



Fair Credit Reporting Act: Class Action Threat Has Been Increased —Is Your Company In Compliance?

"Legal Minute" – August 16, 2018

The federal Fair Credit Reporting Act, or "FCRA"—we all have heard of it and probably have a basic understanding that it governs both background checks conducted by an employer (or by a third party on the employer's behalf) as well as consumer credit reports usually (but not exclusively) conducted by financial institutions. Almost **2,000** FCRA class actions have been filed in the first six months of 2018—an **increase of almost 10%** as compared to the first six months of 2017. So, be sure you know the basics of FCRA compliance:

BEFORE AN EMPLOYMENT BACKGROUND CHECK IS REQUESTED FROM A CONSUMER REPORTING AGENCY:

- In a document that is separate from any other document (except the written authorization), provide the applicant/employee:
 - A clear and conspicuous written disclosure that an investigative consumer report may be obtained for employment purposes and that the report may include information on his/her "character, general reputation, personal characteristics, and mode of living."
 - A statement informing the consumer of his or her right to request a complete disclosure of the nature and scope of the investigation.
- The employer must provide a summary of the applicant's/employee's rights (FCRA version) to the applicant.
- The employer must obtain written authorization from the applicant/employee.
- If the background check involves medical information (*e.g.*, a workers' comp history), the consumer must provide specific written consent and the medical information must be relevant.
- Before requesting a report, the employer is required to certify to the agency that:
 - The employer has followed and will follow all disclosure, authorization, and copy distribution requirements.
 - The information obtained will not be used in violation of any federal or state equal opportunity law or regulation.
 - The information will only be used for employment purposes.

AFTER A BACKGROUND CHECK REPORT IS RECEIVED:

- The recipient shall use the report only for employment purposes and only for the employer's own use. If the report contains medical information, the recipient shall not disclose the information to any other person (except where necessary to carry out the purpose for which the information was disclosed, or as permitted by statute, regulation, or order).



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- If a report contains a notice of address discrepancy, the recipient should employ reasonable policies and procedures to know the identity of the person to whom the report pertains.
- Users of background checks must have procedures in place to properly dispose of records containing this information.

IF ANY ADVERSE ACTION IS TO BE TAKEN:

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

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

[Note: Employers should provide the applicant/employee time to review/dispute the report.] **After any adverse action** under circumstances in which a report regarding the applicant/employee was obtained from an investigative consumer reporting agency, the user of the investigative consumer report shall advise the applicant/employee against whom the adverse action has been taken and 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 consumer reporting agency).
- A statement that the agency did not make the adverse decision and is not able to explain why the decision was made.
- A statement of the applicant's/employee's right to obtain from the agency, at no charge, the information in the applicant's/employee's file if the applicant/employee requests the report within 60 days.
- A statement of the applicant's/employee's right to dispute directly with the agency the accuracy or completeness of any information provided by the agency.

Note: If the only interaction between the applicant and the user has been by mail, telephone, computer or similar means, specific requirements come into play (*see* Section 604(b)(3)(B) of the FCRA).

EXCEPTION WHEN INVESTIGATING POSSIBLE EMPLOYEE WRONGDOING OR MISCONDUCT:

The advance notice, written authorization, and copy requirements do not apply if the report is sought for employment purposes AND is due to suspicion held by an employer of wrongdoing or misconduct by the subject of the investigation.

Note: After taking adverse action based at least in part on information obtained from an agency, the FCRA does require the employer to disclose to the individual a summary containing the nature and substance of the communication upon which the adverse action was based.

Please contact BAHRA, your attorney, or Pete Bulmer (BulmerP@jacksonlewis.com) or Melisa Panagakos (Melisa.Panagakos@jacksonlewis.com) to discuss background checks and FCRA compliance.

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