

# "Disclosure and Authorization" Forms

Compliance with FCRA Requirements Prior to a  
Background Check in Order to Avoid Costly Litigation



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# Foreward

Recently, there has been a vast number of Fair Credit Reporting Act (FCRA) class action lawsuits related to improperly structured “disclosure and authorization” forms.

Several notable companies have been forced to pay huge class action settlements as a result of plaintiffs suing over what seem like minor deviations from FCRA requirements.

Although employers have attempted to improve the quality of their “disclosure and authorization” forms in order to avoid litigation issues, there are a surprising number of simple requirements that are still frequently overlooked.

It’s more important than ever for hiring departments to review their current forms and screening processes to ensure FCRA compliance and reduce their risk of litigation.

This whitepaper examines the strict FCRA requirements for “disclosure and authorization” forms and the potential liability issues that can occur with the smallest of modifications from the required format.

Relevant case studies are included, which detail the financial repercussions that employers have suffered due to improper disclosure forms. The specific pitfalls that many hiring departments run into with their “disclosure and authorization” form customizations are also detailed.

# Introduction and Background

Employment screening has become far more complicated in a global economy. Hiring departments in the United States must abide by strict legal protocols for every job application they receive and process, or they risk litigation and significant financial penalties.

Hiring departments routinely utilize background check services for the purpose of obtaining important information about applicants in order to help them hire qualified, safe and trustworthy employees. However, these background checks must be conducted in a very specific manner based on the FCRA.

FCRA background screening requirements are in place to ensure applicants receive adequate disclosure about how their consumer reports will be used in the screening process and to ensure that their rights are protected during employment screenings.

The FCRA also outlines specific protocols for obtaining consumer reports as part of a background check. Moreover, specific protocols must also be followed before taking an adverse action based, in part, on information in a consumer report and after an adverse action is taken. Employers are obligated to follow these federal protocols along with their state-specific requirements.

# The FCRA Disclosure and Authorization Requirements

The FCRA requires employers to notify job applicants in written form that they will be obtaining a consumer report for employment screening purposes before they actually conduct a background check.

According to the FCRA, the employer must provide “a clear and conspicuous disclosure” in writing to the applicant or the employee who will be checked, and the disclosure must be “in a document that consists solely of the disclosure”.

Specific requirements as to how this form must be delivered to applicants or employees prior to a background check are outlined specifically by the FCRA. The “Disclosure and Authorization” form must not be included in any document with extraneous information except for the applicant or employee’s authorization. It also must not be included in an employment application or be made part of any other form.

Because an authorization can be included with the form, certain identifying information - such as the applicant’s name or date of birth - can be included.

Some states, such as California, Oklahoma and Minnesota, require an area for the applicant to sign in order to receive a copy of their consumer report. This information is typically allowed in a “Disclosure and Authorization” form when it’s required by the state.

Outside of these exceptions, however, there is little else that can be included on the form. It’s a wise decision for hiring departments to consult a legal counsel in their state to review any extraneous information on their “Disclosure and Authorization” form to ensure FCRA-compliance.

# Many Employers Have Fallen Short in Their FCRA Disclosure Compliance

The specific “disclosure and authorization” form requirements mentioned previously are where many hiring departments have fallen short and ultimately subjugated their companies to class action lawsuits.

Some employers have tried combining their “disclosure and authorization” form with job applications or other employment forms - a huge and potentially costly mistake. Other have completely neglected providing their applicants with any disclosure form at all.

Many have been sued and eventually lost in court simply for adding one piece of extraneous information. Judges have found several other different types of extraneous information on disclosure forms to be problematic and a source for potential liability, including:

- Adding a release of liability to the form (e.g., “I hereby release [employer name] and its agents from any and all liability.”)
- Adding an acknowledgement of non-discrimination to the form (e.g., “I hereby acknowledge that the employment decision made by [employer name] is based on non-discriminatory and legitimate reasons.”)
- Combining the “disclosure and authorization” form with the job application
- Adding address, name and contact information of the consumer reporting agency
- Putting state-specific notices for states like California or New York on the same form
- Adding statements about how background information will be collected
- Including information about the potential penalties of providing false information
- Adding policy details, drug screening information, or other miscellaneous content

## State-specific Notices

California has some of the strictest laws in the United States with regard to background checks for employment screening. The state requires employers to submit an additional notice in writing that's separate from the "disclosure and authorization" form. The notice must state the purpose of the background report and provide the name, telephone number and address of the screening company. It must also include a Summary of Rights for the applicant and a checkbox where the applicant can request a copy of their report.

Massachusetts has some of the strictest laws in the country with regard to background checks for applicants with a criminal history\*.

New York employment screening background checks should include a copy of Correction Law 23-A, which explains the applicant's rights and protections if they have a prior criminal conviction.

\*Employers in every state should thoroughly review their screening practices and "disclosure and authorization" forms with an experienced legal counsel.

# The FTC Requires a Stand-alone Disclosure to Prevent Distraction

It's essential for employers to understand the reasoning behind the Federal Trade Commission's (FTC) requirements because of the severity of the financial penalties associated with FCRA violations and the fact that the courts very often rule in favor of the plaintiffs in these cases.

In an advisory letter (Advisory Opinion to Leathers, 9-9-98), the FTC mentioned that the main purpose of the stand-alone disclosure requirement is to prevent consumers from being distracted. They want to guarantee that every consumer receives this important disclosure in a clear, conspicuous, noticeable and understandable format. The disclosure should not be buried in small text where it can be easily missed, nor should it be included with another application or other information that could cause it to be overlooked.



# The Stand-alone Disclosure Requirement and Lawsuits

Numerous class action lawsuits have been filed and won by plaintiffs solely based on non-compliance with the FCRA's stand-alone disclosure and authorization requirements.

The "disclosure and authorization" form prior to a background check specifically has become a popular target for plaintiff attorneys to capitalize on. Plaintiffs have had great success suing companies that often unintentionally use non-FCRA compliant "disclosure and authorization" forms with one piece of extraneous information, an incorrect format, or another FCRA protocol violation.

If their attorneys find anything, they can file a class action lawsuit alleging that the employer failed to provide applicants with a stand-alone FCRA disclosure, and thus, violated the FCRA requirements. About \$100 to \$1,000 per applicant can be recovered as a result of alleged statutory FCRA violations.

Additional punitive damages can also be sought for alleged willful violations of the FCRA. At larger employers, the number of people who may be considered class members can easily reach into the tens of thousands, resulting in very costly 7-figure settlements.

# Recent FCRA Disclosure and Authorization Related Lawsuits

Although the FCRA distinctly mentions that the “disclosure and authorization” form prior to a background check must be a clear, separate and conspicuous document without any extraneous information, a large number of employers have made expensive mistakes with this form.

Class action lawsuits are very common for “disclosure and authorization” protocol violations, resulting in routine, multiple 7-figure settlements. Here are a few recent cases:

## **April 2015 - Home Depot FCRA Lawsuit**

Home Depot USA Inc. agreed to pay \$1.8 million as a result of FCRA violations due to flawed FCRA “disclosure and authorization” forms. Their forms were found to contain extraneous information; specifically, Home Depot requested a release of liability in their “disclosure and authorization” forms. The class members in this suit totaled approximately 120,000.

## **October 2014 - Publix FCRA Lawsuit**

Publix Super Markets Inc. agreed to a \$6.8 settlement that resulted from FCRA disclosure form violations. The supermarket chain was accused of not providing the appropriate stand-alone “disclosure and authorization” form prior to conducting background searches.

Publix’s disclosure forms included extraneous information, including a release of liability. Approximately 90,000 total class members were eligible for a portion of the settlement in spite of the fact that no harm to the plaintiffs or class members was ever proven.

## **October 2014 - Dollar General FCRA Lawsuit**

Dollar General agreed to pay \$4 million as a result of a class action lawsuit that claimed the company violated FCRA disclosure requirements. One plaintiff claimed that Dollar General “willfully failed to comply with the disclosure and authorization requirements in [the FCRA] prior to obtaining a consumer report about him for employment purposes.” In addition, Dollar General also sent outdated adverse action notices when adverse actions were taken and sent them too late.

## Conclusion

Employers must continually review their hiring and background screening practices to ensure that they're compliant with FCRA requirements along with other consumer protection laws.

As the previous examples prove, even the smallest amount of extraneous information on a "disclosure and authorization" form can land a company in hot water and cost millions of dollars. Consumer attorneys are meticulously searching for opportunities to strike at any FCRA background check protocol compliance mistake. Employers that overlook or underestimate FCRA protocols will continue to be penalized.

Because of the large financial liability associated with FCRA background check disclosure violations, it certainly pays for employers to have their forms and every other aspect of their background screening procedures - such as pre-adverse and adverse action notice protocols - reviewed by experienced legal counsel.

## 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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