

Blog Post

# Checking Applicant Backgrounds? Be Careful!

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Background checks are a great idea — unless you fail to do them correctly. Mistakes can be costly. One online retailer paid \$5 million to settle a class action filed by 454,000 job applicants alleging violations of the Fair Credit Reporting Act (FCRA), a key federal law governing the conduct of background checks. The number of such lawsuits continues to rise: it doubled between 2009 and 2018, and *every year since then has marked a new high*. There were 5,406 FCRA lawsuits filed in 2021 alone and, based on the 1,500 filed in the first three months of 2022, this year there will be even more. Accordingly, now is the time to take a careful look at your company’s hiring documents and the way you screen potential employees.

The FCRA is highly technical and employers must strictly comply. A good faith effort at compliance is not enough. One ongoing FCRA class action lawsuit involves a company that was sued because it was trying to update the FCRA disclosure it provides to job candidates and accidentally left *just a single footnote* from the draft form in the disclosure. The Plaintiffs have alleged that the footnote was prohibited “extraneous” information that was impermissible under the FCRA. In April 2022, an appellate court denied the company’s motion to enter summary judgment in its favor without trial, and that case now has to go to trial.

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Background checks are a key component in the hiring process. With the exception of a few industries, background checks are not generally required, but they are recommended for a number of reasons. Many states protect employers from negligent hiring claims if they have performed an appropriate background check. And conducting background checks can be an important part of a workplace violence prevention program. (Check out our [recent blog](#) about the role of background checks in preventing workplace violence.) If you are going to conduct background checks, it is imperative to have a clear process and appropriate forms in place to comply with the requirements of the FCRA to reduce the risk of exposure to costly FCRA claims.

## What Is The FCRA And Why Is This So Hard?

### Applicability

The FCRA is a federal law intended to protect consumers by ensuring the accuracy and fairness of “consumer reports,” which can include not only credit reports but background checks. A “consumer report” is broadly defined to include communication of any information *by a Consumer Reporting Agency (CRA)* bearing on a consumer’s character, general reputation, personal characteristics, or mode of living, which is used as a factor in establishing eligibility for employment purposes or in assessing an employee for promotion, reassignment, or retention. This includes criminal records and driving records.

Note, however, that the FCRA *only governs information from a CRA* — that is, a person or entity regularly engaged in the practice of assembling or evaluating information on consumers to furnish consumer reports. *The FCRA does not govern background checks conducted in-house by an employer.* This generally means that an employer’s internet search of an employee or employee candidate using online resources falls outside of the

FCRA. Similarly, another common background check item that falls outside of the FCRA is an employer's use of in-house staff to call former employers and verify employee references.

Although these in-house background checks fall outside of the FCRA, employers *do not* have the freedom to investigate with impunity because the FCRA is not the only law that applies. In-house background checks still have to comply with any state laws or personal privacy laws. Additionally, haphazard searches may uncover a potential employee's demographic information or information about their affiliations. Relying on or appearing to rely on information about an employee's protected class or protected activities could create exposure to discrimination or retaliation claims under various federal, state, and local anti-discrimination laws. In addition, some states have protections surrounding off-duty conduct, so employers must be careful in how they use information they may find.

## **FCRA Requirements For Employers**

Employers who use CRAs to conduct background checks must comply with the FCRA's disclosure, authorization, and notice provisions.

Disclosure and Authorization. Before obtaining information in a consumer report, the FCRA requires notice be given to the job applicant, and for the applicant to give permission. The notice must be in writing in a stand-alone document that does not address any other topics, and must be clear and conspicuous. Although the FCRA disclosure form can be combined with the individual's written authorization form, employers should still consider providing a stand-alone disclosure form and separate authorization form.

That short summary masks how complicated this can be, and it has become more complicated as technology has changed the way companies operate. Consider our online retailer that paid \$5 million to

settle a FCRA lawsuit — the claims in that case included the allegation that the disclosure was part of the company’s online application and therefore violated the requirement that the disclosure be in a stand-alone document. Where is the line in determining when a disclosure provided to an online applicant is separate from, or part of, the online application? What constitutes “other topics” that cannot be part of the disclosure? In the case going to trial over a footnote, that footnote was a business-to-business drafting note from the company providing the form to the employer. The footnote stated that nothing in the form was legal advice or guidance, and that employers should consult their own counsel about their compliance responsibilities under the FCRA and applicable state law. So even a footnote discussing compliance with the FCRA was extraneous information on a form used to help an employer comply with the FCRA. FCRA compliance is further complicated by the fact that some states have their own background check laws with their own requirements. Some courts have held that combining a state-mandated disclosure with the FCRA-mandated disclosure still violates the requirement that the disclosures be in a stand-alone document.

Adverse Action Notices. If an employer decides not to hire a job applicant based on information obtained in a background check from a CRA, it must meet additional requirements. *Before taking an adverse action*, the employer must provide the candidate with a copy of the consumer report and a written summary of the individual’s consumer rights. The written summary must contain a notice regarding the individual’s right to obtain a security freeze on their credit report. *After taking an adverse action*, the employer must provide notice concerning the adverse action, contact information for the CRA that provided the report, a declaration that the CRA cannot provide specific information about the reasons underlying the adverse action and that it did not make the adverse action decision itself, notice of the individual’s right to request and acquire another

copy of the consumer report at no charge from the CRA within sixty (60) days, and notice of the individual's right to contest the contents of the consumer report with the CRA. There are separate disclosure requirements if the decision was based on the individual's credit score. All of these notices and disclosures create potential opportunities for missteps that could lead to liability under the FCRA.

### What About Criminal History?

Most employers will want to know about an individual's criminal history. The FCRA allows inquiries into criminal history with some limitations. Checks of arrest records older than seven years are not authorized for jobs that pay less than \$75,000 a year. Note that the limitation only applies to arrests — there is no time limitation with regard to criminal convictions. If criminal history is used in the decision not to hire a candidate, the adverse action notices above must be followed.

In addition, any background information received from any source must not be used to discriminate in violation of federal, state, or local law. Because arrests and convictions disproportionately impact certain protected groups, the Equal Employment Opportunity Commission (EEOC) has taken the position that even a neutral policy of excluding all applicants from employment based on certain criminal conduct may be discriminatory. Employers should conduct an individualized inquiry to ensure that any exclusion for criminal history is related to the position at issue.

### Model FCRA Notice And Form

The importance of maintaining appropriate and up-to-date FCRA notices and forms cannot be understated. As noted above, a random footnote or extraneous sentence can create liability. The current FCRA model summary of consumer rights is available from the Consumer Financial Protection Bureau [here](#).

For information or guidance regarding background checks or the FCRA, contact your Akerman labor and employment attorney.

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