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FCRA: An Employer's Guide and Overview

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The Importance Of A Reasonable Background Screen

- Liability Protection

Think of a reasonable background screen as an effective and very cost efficient insurance policy.

In the event of injury caused by an employee (to a client, vendor, to the public, etc.) in the course and scope of his or her employment, the **first** thing the attorney for the injured or damaged party will do is pull a background screen on the offending/responsible employee.

In the event that there was past criminal conduct that reasonably could have been detected by the employer, **a lawsuit against the employer for negligent hiring is all but guaranteed**.

This liability and risk exposure can be reduced and/or eliminated by conducting a reasonable background screen each and every time on each applicant.

Do not be lured into a false sense of security by firms that peddle low cost "national" searches. National databases are filled with gaps and holes and likely may not be deemed to be a "reasonable and sufficient search" (during the subsequent negligent hiring lawsuit against the employer, in the event of injury or damage caused by an employee).

Before you buy a low cost "national" criminal records search, be sure to read all the disclaimers by the national search provider – specifically, all the gaps and inadequacies of the national criminal database. This lays out pretty clearly what you are getting, which may not be much, if anything, in liability and risk protection.

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FCRA – An Overview

The FCRA is the federal law which governs employers who use consumer reports in making employment decisions. Historically, prior to amendment of the FCRA in 1997, the only "notice" required by an employer was if a credit check was going to be run. As amended, the FCRA now imposes significant additional obligations on employers that run a consumer report from a credit reporting agency in making an employment decision.

In addition, state laws may prescribe further restrictions on the use of consumer reports in making employment decisions.

State laws may provide **greater restrictions** than the FCRA on such use, but cannot weaken the federal law (FCRA).

So, as a practical matter, this means that the "starting point" in determining your compliance is the FCRA, but very importantly you must also check and comply with any additional restrictions under state law.

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"But, Which State Law Do I Apply"?

There is no bright line rule. We have taken a number of factors into consideration, and our best (and we believe safest) practice recommendation is as follows:

Check the state for **each** of the following:

1. The state of residence of the applicant (or employee) as set forth by the applicant (employee) on his or her application, AND
2. The state where the applicant/employee will be/is working.

In many cases, the states -- based on (1) and (2) above -- will be the same. But, in some cases, they will be different. If they are different: **Apply the law of the state with the most restrictive rule/reporting requirement**.

Example: Applicant (based on his or her application) resides in state A and is or will be working in state B, and state A has a 7 year limitation on reporting convictions, and the applicant has a conviction 10 years ago. Result: Not reportable.

If you have any questions on a case by case basis, please do not hesitate to contact us.

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Why Comply with the FCRA and Applicable State Law?

Answer: There is a small army of plaintiffs' and class action attorneys standing by waiting to sue you for the most minor and technical violation(s).

By "technical violations" we mean a violation which may have **zero** connection with any damages to the applicant or employee.

Example: Recently, we consulted on a case where the applicant had multiple felony criminal convictions that were properly reported back to an employer, and as a result the position was not offered to the applicant. However, the CRA mistakenly also reported a misdemeanor (and non serious) criminal record involving a Health & Safety Code violation. The denied applicant then went to a supposedly non-profit group which offers support to people denied employment due to criminal records. The group reviewed the records and found that the misdemeanor record was reported shortly beyond a state law imposed 7 years (from date of conviction), and then referred the person to a particular attorney (who just happened to be on the Board of the "non-profit".) The attorney then demanded multiple hundreds of thousands dollars as damages against the CRA, claiming that "but for" the reporting of the misdemeanor, the applicant would have been hired. The lawyer also claimed damage to his client's "reputation."

The problem for the CRA was that even a technical violation, **with zero connection to any damages to the applicant** (obviously, in this case, based on the multiple felony records, the misdemeanor record had no connection to the adverse action), the CRA was still liable to the applicant for her attorneys' fees under state law. So, here, the CRA ended up having to pay money to avoid costly litigation, and having the cover the applicant's attorneys' fees bill.

Seem absurd? Sure does to us, but this can be the result of even a technical violation of FCRA and/or applicable state law.

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FCRA Definitions

A "Credit Reporting Agency" (CRA): Any person or entity that for a fee engages in assembling consumer credit or other information for third parties.[1]

A "Consumer": An individual.

"Consumer Reports": A communication by a CRA which bears upon a consumer's credit, character, reputation, personal characteristics or mode of living which is used (or expected to be used) in employment decision-making.

[1] If an employer uses a CRA, it must comply with the FCRA and applicable state law.

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Overview of FCRA's Requirements

Two primary requirements:

1. Disclosure and Authorization
2. Adverse Action Notification

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Disclosure & Authorization ("D+A")[2]

An employer using an "investigative consumer report"[3] must:

1. Make a written disclosure to the applicant or employee that a consumer report may be obtained. The timing of the disclosure must be not later than 3 days after the consumer report is requested but before the report is obtained. The written disclosure must be a separate document. It cannot, for example, be part of the employment application.

2. The employer must obtain a written authorization (from the applicant or employee) prior to running the consumer report.

3. The employer must provide to the consumer The Summary of Consumer Rights as part of the D+A.

4. The employer must provide to the consumer a Statement informing the consumer of his or her right to request additional disclosures regarding the nature and scope of the investigation/screening.

5. If the request for additional disclosure is made by the consumer within a reasonable time, then:

- The employer just make a complete disclosure of the nature and scope of the investigation/ background screening; and
- The additional disclosure must be in writing and given to the consumer no later than 5 days after the request was received, or the consumer report was first requested by the employer, whichever is later in time.

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[2] In 2004, the FCRA was amended to address certain types of workplace investigations (i.e. where there is reasonable suspicion on wrongdoing), including allowing for a different D+A process. In addition, a separate set of requirements applies to consumer reports that contain medical information. Each of these sets of rules are beyond the scope of this Summary. Please contact ScreeningOne for further information.

[3] The FCRA makes a distinction between "consumer reports" and "investigative consumer reports." One important distinction, as defined, is that an ICR includes information which is obtained through communication with neighbors friends, acquaintances or associates of the consumer, or others. In our view, based on the regulatory language, rulings and case law, our recommended best practice for employers is to follow the D+A requirements for an ICR.

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Adverse Action ("AA")

The 2 step AA notice process is triggered if the employer receives information in the consumer report which it intends to act on in a way adverse to the interests of the employee or applicant.

Examples of AA include: Declining/not extending an offer, withdrawing an offer, declining/denying promotion and termination.

Before AA is taken, the employer must follow a 2 step process: Pre-AA Notice and AA Notice..

1. **Pre-Adverse Notice**: As the name indicates, **before** any AA is taken the employer must provide the applicant or employee:

- A copy of the consumer report obtained from the CRA
- The Summary of the Consumer's Rights under the FCRA.

2. **Waiting Period**: Before any adverse action is taken, the employer must wait a reasonable period of time after the Pre-Adverse Notice. No time is specified in the FCRA but the Federal Trade Commission informally approved a 5 business day period, and this is our best practice recommendation. [4]

3. **AA Notice**

Must include:

- Notice of the AA taken
- Name, address and toll free telephone number of the CRA
- A statement that the CRA did not make the decision to take the AA and is unable to tell the consumer why the AA was taken
- Notice of the right to obtain a copy of the report from the CRA if request is made within 60 days.
- Notice of the right to dispute the accuracy and completeness of the report.

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[4] The idea is to provide the applicant or employee with notice and the ability to correct any errors in the information on which the adverse action is to be made. (From time to time, errors **do** occur in the records!)

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Questions?

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