



HR Resources | Best Practices Series

# **EMPLOYMENT BACKGROUND SCREENING AND THE FAIR CREDIT REPORTING ACT**



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## Employment Background Screening and the Fair Credit Reporting Act

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**This guide and the information contained herein is intended for informational and educational purposes only and is not intended as, nor should it be used as, legal advice.**

## A Guide to Complying with the Fair Credit Reporting Act for Employers

### History of the Fair Credit Reporting Act

The Fair Credit Reporting Act (FCRA) was enacted in 1970 to regulate the consumer reporting industry and to promote accuracy, fairness and the privacy of personal information assembled by Consumer Reporting Agencies (CRAs) in consumer reports. Over the years it has been amended several times. The FCRA regulates the practices of CRAs that collect and compile consumer information into consumer reports for use by credit grantors, insurance companies, employers, landlords, and other entities in making eligibility decisions affecting consumers. Information included in consumer reports, which will be referred to as background check reports in this Guide, may include consumers' credit history, criminal history and public record information such as arrests, judgments and bankruptcies, employment and education verification, and drug tests. For purposes of this Guide, it regulates background check reports that are obtained from a CRA, for employment screening purposes.

The federal agencies charged with enforcing the FCRA are the Consumer Financial Protection Bureau (CFPB) and the Federal Trade Commission (FTC). The FCRA is enforced at the federal and state levels, as well as through private litigation.

The FCRA regulates CRAs that provide consumer reports to employers. For employment screening purposes it generally requires Notice and Authorization from the applicant, Permissible Purpose, Pre-Adverse and Adverse Action notices, Disclosures of the Consumer Reports and proper Disposal of consumer reports. Both the CRA and end user of the report have responsibilities and obligations to the job applicant with respect to the consumer report, commonly referred to as a background check report.

## Employer Responsibilities

The employer responsibilities under the FCRA can be broken down into three parts:

- Before obtaining a background check report from a CRA
- What information is allowed to be included in the background check report
- How to use the information in the background check report

## Before Obtaining a Background Check Report

### Agreement to comply with the FCRA

END USER CERTIFICATION – The Employer must certify and sign a legally binding contract with the CRA that they will follow the provisions of the FCRA as well as equal employment opportunity laws, in addition to having a permissible purpose for obtaining the background check report. Under the FCRA, a permissible purpose includes a report used for employment purposes.

NOTICE TO USERS OF CONSUMER REPORTS: OBLIGATIONS OF USERS UNDER THE FCRA – The CRA provides the employer with this notice which details an employer's obligations under the FCRA. This notice is provided by the CFPB and can be found on their website at [www.consumerfinance.gov/learnmore](http://www.consumerfinance.gov/learnmore).

### Notice and Authorization to the Applicant

SUMMARY OF CONSUMER RIGHTS – The job applicant must be provided with the CFPB's notice, "A Summary of Your Rights under the Fair Credit Reporting Act", which details for the job applicant their rights under the FCRA. This includes their right to know what's in the background check report.

NOTICE AND AUTHORIZATION – Before ordering a background check report, the employer must obtain the job applicant’s written authorization on a form that is **separate** from the employment application.

### **Permissible Purpose**

**E**nd Users (Employers) must have a permissible purpose to obtain a consumer report, - a background check report - for employment purposes. That report can only be used for employment screening purposes by the employer.

## The Background Check Report - What Information Can Be Included?

As a general rule, a background check report used for employment screening purposes could include the following information – criminal history, credit history, educational and/or employment verification, DMV records and/or drug testing results.

### FCRA - Federal Time Limits

The FCRA sets some time limits on what can be reported. Bankruptcies cannot be reported after 10 years; tax liens cannot be reported more than seven years after payment; accounts placed for collection cannot be reported after seven years; civil suits, civil judgments and any other negative information, after seven years. However, these restrictions do not apply to job applicants with a salary of \$75,000 or more per year with respect to a credit report.

### Criminal Convictions

Criminal convictions are an exception to the FCRA time limits on the reporting of adverse information in a background check report. The FCRA allows criminal convictions to be reported at any time—there are no time limits. However, some states have stricter rules limiting reporting or use of criminal convictions and follow a seven-year rule and do not allow reporting of criminal convictions more than seven years after disposition, release or parole. However, in some states, the seven year restriction does not apply to job applicants with a specific annual salary, usually over \$20,000 or \$75,000.

## State FCRA Laws

Many states have FCRA laws that are stricter than the Federal FCRA. The state laws which go over and above federal law are summarized at the end of this article.

## Employer Responsibilities Regarding Background Check Reports and the Information Contained in the Reports

If an employer is going to take any adverse action against a job applicant or employee with respect to their hiring, promotion, reassignment or retention as an employee based on the report they must notify the individual about that and provide them with a copy of the report as well as a copy of the CFPB's "A Summary of Your Rights Under the FCRA." This is called the Pre-Adverse Action letter or notice. If the individual is ultimately not hired or other employment action is taken adversely affecting the individual, an adverse action letter must be sent.

Before you reject a job applicant, reassign or terminate an employee, deny a promotion or take any other adverse employment action based on information found in a background check report, you must provide the applicant or employee with:

### Pre-Adverse Action:

PRE-ADVERSE ACTION NOTICE – This letter notifies the applicant or employee that information in the background check report might be used to take an "adverse action" against them. The purpose of the "Pre-Adverse Action" notice and this step, which is required by the FCRA, is to give the applicant or employee an opportunity to review the report to determine if any information in the report is inaccurate or incomplete and if it is, to contact the CRA to dispute or explain what is in the background check report. Therefore, if you are going to use any information in a background check report that may

result in an “adverse action” you must provide the applicant or employee with the following:

1. A copy of the BACKGROUND CHECK REPORT – so they can review the findings.
2. A copy of the CFPB’s “A SUMMARY OF YOUR RIGHTS UNDER THE FAIR CREDIT REPORTING ACT” – details the applicant or employee’s rights under the FCRA.

## WINDOWS OF DISPUTE

### **Adverse Action:**

**A**fter a reasonable amount of time has been provided to the applicant or employee to review the report, and you intend to make a final decision not to hire the applicant or retain the employee, you must take one additional step. That is the Adverse Action step and, under the FCRA, you must provide the applicant or employee with an ADVERSE ACTION NOTICE, notifying them that an adverse action is being taken against them – such as not hiring them – based on information in the background check report. This notice can be sent in writing or electronically.

**A**n Adverse Action Notice tells the applicant or employee about their rights to see information being reported about them and to correct inaccurate information. The notice must include:

- The name, address and phone number of the CRA that supplied the background check report;
- A statement that the company that supplied the background check report did not make the decision to take the adverse action and cannot give them any specific reasons for the adverse action; and,
- A notice of the person’s right to dispute the accuracy or completeness of any information in the report and to get an additional free report from the CRA that supplied the background check report if they ask within 60 days.

**Note:** The above information is intended as a general overview of the Pre-Adverse and Adverse Action steps under the FCRA and employers should consult with their legal counsel regarding specifics. Also, several States have adopted their own version of the federal FCRA which may impose more limitations on background check reports. For instance, California has their own requirements related to such reports and which are not addressed in this guide.

## Disposal of Background Check Reports

Users of consumer reports, as defined by the FCRA, including background check reports used for employment screening purposes must have in place procedures to properly dispose of consumer information found in such reports. Reasonable measures to protect against unauthorized access to or use of the information could include:

- **Destroying** or erasing electronic files so that consumer information cannot be read or be reconstructed.
- **Shredding**, burning or otherwise destroying paper documents so that consumer information cannot be read or reconstructed.
- Hiring a certified contractor specialized in document destruction after performing due diligence of the company's operations and security policies.

## Scope of the Fair Credit Reporting Act

The FCRA applies to all employers in the United States who utilize third party screening providers, including:

- Private employers, regardless of size
- Federal government
- State government
- Local & municipal governments

## State Specific FCRA Laws

Many states have FCRA laws that exceed what is required by the federal FCRA. Employers need to be aware of both Federal and State laws. Below is a general overview of certain state requirement regarding the use of reporting of certain criminal history information and is not intended to be a complete review of all state law.

Contact Crimcheck for more information about your state.



California  
Montana  
Nevada



Convictions that fall outside of the 7 year scope cannot be reported.  
\*This also includes arrest records.

Alaska  
Kentucky



Only convictions can be reported.

Colorado  
Kansas  
Maryland  
New Hampshire  
Texas  
Washington



Convictions that fall outside of the 7 year scope cannot be reported except when the candidate's salary is expected to be a certain amount (This salary exception varies depending on the state.)

New Mexico



Convictions that fall outside of the 7 year scope cannot be reported and only convictions can be reported.

Hawaii



1. The candidate must receive a conditional offer for employment in order for the employer to inquire about their criminal history and  
2. All convictions reported must be relevant to the duties and responsibilities of the position offered to the candidate.

Michigan



A misdemeanor can only be reported if it resulted in a conviction (Does not apply to felonies)

Minnesota  
Oklahoma



The candidate must be allowed to receive a copy of the report (Minnesota – a copy of the report to the consumer within 24 hours)

New York



1. Only convictions can be reported  
2. Candidate must complete a specific authorization form

Massachusetts



1. Convictions that fall outside of the 7 year scope cannot be reported except when the candidate's salary is expected to be a certain amount  
2. Specific misdemeanors are excluded from consideration  
3. Certain misdemeanors are subject to 5 year scope restrictions

## Additional Considerations when Screening: EEOC Guidelines

In addition to an employer's obligations and responsibilities under the FCRA, they must also consider guidance provided by the Equal Employment Opportunity Commission (EEOC) with respect to the use of criminal history records for employment screening purposes. The guidance is the "EEOC Enforcement Guidance on the Consideration of Arrest and Convictions Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964" (No. 915.002). This document is intended to provide employers with guidance regarding the use of arrest or conviction records in employment decisions under Title VII of the Civil Rights Act of 1964.

To read the guidance click here:

[http://www.eeoc.gov/laws/guidance/arrest\\_conviction.cfm](http://www.eeoc.gov/laws/guidance/arrest_conviction.cfm)

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## FCRA Terms and Definitions

**Adverse Action** - A denial of employment or any other decision for employment purposes based in whole or in part on a consumer report that adversely affects any current or prospective employee.

**Consumer** - An individual who is the subject of a background check report requested by an employer and conducted by a consumer reporting agency.

**Consumer Report** - Any written, oral, or other communication of any information by a consumer reporting agency bearing on a consumer's character, general reputation, personal characteristics, mode of living, credit worthiness, credit standing /or credit capacity 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 eligibility for, for instance, employment purposes..

**Consumer Reporting Agency (CRA)** - Any entity which, for a monetary fee, engages in whole or in part in the practice of assembling or evaluating consumer information for the purpose of furnishing consumer reports to third parties. Background screening companies such as Crimcheck are considered to be a CRA under the FCRA.

**Investigative Consumer Reports** - More detailed, personal and subjective information than a standard consumer report and which includes information about a consumer's character, general reputation, personal characteristics or mode of living (i.e., reputation, habits, etc.) which is obtained through personal interviews with neighbors, friends or colleagues.

**Permissible Purpose** - FCRA approved reason for obtaining consumer reports and/or investigative consumer reports. Under section 604 of the FCRA, consumer reports can only be furnished for the following reasons:

- Court order or subpoena
- In accordance with the consumer's written instructions
- Credit transactions involving the consumer
- Employment purposes
- Insurance underwriting
- License or government benefit eligibility
- Assessment of credit or prepayment risks
- If there is a legitimate business need for the information such as in connection with a business transaction initiated by the consumer which could include tenancy

## The Bottom Line: Quick Guide to FCRA Compliance

### A Guide to Complying with the FCRA for Employers

Part One: The FCRA



How does the FCRA relate to background screening?

The **Fair Credit Reporting Act** is federal law that governs how employers (**you**) can use background check reports for pre-employment screening & it ensures that the Consumer Reporting Agency (**Crimcheck.com**) is fair and respectful of the consumer's (**your applicant's**) privacy.

Before you can obtain a background check

End User Certification	→	You must complete the End User Certificate which certifies that you will comply with all FCRA requirements regarding background checks.
Notice to Users of Consumer Reports	→	You will be provided with the Notice to Users of Consumer Reports document which details your obligations under the FCRA as the employer.
Summary of Consumer Rights	→	The applicant must be provided with the Summary of Consumer Rights document which details their rights under the FCRA as a consumer. It notifies them that the report will be used for employment decisions, explains their notification rights and explains how to dispute inaccurate information.
Notice and Authorization	→	Before ordering a background check report, you must obtain the applicant's permission, on a signed form that is separate from the employment application.

# A Guide to Complying with the FCRA for Employers

## Part Two: Adverse Action



### Adverse Action Notification

#### Before you take Adverse Action:

Before you reject a job applicant, terminate an employee, deny a promotion or take any adverse action based on information on a background screening report, you must provide the applicant or employee with:

- 1. Pre-Adverse Notification Letter**  
which includes the contact information of the Consumer Reporting Agency
- 2. A Copy of the Background Screening Report**
- 3. Summary of Your Rights Under the FCRA**
- 4. Window of Dispute -**  
a sufficient amount of time for the applicant or employee to review and dispute the findings

#### After you take Adverse Action:

You must provide the applicant or employee with an **Adverse Action Notice** notifying them that their employment has been denied based on findings in the background check report.

# A Guide to Complying with the FCRA for Employers

## Part Three: EEOC Guidance



### Additional EEOC Guidelines

#### Targeted Screen

When making hiring decisions, Crimcheck.com recommends using a **Targeted Screen** that is:

- Narrowly tailored to specific job descriptions
- Documented, including that data and rationale behind the decisions for the screen

#### Utilize an Individualized Assessment

##### Factors to Consider:

- Facts surrounding the offense
- Number of offenses
- Age at the time of the conviction
- Length and consistency of employment history before and after the offense or conduct
- Rehabilitation efforts
- Evidence that after the conviction the individual performed the same type of work with a different employer with no known incidents of criminal conduct

#### Ban The Box

Some state, county and city governments have "**Banned The Box**". This is legislation which removes the "box" on employment applications that asks applicants to disclose criminal history. The purpose is to limit discrimination against applicants with a criminal history.

- At this time, Ban the Box mainly applies to government positions and companies that have contracts with these governments.
- Feel free to remove this box from your employment application if you want; if you are a Crimcheck.com client, it is already included on your background authorization form.

### Stay Compliant with Crimcheck.com!

Crimcheck.com can help you stay compliant and up-to-date on all new FCRA legislation -  
Contact us to get started today!

Contact Us:  
877-992-4325

