

## Using Consumer Reports: What Employers Need to Know

*Your advertisement for cashiers nets 100 applications. You want credit reports on each applicant. You plan to eliminate those with poor credit histories. What are your obligations?*

*You are considering a number of your long-term employees for major promotions. Can you check their credit reports to ensure that only financially responsible individuals are considered?*

*A job candidate has authorized you to obtain a credit report. The applicant has a poor credit history. Although the credit history is considered a negative factor, it's the applicant's lack of relevant experience that's more important to you. You turn down the application. What procedures must you follow?*

As an employer, you may use consumer reports when you hire new employees and when you evaluate employees for promotion, reassignment, and retention — as long as you comply with the Fair Credit Reporting Act (FCRA). Sections 604, 606, and 615 of the FCRA spell out your responsibilities when using consumer reports for employment purposes.

The FCRA is designed primarily to protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible. Amendments to the FCRA — which went into effect September 30, 1997 — significantly increase the legal obligations of employers who use consumer reports. Congress expanded employer responsibilities because of concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The amendments ensure (1) that individuals are aware that consumer reports may be used for employment purposes and agree to such use, and (2) that individuals are notified promptly if information in a consumer report may result in a negative employment decision.

### What is a Consumer Report?

A consumer report contains information about your personal and credit characteristics, character, general reputation, and lifestyle. To be covered by the FCRA, a report must be prepared by a consumer reporting agency (CRA) — a business that assembles such reports for other businesses.

Employers often do background checks on applicants and get consumer reports during their employment. Some employers only want an applicant's or employee's credit payment records; others want driving records and criminal histories. For sensitive positions, it's not unusual for employers to order investigative consumer reports — reports that include interviews with an applicant's or employee's friends, neighbors, and associates. All of these types of reports are consumer reports if they are obtained from a CRA.

Applicants are often asked to give references. Whether verifying such references is covered by the FCRA depends on who does the verification. A reference verified by the employer is not covered by the Act; a reference verified by an employment or reference checking agency (or other CRA) is covered. Section 603(o) provides special procedures for reference checking; otherwise, checking references may constitute an investigative consumer report subject to additional FCRA requirements.

### Key Provisions of the FCRA Amendments

#### ***Written Notice and Authorization.***

Before you can get a consumer report for employment purposes, you must notify the individual in

writing — in a document consisting solely of this notice — that a report may be used. You also must get the person's written authorization before you ask a CRA for the report. (Special procedures apply to the trucking industry.)

### ***Adverse Action Procedures.***

If you rely on a consumer report for an "adverse action" - denying a job application, reassigning or terminating an employee, or denying a promotion — be aware that:

**Step 1: Before** you take the adverse action, you must give the individual a **pre-adverse action disclosure** that includes a copy of the individual's consumer report and a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" — a document prescribed by the Federal Trade Commission. The CRA that furnishes the individual's report will give you the summary of consumer rights.

**Step 2: After** you've taken an adverse action, you must give the individual notice — orally, in writing, or electronically — that the action has been taken in an **adverse action notice**. It must include:

- the name, address, and phone number of the CRA that supplied the report;
- a statement that the CRA that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it; and
- a notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished, and his or her right to an additional free consumer report from the agency upon request within 60 days.

### ***Certifications to Consumer Reporting Agencies.***

Before giving you an individual's consumer report, the CRA will require you to certify that you are in compliance with the FCRA and that you will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

In 1998, Congress amended the FCRA to provide special procedures for mail, telephone, or electronic employment applications in the trucking industry. Employers do not need to make written disclosures and obtain written permission in the case of applicants who will be subject to state or federal regulation as truckers. Finally, no pre-adverse action disclosure or Section 615(a) disclosure is required. Instead, the employer must, within three days of the decision, provide an oral, written, or electronic adverse action disclosure consisting of: (1) a statement that an adverse action has been taken based on a consumer report; (2) the name, address, and telephone number of the CRA; (3) a statement that the CRA did not make the decision; and (4) a statement that the consumer may obtain a copy of the actual report from the employer if he or she provides identification.

### ***In Practice...***

- You advertise vacancies for cashiers and receive 100 applications. You want just credit reports on each applicant because you plan to eliminate those with poor credit histories. What are your obligations?

You can get credit reports — one type of consumer report — if you notify each applicant in writing that a credit report may be requested and if you receive the applicant's written consent. Before you reject an applicant based on credit report information, you must make a pre-adverse action

disclosure that includes a copy of the credit report and the summary of consumer rights under the FCRA. Once you've rejected an applicant, you must provide an adverse action notice if credit report information affected your decision.

- You are considering a number of your long-term employees for a major promotion. You want to check their consumer reports to ensure that only responsible individuals are considered for the position. What are your obligations?

You cannot get consumer reports unless the employees have been notified that reports may be obtained and have given their written permission. If the employees gave you written permission in the past, you need only make sure that the employees receive or have received a "separate document" notice that reports may be obtained during the course of their employment — no more notice or permission is required. If your employees have not received notice and given you permission, you must notify the employees and get their written permission before you get their reports.

In each case where information in the report influences your decision to deny promotion, you must provide the employee with a **pre-adverse action disclosure**. The employee also must receive an **adverse action notice** once you have selected another individual for the job.

- A job applicant gives you the okay to get a consumer report. Although the credit history is poor and that's a negative factor, the applicant's lack of relevant experience carries more weight in your decision not to hire. What's your responsibility?

In any case where information in a consumer report is a factor in your decision — even if the report information is not a major consideration — you must follow the procedures mandated by the FCRA. In this case, you would be required to provide the applicant a pre-adverse action disclosure before you reject his or her application. When you formally reject the applicant, you would be required to provide an adverse action notice.

- The applicants for a sensitive financial position have authorized you to obtain credit reports. You reject one applicant, whose credit report shows a debt load that may be too high for the proposed salary, even though the report shows a good repayment history. You turn down another, whose credit report shows only one credit account, because you want someone who has shown more financial responsibility. Are you obliged to provide any notices to these applicants?

Both applicants are entitled to a pre-adverse action disclosure and an adverse action notice. If any information in the credit report influences an adverse decision, the applicant is entitled to the notices — even when the information isn't negative.

## **Non-compliance**

There are legal consequences for employers who fail to get an applicant's permission before requesting a consumer report or who fail to provide pre-adverse action disclosures and adverse action notices to unsuccessful job applicants. The FCRA allows individuals to sue employers for damages in federal court. A person who successfully sues is entitled to recover court costs and reasonable legal fees. The law also allows individuals to seek punitive damages for deliberate violations. In addition, the Federal Trade Commission, other federal agencies, and the states may sue employers for noncompliance and obtain civil penalties.

The National Small Business Ombudsman and 10 Regional Fairness Boards collect comments from small businesses about federal compliance and enforcement activities. Each year, the Ombudsman evaluates the conduct of these activities and rates each agency's responsiveness to

small businesses. Small businesses can comment to the Ombudsman without fear of reprisal. To comment, call toll-free 1-888-REGFAIR (1-888-734-3247) or go to [www.sba.gov/ombudsman](http://www.sba.gov/ombudsman).

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