

5 Tips to Avoid FCRA Non-Compliance

In today's world, it makes good business sense to conduct pre-employment background checks on potential new hires. More and more companies are employing such screenings in making promotions, reassignment or retention decisions.

It seems pretty straightforward. You're considering hiring or promoting someone. You run a background check and discover something criminal in his or her past and decide not to hire this person. However, it's not that simple in today's litigious society. The pre- and post-employment background process is wrought with legal landmines, and if you don't comply fully, it could be your potential hire who has the last word.

Therefore, it's essential that your screening process conforms to the Fair Credit Reporting Act (FCRA). In addition to FCRA, there are the Equal Employment Opportunity Commission (EEOC) laws on discrimination and fair hiring and promoting process, along with a myriad of state laws that may or may not pre-empt the federal laws.

Under FCRA alone, an employer can be liable for willful non-compliance or negligent non-compliance, which means not knowing or understanding the law is no excuse. According to the statutes, claims of willful non-compliance carry stiff fines - up to \$1,000 per violation - including attorneys' fees and unlimited punitive damages. Negligent non-compliance claims do not provide for statutory damages. Instead, they allow for actual damages, attorneys' fees and court costs. In some cases, the courts have ruled that the claims not only apply to every person hired but can be extended to every person that has ever applied to your organization.

Settlements have reached into the millions of dollars and can be a PR nightmare for the companies named in such litigation. case in point, the recent preliminary approval of a \$5.9 million class action settlement against a major transit company. The Plaintiffs in this case allegedly, failed to provide the requisite disclosures to applicants before running background checks on them. and further failed to follow the required adverse action notification process when they were turned down for employment based on information found in the criminal background reports.

This white paper provides 5 tips to follow when screening potential or current employees.

1. The Release Form

Disclosure is required when doing any kind of background screening, but the improper use of release forms can be your downfall. If you are doing background checks, obviously you have a release form as part of the application process. Think that has you covered? Think again.

One of the easiest errors to make that was specifically mentioned in the class action suit had to do with the release form that most companies use during the hiring process. This form must be a clear and conspicuous document consisting solely of the disclosure that a consumer report may be obtained about the individual for employment purposes and that the individual has authorized in writing the employer to obtain a background check report.

Believe it or not there are details in FCRA that state exactly how this form must be written, right down to the font size! Any and all violations are actionable and have held up in court.

Inform job candidates in writing that their background and credit history will be a consideration in the hiring determination, and obtain signed authorization from the Job applicant. The stand-alone document must disclose that a Consumer Report or investigative Consumer Report may be obtained for employment purposes. "I would advise using an authorization documentation that authorizes the employer to obtain information at any time during employment, such as when considering the employee for a promotion. as long as It's property worded," said Alva Cross, Associate at Fisher & Phillips (www.Laborlawyers.com).

Once a candidate is selected for the position, make the certification to the consumer reporting agency (CRA) that the information obtained will be used for proper purposes and in compliance with the FCRA. Most CRAs will provide employers with a certification form and single certification is sufficient to cover all future reports obtained from that CRA.

An additional step may be required if an Investigative Consumer Report needs to be obtained or the job applicant or employee requests additional information. Although FCRA does not contain any specific record keeping language, there is a two year statute of limitation. It is advised to keep record of authorizations for least two years.

2. Reacting to Criminal Arrests or Convictions

You must be very careful if you ask about arrest records, or take action as the result of a criminal background check.

It seems like the normal thing to do. Set a policy in place that does not allow convicted felons to be hired and expect your hiring personnel to follow the policy. Many companies do just that. It is very common to see a question on a "standard" job application that asks if a person has ever been arrested for a crime, or some variation of that question.

The federal government is taking aim at companies that have that type of policy in place. The EEOC has offered opinion that such a policy that systematically bars criminals from employment may discriminate against minorities. Your company policy must be clear, that a criminal record alone, does not automatically bar a person from employment.

A better-designed process would be to review the information provided to you by the background screening agency, and weigh that information against the job applied for. If there is a clear concern for safety or protection of property, your decision not to hire should be sound. But be prepared to explain your policy to the authorities or to the attorneys representing the rejected applicants. With multiple hiring managers, locations and open positions, it pays to take some time to prevent this sort of legal action from striking you by having appropriate policies in place.

Give written notice before taking adverse action, which in the employment context means:

- Denial of employment
- Any other decision for employment purposes that adversely affects any current or prospective employee

Give the job applicant a reasonable period of time to respond before actually taking adverse action. "I recommend giving Job applicant at least five (5) business days before taking adverse action based in whole or in part on the report. Likewise, if you're basing employment decisions on credit checks, it would be just as wise to give the candidate a chance to respond to negative information on a credit report. The negative information could be a misunderstanding or the candidate could be a victim of identity theft", said Alva Cross. Associate at Fisher & Phillips (www.LaborLawyers.com).

3. Adverse Action Notification

Improper notification of Adverse Action based on the results of a screening has tripped up many companies. Under the Fair Credit Reporting Act (FCRA), "adverse action" refers to consequences to an applicant or employee such as denying employment, or reassignment, or promotion, or termination, based on information obtained in a credit report or other background check. Under FRCA, any background screening reports provided by any outside vendor are considered "consumer reports."

Per the statutes, before you turn down an applicant for employment, promotion, or transfer you must clearly notify him or her that a decision "may" be made that could have an "adverse affect on his or her employment or application. A cover letter is not required by FCRA, but it is recommended. The cover letter provides an explanation to the candidate and provides the employer with a written record documenting your compliance. The cover letter may include notice for corrective or disciplinary action if the person is already employed.

In addition to telling the consumer about the adverse action based on information in the report, there are specific mandates requiring how such Adverse Action Notification is worded. For example Section 615(a) states that the notice must include the name and address of the consumer-reporting agency making the report. If the consumer-reporting agency operates on a nationwide basis, the notice must include any and all of its toll-free telephone numbers. How would you like to end up with a million dollar fine, just because you left out a phone number?

The notice must clearly explain that the consumer reporting agency did not make the decision to take the adverse action, and cannot give the consumer the specific reasons why the adverse action was taken. The Notification also must let the employee or potential hire against whom the action was taken know that he or she has the right to:

- Obtain within 60 days a free copy of a consumer report on the consumer from the consumer reporting agency identified in the notice.
- To dispute the accuracy or completeness of any information in a consumer report furnished by the consumer-reporting agency.

Adverse action notification is a serious compliance requirement that must be done "Just right!" Making an adverse action decision without proper adverse action notification procedures is almost guaranteed to cost your organization millions of dollars in fines or settlements when discovered by the government or class action attorneys.

4. Establish a Company Policy for Pre-employment Background Screening

Included in this policy should be the name and contact information of the screening company the organization uses, a copy of the agreement with the company, details about the type of background screening relevant to each position within the company, and the length of time the information is to remain on file.

Information regarding what will lead to disqualification of a candidate, or adverse action to a current employee, in the event negative information is presented in the screening report must be included in the policy. Copies of the disclosure and authorization forms, a detailed procedure listing the steps required to conduct a background check, for issuing a pre-adverse action notification, and for taking an adverse action should also be part of the policy.



Companies should have in place a written policy covering the procedures used in pre-employment background screening. A written policy avoids the possible consequences that may occur as a result of not following the proper steps in conducting a background check and helps ensure that the screening is done within the confines of the FCRA.

5. Review Your Background Screening Program Yearly to Ensure Compliance

State and federal laws change frequently in the United States regarding the use of background information in the hiring process.

Two Topics that are constantly in the state of flux, and bear close watching are the use of credit reports and the various “Ban the Box” initiatives, which want to do away with the criminal history “check box” on job applications.

A well-informed background screening firm, in conjunction with your employment law attorneys will help you to avoid lawsuits and legal landmines.

Background screening is a great way to ensure the security of your business. It also can get you into more than you bargained for, when done incorrectly. These tips can only begin to tell you about the many pitfalls you may fall into when using background screening. Only a full analysis of your processes and procedures can guarantee that you are in compliance.



Free Analysis

Reviewing your background screening process yearly ensures that the procedures used follow the prescribed steps and will identify areas of concern.

Contact Pre-employ.com today for a [free analysis of your background screening program](#) to see how it measures up.

Disclaimer: These tips are informational in purpose only and should not be construed as legal advice. Please contact your own legal counsel prior to making any employment-related decisions.

About Pre-employ

Headquartered in Northern California, Pre-employ is a national leader in the screening industry. For more than 20 years, Pre-employ has provided cost-effective solutions that deliver quality employee background screening services, industry best practices, and valuable resources to help minimize risk and enhance the hiring process. For two years in a row, Pre-employ was named to Business News Daily's Best Background Check Services.

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