

Understanding Your Fair Credit Reporting Act Obligations

It is important to understand your obligations under the Fair Credit Reporting Act (FCRA) when you become an end user of background screening services. The FCRA is the federal law which governs the usage of background check reports (consumer reports). It sets specific procedures that must be followed when obtaining information about employees.

When an employer uses a consumer reporting agency (CRA) to conduct background screening the employer is subject to the provisions of the FCRA that are directed at end users. The Federal Trade Commission, the agency responsible for enforcement of the FCRA has a document that explains the obligations of end users of consumer reports titled, "Notice To Users Of Consumer Reports: Obligations Of Users Under The FCRA." Key provisions include:

Permissible Purpose

Users must have a permissible purpose to obtain a consumer report. It is permissible to obtain a consumer report for employment purposes, including hiring and promotion decisions, where the consumer has given written permission. Once you gain access to run reports through a consumer reporting agency you cannot run reports for impermissible reasons such as running a report on your daughter's boyfriend. Doing so is a violation of the FCRA.

Disclosure and Authorization

Before obtaining a report users must make a clear and conspicuous written disclosure to the consumer in a document that consists solely of the disclosure, that a consumer report may be obtained. This is an area that trips up many employers – not so much for failing to make the disclosure but usually for not keeping the disclosure in a completely separate document. Too often, in an effort to cut down on the length of employment application documents employers will try to consolidate information and put the disclosure directly on the application. This is a violation of the FCRA.

Users are also required to obtain prior written authorization from the consumer. The disclosure statement and the authorization form can be combined. Authorization to access reports during the term of employment may be obtained at the time of employment.

Adverse Action

"Adverse actions" include all employment actions affecting consumers that can be considered to have a negative impact – such as denying employment or promotion.

Before taking an adverse action, the user must provide a copy of the report to the consumer as well as the document titled, "A Summary of Your Rights Under the Fair Credit Reporting Act." This notification that an adverse action is being considered is sometimes referred to as a "pre-adverse action notice." After sending the pre-adverse action notice the user is required to give the consumer a reasonable amount of time to question and correct any information contained in the report. Although not specifically stated in the FCRA, five days has been deemed to be a reasonable amount of time.

If after waiting for the consumer to respond the user takes the adverse action and the decision to do so is based at least in part on information contained in a consumer report, the user must notify the consumer. This

notification is typically referred to as the “post-adverse action notice.” The notification may be done in writing, orally, or by electronic means. It must include the following:

- The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.
- A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.
- A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer makes a request within 60 days.
- A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

User Certifications

Users of consumer reports must provide certain certifications to the CRA. User must certify that they will satisfy all of the obligations above:

- Reports will only be obtained for a permissible purpose.
- Disclosure and authorization requirements will be followed.
- Information obtained will not be used in violation of any federal or state equal opportunity law or regulation.
- Adverse action procedures will be followed.

Proper Disposal of Records

Users of consumer report information are required to have in place procedures to properly dispose of records containing this information. Reasonable measures for disposing of consumer report information could include establishing and complying with policies to:

- Burn, pulverize, or shred papers containing consumer report information so that the information cannot be read or reconstructed.
- Destroy or erase electronic files or media containing consumer report information so that the information cannot be read or reconstructed.

The above information is a summary of the most important and most common obligations of end users of consumer reports in the employment context. For a more complete explanation of your obligations see both “Notice To Users Of Consumer Reports: Obligations Of Users Under The FCRA” and the full-text of the Fair Credit Reporting Act. You should also consult with your own legal counsel before instituting a background screening program.

Background Screening Checklist

Does your organization have a comprehensive background screening policy?

Correct Answer: **YES**

The first step is sometimes the hardest. It is important to implement a background screening policy that asks the questions that follow. Minimizing risks and exposures that have the ability to cripple your ministry and harm those who serve within it is the foundation of a best practice background screening policy.

Is your background screening policy tailored to specific job functions?

Correct Answer: **YES**

Effective background screening policies should take the activities and responsibilities of the position into account. You will screen an applicant for a position in your finance office differently than you would an applicant who will work in your nursery. Tailor your background screening to the nuances of the task at hand. Fiduciary responsibilities, driving vehicles, access to vulnerable populations and management responsibilities should all be screened with their own customized policy in mind.

Are you familiar with the Fair Credit Reporting Act and how it applies to your background screening policy?

Correct Answer: **YES**

The Fair Credit Reporting Act (FCRA) governs all background screening conducted by a Consumer Reporting Agency (CRA). A CRA is any third party that for a fee prepares consumer reports. A consumer report is a background check report – and is NOT limited to just a traditional credit report. A consumer report can include criminal records, motor vehicle records, and educational and employment verifications. The main purposes of the FCRA are to:

- promote fairness, accuracy and privacy;
- require consumer's written authorization for a consumer report;
- advise consumers of their rights;
- allow consumers to know if information has been used against them;
- give consumers the opportunity to object to inaccurate or incomplete information and provide opportunity to make corrections;
- insure that errors are corrected within a reasonable amount of time

There are civil and criminal penalties including fines and imprisonment for willful violations of the FCRA.

Are you familiar with the laws related to background screening in your state?

Correct Answer: **YES**

Like other employment-related laws, the laws that govern background screening vary from state to state. Some states place limits on how far back your searches may go. Some states limit the type of information you can consider. Many states require schools and facilities that provide childcare to undergo state specified screening. This may take the form of state bureau or police record searches or require the applicant to be fingerprinted. Familiarize yourself with the laws of your state and make sure your background screening policy is compliant.

Do you obtain an applicant's or employee's permission prior to obtaining a background check report from a consumer reporting agency?

Correct Answer: **YES**

If you are using a consumer reporting agency to conduct your background screening, the Fair Credit Reporting Act applies and obligates you, the employer, to provide your applicants or employees with a clear and conspicuous written disclosure at any time before the report is procured or caused to be procured. The written notice must be in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes. Your applicants or employees must authorize you, the employer, to obtain the consumer report.

If you are NOT using a consumer reporting agency, best employment practices still suggest that obtaining a written consent and authorization for the employer to investigate into the consumer's past.

Does your background screening policy include consideration of arrest records?

Correct Answer: **NO**

According to the EEOC, use of arrest records as an absolute bar to employment has a disparate impact on some protected groups, such records alone cannot be used to routinely exclude persons from employment. However, conduct which indicates unsuitability for a particular position is a basis for exclusion. Where it appears that the applicant or employee engaged in the conduct for which he was arrested and that the conduct is job-related and relatively recent, exclusion is justified.

Example 1

Wilma, a Black female, applies to Bus Inc. in Highway City for a position as a bus driver. In response to a pre-employment inquiry, Wilma states that she was arrested two years earlier for driving while intoxicated. Bus Inc.



rejects Wilma, despite her acquittal after trial. Bus Inc. does not accept her denial of the conduct alleged and concludes that Wilma was acquitted only because the breathalyzer test which was administered to her at the time of her arrest was not administered in accordance with proper police procedures and was therefore inadmissible at trial. Witnesses at Wilma's trial testified that after being stopped for reckless driving, Wilma staggered from the car and had alcohol on her breath. Wilma's rejection is justified because the conduct underlying the arrest, driving while intoxicated, is clearly related to the safe performance of the duties of a bus driver; it occurred fairly recently; and there was no indication of subsequent rehabilitation.

Example 2

Lola, a Black female, applies to Bus Inc. for a position as a bus driver. In response to an inquiry whether she had ever been arrested, Lola states that she was arrested five years earlier for fraud in unemployment benefits. Lola admits that she committed the crime alleged. She explains that she received unemployment benefits shortly after her husband died and her expenses increased. During this period, she worked part-time for minimum wage because her unemployment check amounted to slightly less than the monthly rent for her meager apartment. She did not report the income to the State Unemployment Board for fear that her payments would be reduced and that she would not be able to feed her three young children. After her arrest, she agreed to, and did, repay the state. Bus Inc. rejected Lola. Lola's rejection violated Title VII. The commission of fraud in the unemployment system does not constitute a business justification for the rejection of an applicant for the position of bus driver. The type of crime which Lola committed is totally unrelated to her ability to safely, efficiently and/or courteously drive a bus. Furthermore, the arrest is not recent.

Source of examples: [EEOC](#)

Does your background screening policy include consideration of conviction records?

Correct Answer: **YES**

According to the EEOC, an employer's policy or practice of excluding individuals from employment on the basis of their conviction records has an adverse impact on certain groups of individuals based on statistical evidence of disproportionate rates of convictions for these groups. Therefore unless there is a business necessity such a policy or practice is unlawful under Title VII.

To justify a business necessity the following factors must be considered:

1. The nature and gravity of the offense or offenses;
2. The time that has passed since the conviction and/or completion of the sentence; and
3. The nature of the job held or sought.
4. An individual assessment (new as of April 25, 2012) that includes consideration of:
 - a. The facts or circumstances surrounding the offense or conduct
 - b. The number of offenses for which the individual was convicted
 - c. Older age at the time of conviction, or release from prison
 - d. Evidence that the individual performed the same type of work, post-conviction with the same or a different employer, with no known incidents of criminal conduct
 - e. The length and consistency of employment history before and after the offense or conduct
 - f. Rehabilitation efforts, e.g., education/training
 - g. Employment or character references and any other information regarding fitness for the particular position
 - h. Whether the individual is bonded under a federal, state, or local bonding program.

Is the scope of your background screening limited to the state in which you are located?

Correct Answer: **NO**

People move – especially if they are running away from a troubled past. You cannot rely on statements from your applicants regarding their address history. Therefore the scope of your background screening should start with a foundation of a national database search – and then based on an address history generated by checking an applicant's social security number you should consider checking records in each of the counties where the applicant has lived.

Does your background screening policy include in-depth county level searches?

Correct Answer: **YES**

County level searches are the most accurate and most up to date information that an organization can search on an individual. You may not realize that many states have upper and lower county seat levels to this search. Felonies and serious crimes are typically handled by the superior or upper county seat while misdemeanor and petty crimes are handled by the lower county seat.

Does your background screening policy include a civil records search?

Correct Answer: **YES**

Civil records are becoming a more widely used resource to provide a deeper view into an applicant's behavioral record. Many times civil records will contain information about an applicant that a criminal report will not giving you a deeper look at troubled behavior before it becomes criminal. For example, an individual who has no embezzlement record may be the subject of several civil actions for misappropriation of funds.

Does your background screening policy include consideration of credit report information?

Correct Answer: **NO**

Several states have enacted legislation that limits the usage of credit report information. The EEOC has also started to aggressively target those organizations with bright line policies that automatically exclude candidates with poor credit. Similar to conviction records, the EEOC and those states which have placed limits on the usage of credit report data, look for a business necessity of considering credit report data in employment decisions. Your policy should consider the nature of the job held or sought – it may be permissible to consider credit report information for positions that involve access to financial information or resources

For positions that involve driving an organization-owned vehicle or a personal vehicle for organization purposes does your screening policy include consideration of motor vehicle records?

Correct Answer: **YES**

Reviewing motor vehicle records is suggested for any applicant with driving privileges on behalf of the organization, whether it be in a personal or company vehicle, on organization property, or for any organization related purpose.

Does your background screening policy include verification of previous employment?

Correct Answer: **YES**

Employment verification is recommended to confirm an applicant's work history and is a useful tool in revealing any exaggerations or falsifications by the applicant on employment tenure or position held. According to a CareerBuilder.com survey, 49 percent of managers surveyed had caught a job applicant fabricating some part of his or her resume.

Does your background screening policy include verification of education?

Correct Answer: **YES**

Education verification is often overlooked in the hiring process. Education is the primary area of falsification on executive resumes nationwide. Verifying the dates of attendance for your applicant, as well as any certifications or diplomas obtained while in attendance decreases the likelihood of hiring unqualified personnel.



Does your background screening policy include reference requests from personal acquaintances?

Correct Answer: **YES**

When personal contacts have a way to anonymously provide references for an applicant they tend to provide far more information than a previous employer and the information they provide is often more enlightening as to the suitability of an applicant for the position in question.

Do you conduct pre-employment interviews?

Correct Answer: **YES**

Most organizations practice some sort of interview process. Where many fall short is having only one. A multi-interview process allows for more people to be involved in the hire, namely all those who will work directly with or for the applicant and give a more complete view of the applicant.

Does your background screening policy include drug testing?

Correct Answer: **YES**

While many industries require drug testing to protect the safety and job performance of their employees, drug and alcohol testing can also be used to monitor the behavior and trustworthiness of an individual. This is an effective deterrent against addicts and users who may attempt to gain access to vulnerable populations or those attempting to acquire restricted pharmaceuticals.

Prior to taking an adverse employment action (not hiring, not promoting) based on information contained in a background report do you notify the applicant or employee and provide him or her with a copy of the report?

Correct Answer: **YES**

If you are using a consumer reporting agency to conduct your background screening, the Fair Credit Reporting Act applies and obligates you, the employer, to provide the applicant or employee with a copy of the report you obtained as well as the "Summary of Your Rights" document prescribed by the Fair Trade Commission (FRCA Section 609(c)(1)). The idea behind this is to give the applicant or employee meaningful time to review the report and respond to address any potential inaccuracies in the report.

After taking an adverse employment action (not hiring, not promoting) based on information contained in a background report do you notify the applicant or employee?

Correct Answer: **YES**

If you are using a consumer reporting agency to conduct your background screening, the Fair Credit Reporting Act applies and obligates you, the employer, to provide the applicant or employee with certain information. You must provide:

- the name, address, and telephone number of the consumer reporting agency (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
- a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- notice of the individual's right to obtain a free copy of a consumer report on the consumer from the consumer reporting agency; and
- notice of the individual's right to dispute with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency.

Does your background screening process renew every year for current volunteers and employees?

Correct Answer: **YES**

Having an annual background screen allows your organization to have an up to date view of those who serve within it. Whether your policy asks for annual searches or every two or three years it is important that credentials expire. Expiring credentials insure that problem behavior or activity come to light before they affect your ministry.

Does your background screening policy allow volunteers to pay for their own screening?

Correct Answer: **YES**

Implementing a best practice solution for background screening can seem like a large investment. Many volunteers are willing to help with this process knowing that they are participating in the safety of all vulnerable populations. Volunteers are also starting to understand that in many ways they are a part of a vulnerable population as well. In-depth background screening policies allow them some protection in the event of a false accusation.

