disclosure by Employer to Candidate or Employee (Form "B"). An employer may not obtain a consumer report (or cause a report to be obtained) for employment purposes until:

a. The employer provides a "clear and conspicuous" disclosure to the relevant individual that a consumer report may be obtained for employment purposes. This disclosure must be in writing on a document that consists only of the disclosure (but the FCRA

does allow this disclosure document to also contain an individual's authorization to allow a potential or current employer to obtain a consumer/background report on him or her). Therefore, this disclosure is not effective if it is on the employment application or other document that contains information in addition to the disclosure. An example of a disclosure related to this requirement is attached; and

b. The relevant individual has authorized in writing the employer to obtain or procure the consumer report related to the individual. This authorization may be made on the disclosure referenced above. If the individual refuses to provide such authorization, the employer may not go ahead and get the report any way. However, if an employer's policies make such a background check a condition to employment, the employer could refuse to hire or further consider the candidate based upon his or her refusal to authorize the employer to obtain the background check (included on Form "B").

c. If an individual applies for employment by mail, telephone, computer, or similar means (no in-person interview or interaction prior to the time the background check is to be obtained), then these disclosures and authorizations can also occur orally, in writing, or electronically. However, as a practical risk avoidance matter, we would strongly advise against relying on verbal disclosures or authorizations. In light of the usage and availability of e-mail and fax machines, it is simply not worth the risk of relying on verbal disclosures and/or authorizations.

3. Disclosure Required if Adverse Action Taken (Form "C"). Before an employer may take any "adverse action" based, in whole or in part, on the consumer report, the employer must provide the candidate or employee certain information. The FCRA defines "adverse action" to include, "a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee [or candidate]." 15 U.S.C. § 603(k)(ii). Therefore, this requirement applies to more than just an employer's decision not to hire an individual due, in whole or in part, on the results of the individual's background check. While the Act certainly applies to that situation but it also applies if the employer decides to employ the individual for a lesser position or takes some adverse action against a current employee based, in whole or in part, on the contents of the consumer report. The actions the employer must take before taking the adverse action are:

a. Provide the individual a copy of the consumer report; and

b. Provide the individual a "Summary of Rights" under the FCRA. The Federal Trade Commission ("FTC") has prepared such Summary of Rights and a copy of the document is attached (Form "D").

c. Different disclosure rules apply if an individual applies for employment by mail, telephone, computer, or other similar means, and the employer bases an employment decision, in whole or in part, on the individual's consumer report. Specifically, in such a case, within three (3) days of taking such action, the employer must provide the following notifications: i) that adverse action has been taken based, in whole or part, on a consumer report; ii) the name, address, and telephone number of the consumer reporting agency that furnished the consumer report (including the toll-free number established by the consumer reporting agency

that is required of agencies that maintains files on a nationwide basis); iii) that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and iv) the consumer may, upon proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report. If the consumer requests a copy of the consumer report (and provides proper identification), the employer must send the consumer a copy of the report and the “Summary of Rights” described above within three (3) business days.

4. Additional Disclosures Required for “Investigative Consumer Reports.”
(Form “E”)

The FCRA requires additional disclosures if an employer seeks to obtain an “investigative consumer report” relating to a potential candidate or employee. Investigative consumer reports go farther than normal consumer reports and usually involve the consumer reporting agency interviewing individuals about an applicant or employee. Specifically, before obtaining an investigative consumer report, an employer must make the following disclosures:

a. Disclose to the candidate or employee, in writing, that an investigative consumer report may be made including information “as to his or her character, general reputation, personal characteristics, and mode of living.” This disclosure must be mailed or otherwise delivered no later than three days after the report is requested;

b. The disclosure must also include a statement informing the candidate or employee of his or her right to request the additional disclosures address below in (c). Finally, the disclosure must include a written summary of the individual’s rights that is addressed above and an example of which is attached.

c. If the candidate or employee makes a written request after received the above disclosure, the employer must provide a “complete and accurate” disclosure of the nature and scope of the investigation requested. This report must be in writing and mailed, or otherwise delivered, within five (5) days after the candidate’s or employee’s request is received.

The standard background check, especially a pre-employment or post-offer/pre-employment background check, would not normally call for an investigative consumer report. Due to the additional disclosure requirements, an employer should decide whether or not an investigative consumer report is really necessary. We have attached an example of a disclosure and authorization form that would apply if an employer is requesting an investigative consumer report rather than the more-typical (non-investigative) consumer report.

D. Investigations of Misconduct.

The FCRA excludes certain communications from the disclosure and notification requirements set forth above. Specifically, a communication is excluded from the definition of a “consumer report” if: i) the communication is made to an employer in connection with an investigation of suspected misconduct related to employment or in order to comply with federal, state, or local laws or the pre-existing policies of the employer; ii) the communication is not

made for the purpose of investigating an individual's credit worthiness, credit standing, or credit capacity; and iii) the communication is not provided to any person other than the employer or an employer's agent, a federal or state officer or department or unit of local government, or another individual as required by law.

E. State Laws.

Some states may have laws that include additional requirements relating to background checks. This document only addresses the federal FCRA. Therefore, an organization should determine whether there are any applicable state laws in their state of operation relating to the procurement or use of background reports on candidates or employees.

F. Review Contracts with Background Information Providers Carefully.

Before a background check company (consumer reporting agency) will provide services to a company, it will likely present a services contract for your organization to consider and sign. Review these contracts very closely because they are usually very one-sided (in favor of the background check company) and provide very little protection for the company purchasing the service. An example of such "one-sidedness" includes provisions of the contract that will limit (or entirely disclaim) the background check company's liability for any errors that the company may make. Another example are "indemnification" provisions requiring the company purchasing the services (your organization) to defend the background company (legal costs) if it is ever sued relating to the services provided and even to pay any liability that may be imposed against the background check company. Occasionally, the background check companies will present contracts with these types of provisions as "take-it-or-leave-it" agreements. In such case, your organization must decide whether the value of the service outweighs the potential risks associated with a very one-sided agreement. In some cases, these companies will agree to revise such provisions to make them more even-sided but you will never know unless you request such revision (or removal). Finally, it is important to discuss services with more than one background check company because some agreements and terms are better than others.

II. **Avoid Risks Associated with Improper Applications and Interviewing.**

Although interviews and application forms are necessary and effective ways to determine whether a potential employee is right for a company, they can also present landmines for potential liability if not handled correctly. A company should never have an individual conducting interviews unless that individual has been trained about the various equal employment opportunity requirements that must be followed. Even if an interviewer does not intend to be discriminatory, words or questions mistakenly or innocently used can create the impression of discrimination.

A. Why Applications are Important.

If an employer does not utilize employment applications, there are numerous reasons why it should. This is especially true where the candidate (if hired) will have access to money, will have face-to-face interaction with customers, and/or where a mistake or lack of judgment on the employee's part could result in liability for the employer. One of the most important functions

of the application is to require an applicant to disclose certain facts about his or her history (non-medical history) especially his or her criminal history, if any. The issue is not whether or not an employer decides to employ an individual with a criminal history (convictions) but, instead, the fact that an employer should know so that it can decide whether there are risks. If an candidate is dishonest on the application or fails to answer a question about his or her criminal history and the employer later learns that fact, most courts recognize that this is as a legitimate reason to end the employment relationship. Furthermore, if an employer does not ask this type of question and a customer or third-party is injured due to criminal behavior consistent with the employee's past, the failure to ask that question could be found to be negligent (thus opening the door to liability on a "negligent hiring" theory). Verbal requests of this kind are not sufficient because it offers no evidence that you took this step. An example:

John Doe has numerous convictions for drunk driving, public intoxication, and drug offense. Mr. Doe "applies" to an outfitter to be a shuttle van driver for the company's white water rafting operation and the outfitter hires Mr. Doe without an application, without asking about his history, and without running a background check. Mr. Doe subsequently has an accident in the van injuring customers and third parties and it turns out that Mr. Doe was legally intoxicated. In this example, the outfitter would run a substantial risk if liability based upon its failure to check the applicant's history before putting him behind the wheel. On the other hand, if the outfitter used an application asking Mr. Doe to disclose any convictions, even if Mr. Doe lied and did not disclosure his convictions, the outfitter would be in a much better position to defend a claim made against it.

It is important to check your state's laws regarding this issue because numerous states have enacted legislation regulating what types of questions an employer can ask about a candidate's or employee's criminal history and how the employer can use that information. Typically, it is advisable to ask about convictions instead of arrests. However, in some safety sensitive positions or cash-handling positions, it may be important o ask about arrests as well if there is a such information is directly relevant to the position at issue.

We have enclosed a sample employment application. Again, it is important consult your state law to determine whether the state has enacted any specific laws relating to what an employment application can and cannot include.

B. Areas to Avoid.

There are certain areas to avoid during interviews because even if the discussion is entirely innocent, it can be misconstrued either during the interview or when the person learns that he or she did not get the job. In addition, even if the person is hired, if he or she believes there were inappropriate questions during the interview, the person may recall those questions if any adverse employment action is ever taken against them. These areas include: race; color; religion; sex; national origin; age; disability (see below); marital status; pregnancy or intention to have a family; status regarding public assistance; bankruptcy history; level of participation in the reserves or other military or "uniformed services;" or the participation in any lawful activity off the employer's premises that is not in direct conflict with the employer's essential business functions. Although this seems like a lot, once a person is aware of the issues and has received adequate training, common sense should be able to guide the person. However, if the person's

common sense and training is not serving as a sufficient guide, the employer should immediately find another interviewer because, due to the non-scripted manner of interviews, an interviewer needs to be very confident about what can be asked and how the interview should be conducted.

C. Questions That Are “Per Se” Unlawful.

1. Disability. The Americans with Disabilities Act (“ADA”) prohibits an employer from asking an applicant any medical-related questions that might reveal a disability. This is true with respect to applications and/or interviews. This prohibition includes inquiries related to weight, height, physical or mental disabilities, hospitalization records, and even workers’ compensation claims. However, an employer may ask, “If hired, can you perform the essential functions of the this job with or without a reasonable accommodation.” If the applicant or interviewee responds in the affirmative but states only with reasonable accommodation, the employer may ask what type of accommodation might be required. In addition, you may ask about reasonable accommodation where the individual’s disability is obvious, where an individual has voluntarily disclosed that he or she will need a reasonable accommodation, or in response to a voluntarily disclosed disability. Any questions about reasonable accommodations should be limited to essential functions of the job and these functions should be reflected and supported in the job description.

2. Citizenship. Although most employers are well aware that they are not to ask questions related to race or national origin, fewer are aware that they should also avoid questions of citizenship. Federal law, (the Immigration Reform and Control Act, more specifically) specifically prohibits a potential employer from asking a candidate about his or her citizenship status as part of the hiring process. An acceptable inquiry is “[I]f hired, will you be able to present evidence as to your identity and authorization to work in the United States?” However, in most cases, even that type of question should be avoided. Instead, the better option is for an employer to place a statement to the effect of “Upon hiring, all employees will be required to present evidence as to their identity and authorization to work in the United States” on its application instead of presenting the issue as a question.

D. Other Potentially Troublesome Questions to Avoid.

Although not automatically prohibited like disability-related questions, other questions can cause problems and, therefore, are best to avoid for the reasons stated above. The overarching rule of thumb should be whether the question is relevant to the job at hand. If not, then the question should probably not be asked. Set forth below are some questions to avoid:

1. Age or Date of Birth. Questions that might reveal a person’s age (such as graduation dates) should be avoided. If there is a state law requiring employees to be a certain age, the proper way to ask the question is, “are you at least _____ years old?”

2. Sex or gender. Avoid this on the application (and interview although you would think it would be unnecessary).

3. Race or national origin. Avoid this for obvious reasons.

4. Arrest Record. An arrest does not mean that a person committed a crime and such questions have been used to support race disparate impact lawsuits.

5. Religion. Do not ask any questions about a person's religion or whether he or she will need days off to take part in religious activities.

E. Drug/Alcohol Testing

If an employer conducts drug and/or alcohol testing on candidates and/or employees, the timing of such tests are important. Employers are prohibited from conducting alcohol testing on applicants before a conditional offer of employment (i.e., "you are hired but must successfully complete an alcohol screening/test before you actually begin work") has been made (per the Americans with Disabilities Act ("ADA")). Technically, the ADA does not prohibit testing for illegal drugs before an offer is made. However, it is also advisable to wait to conduct drug testing until after a conditional offer of employment has, in fact, been made. In addition, if an employer conducts drug and/or alcohol testing, it is important to have a written testing policy and it is absolutely critical to have a consent form that the applicant/employee signs authorizing the test and release of information.

Drug and/or alcohol testing is one of the areas in which many states have passed their own laws and regulations. Many of these state laws specifically require written policies and certain language for the policies. In addition, some of these state laws limit in what situations a drug and/or alcohol testing may be performed. As a result, it is very important to consult your state law to determine whether it has any laws relating to drug and/or alcohol testing in the private (non-governmental) employment area .

F. Other Steps to Take.

1. Be consistent. One of the most effective defenses to any discrimination claims is that the employer was consistent with people of all types.

2. Make sure your selected person meets the paper qualifications for the position and do not ignore such qualifications. Although the hire may seem like a "quick fix" to an immediate need, unqualified hires create numerous risks. These risks relate both to the unqualified employee (more risk of injury and poor performance) and your clients that interact with the unqualified employee (more risk of injury to the client or an unsatisfactory experience). Also, if a particular requirement is not really a "requirement," in reality, change the job description to fit the actual reality.

3. Be polite and express interest in the issues raised by the interviewee.

4. Do not ask personal questions. Although actual questions may be entirely lawful, the more personal a question, the more likely a response will be something more than you asked for and an appearance can be created that you were fishing for that information.

5. Conduct periodic training for all staff members that will be taking part in interviewing.

The fact that an employer is looking to hire someone for a position usually means the employer is busy and the person doing the interview may be busier than most making up for the empty position. This haste and need to fill a position lends itself to making mistakes and creating misimpressions during interviews. Despite the difficulty in relaying such information, individuals who will be conducting interviews must understand that it is a critical function and must be handled with care. If an employer can effectively communicate that fact and offer some level of training, it will have taken great strides to avoid liability in this area.