

## The Fair Credit Reporting Act is Not Just About Credit Reports

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Employers have the legal ability and opportunity to utilize information contained in consumer credit reports to evaluate employees if they follow the rules. But if you don't understand the rules and, therefore, fail to comply, it can lead to civil and criminal penalties.

Under the Fair Credit Reporting Act ("FCRA"), the regulatory definition of a consumer "report" goes well beyond the literal meaning typically associated with that word. Actually, the regulation is quite broadly drafted, and takes into account more about a person than you might think (or want to know). A "consumer report" includes any information disseminated by a consumer reporting agency that bears on a consumer's: credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. The information does not have to be written down in "report" form, but can be communicated orally. But in order to be considered a consumer report, the information must be used and/or collected for the purpose of establishing eligibility for primarily: (1) credit or insurance to be used primarily for personal, family, or household purposes; and (2) employment purposes.

The term "employment purposes" when used in connection with a consumer report means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

*Any employer seeking to obtain and make use of a consumer report (including third party conducted reference checks), must comply with the following regulatory requirements:*

Before you obtain a consumer report:

1. Provide the applicant/employee:
  - A clear and conspicuous written disclosure, (in a document that is separate from any other document that you might use information in their consumer report for decisions relating to employment and that the report may include information on their "character, general reputation, personal characteristics, and mode of living." You can include some minor additional information in the notice, like a brief description of the nature of consumer reports, but only if it does not confuse or detract from the notice;
  - A statement informing the applicant/employee of their right to request a complete disclosure of the nature and scope of the investigation; *and*
  - A summary of the applicant's/employee's rights (FCRA version); the following is a link to the Summary of Rights: <https://www.consumer.ftc.gov/sites/default/files/articles/pdf/pdf-0096-fair-credit-reporting-act.pdf>
2. Obtain written authorization from the applicant/employee:
  - If you want the authorization to allow you to get consumer reports throughout the person's employment, make sure you say so clearly and conspicuously.
  - If the background check involves medical information (e.g. a workers comp history), the applicant/employee must provide specific written consent and the medical information must be relevant.
3. Certify to the third party creating the consumer report that you, the employer:
  - Notified the applicant/employee about the FCRA and got their permission to get a consumer report;
  - Complied with all of the FCRA requirements; and will not discriminate against the applicant/employee or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations; *and*
  - Will only use the information for employment purposes.

Before taking any adverse action, based at least in part on information obtained from an agency, provide the applicant/employee:

- A notice of the adverse action;
- A copy of the report; and
- A summary of the applicant's/employee's rights (FCRA version).

Remember: Employers should provide the applicant/employee time to review/dispute the report.

After any adverse action, supply the applicant/employee a written notice of the adverse action, including:

- The name, address, and telephone number of the agency that provided the report (include a toll-free number if the agency is a nationwide CRA);
- A statement that the agency did not make the adverse decision and is not able to explain why the decision was made; **and**
- A statement of the applicant's/employee's right to dispute the accuracy or completeness of any information the consumer reporting company furnished, and to get an additional free report from the company if the person asks for it within 60 days

Note: There are specific/different requirements if the *only* interaction between the applicant and the user has been by mail, telephone, computer or similar means.

The following is the link to the FTC's page regarding what employer's need to know about using consumer reports: <https://www.ftc.gov/tips-advice/business-center/guidance/using-consumer-reports-what-employers-need-know>.

Not knowing may not always be worse, but it can be costly.

#### **Attorney**

- Tracy Armstrong