



## Fair Credit Reporting Act (FCRA) Basics

### A Primer for U.S. Employers from Littler Mendelson, the Nation's Largest Workforce Law Practice

#### Summary

HIRE-SAFE and other background screening companies as a consumer reporting agency (CRA) collect and assemble a wide range of information about individuals. This information may include, for example, educational history, employment history, criminal history, and motor vehicle records. HIRE-SAFE's employer-customers use this information for a variety of employment related purposes permitted by law. The federal Fair Credit Reporting Act (FCRA) and several state statutes regulate employment background screens.

Employers should understand that, even if they may lawfully request a background report from a background screening company, their use of the results in making an employment-related decision must still comply with all applicable requirements for using the report to make an employment decision. Employers should also be mindful that federal and state legislators are actively considering and enacting new legislation in this area.

#### Notice

HIRE-SAFE prepared these materials for informational purposes only. These materials are not a substitute for, and should not be construed as, legal advice. HIRE-SAFE does not warrant any statements in these materials. Employers should direct questions about federal and state laws regulating the screening process to experienced legal counsel. Some useful resources are also available on-line at the Federal Trade Commission's web site ([www.ftc.gov](http://www.ftc.gov)). The Commission has oversight of the federal Fair Credit Reporting Act.

#### The Federal Fair Credit Reporting Act

The federal Fair Credit Reporting Act ("FCRA") and several state statutes regulate employment background screens. The FCRA regulates background screens for "employment purposes" if the employer procures records or information on an individual from a background screening company such as HIRE-SAFE (known in the screening industry and under the FCRA as a "consumer reporting agency").

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*A copy of the FCRA is available online at <http://www.ftc.gov/os/statutes/fcradoc.pdf>.*

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The FCRA broadly defines the term "employment purposes" to include the evaluation of a job applicant for employment as well as decisions concerning promotion, reassignment or retention of an employee.

The FCRA's name may be somewhat misleading. While the FCRA does regulate employment credit checks, the scope of the law is broader than credit history information to include what is referred to as consumer report information. For example, the FCRA also regulates requests for criminal, educational, military and driving records from a "consumer reporting agency," such as HIRE-SAFE.

The FCRA does not regulate purely "in-house" activities, such as reference checks and job interviews conducted directly by the employer, or an



employer's own efforts to obtain information on an applicant or employee such as such as criminal records obtained directly from a public record source. (Some states, such as California, do impose restrictions and requirements on employers who perform "in-house" checks of public records.)

As a practical matter, however, few employers have the resources or expertise needed to conduct their own public records searches and verifications. Instead, employers typically contract for this service with a background screening company, like HIRE-SAFE that specializes in, and has expertise concerning, employment screening.

While the FCRA focuses principally on regulating consumer reporting agencies, such as HIRE-SAFE, it also establishes requirements for employers who procure and use an employment background report from HIRE-SAFE or other consumer reporting agencies. These requirements prescribe the procedure that an employer must follow before procuring an employment background screening report as well as the steps an employer must take when it relies, in whole or in part, on information contained in a background report to make an adverse decision directed at the applicant such as to reject an applicant for employment, reassignment, promotion, etc. These materials describe the steps that employers must follow.

Before turning to those steps, however, employers should be aware that other laws may have an impact on their use of employment background reports. Some states, such as California, have enacted their own fair credit reporting laws. Notably, some state laws, such as California's, afford more substantial penalties than the FCRA affords for violations of what is required in the law. Employers therefore should become familiar with the various state laws. The laws may vary somewhat from state to state.

Employers also should be mindful that federal and state legislators are actively considering and enacting new legislation in this area. Employers should consult with legal counsel before taking action based in whole or in part on a background report to confirm that no

legislative changes have altered the procedures that must be followed.

## Others Laws Regulate the Hiring Process

Other federal and state laws regulate the hiring process, including applicable state labor laws as well as anti-discrimination laws, such as Title VII of the Civil Rights Act of 1964 ("Title VII") and the Americans With Disabilities Act ("ADA"). Employers should understand that, even if they lawfully can request a background report from a background screening company, their use of the results in making an employment-related decision must still comply with all applicable restrictions for using the report.

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To be perfectly clear, just because information is lawfully disclosed in a background report by the background screening company, that does not mean the employer necessarily is free to make a hiring decision based in whole or in part on that information. The employer must comply with all state and federal laws (including the FCRA) applicable to the employer's use of that information for the particular employment-related decision or action.

For example, some state laws restrict the employer's use of arrest records and even convictions. Hawaii, Pennsylvania, Wisconsin and New York, for example, have statutes requiring that the applicant's criminal record in question have a rational relationship to the job in question.

Please also note that whereas all convictions are now reportable under the FCRA, the federal Equal Employment Opportunity Commission (EEOC) – the agency with oversight of Title VII – takes the position in its advisory compliance materials that employers may not automatically disqualify job applicants with convictions from consideration for employment.



Instead, each applicant must be evaluated with regard to (1) the nature of the underlying crime, (2) the date of the conviction, and (3) the relationship between the crime and the job duties for the position in question.

These materials address only the FCRA, not these other laws. For additional information about these other laws, employers should consult their legal counsel.

### **STEP 1: Certification**

Under the FCRA, HIRE-SAFE may provide a pre-employment background report to an employer only if the employer intends to use the report to make an employment-related decision. By law, HIRE-SAFE is required to confirm that the employer will use the reports provided only for this “permissible purpose,” by asking the employer to certify that it will obtain the applicant’s written authorization before requesting a background report be furnished by HIRE-SAFE.

By completing this certification, the employer agrees to comply with the FCRA and all federal and state equal employment opportunity laws and regulations (discussed above) related to the procurement and use of consumer background reports. An authorized representative of the employer is required sign the certification form.

### **STEP 2: Disclosure and Authorization**

Before requesting that HIRE-SAFE provide an employment background report, the employer is required to provide certain disclosures to the consumer (i.e., job applicant or current employee), inform them that it will be procuring a background report on them for employment purposes, and obtain the consumer’s written authorization to do so. The disclosure form typically includes the following information:

1. The fact that the employer will be requesting a background report from a background screening company;
2. The name and contact information of the background screening company that will provide the background report;

3. The types of information that will be provided in the background report; and
4. If the background screening report will be an “investigative consumer report” (defined below), the consumer’s rights to request additional information regarding the nature and scope of the report.

Employers must satisfy additional requirements if they request medical information in a background check report. In addition, some states, such as California, New York, Minnesota, Oklahoma and Washington, require the inclusion of additional information in the notice.

The authorization consists of a statement, signed by the applicant, permitting the background screening company, such as HIRE-SAFE, to provide the background report to the employer. The authorization might also include space for the applicant to provide personal identifying information needed to conduct the background screen (for example, the applicant’s Social Security number), but is not required per the FCRA or applicable state law.-.

The disclosure and authorization must be a stand-alone document that must not be part of an employment application or any other pre-employment document. HIRE-SAFE can provide a sample disclosure and authorization form upon request.

Background reports fall into two categories: “consumer reports” and “investigative consumer reports.” A “consumer report” contains only information taken from public and private records sources. An “investigative consumer report” may include those types of records but also includes information obtained through personal interviews with neighbors, friends, or associates of the applicant reported on, or with others with whom the applicant is acquainted, or who may have knowledge concerning any such items of information. (Please note that CA state law does not make this distinction and all background reports procured for employment purposes are considered “investigative consumer reports”.

If, for example, an employer asks HIRE-SAFE to obtain information in addition to an applicant's job title and dates of employment from former employers, such as information about the applicant's job performance or the reasons for termination, then the report that HIRE-SAFE provides the employer would be an investigative consumer report.

Because investigative consumer reports can contain especially sensitive information, the FCRA affords additional protections to the applicant when the prospective employer requests one. These protections include the following:

1. Within three (3) days after requesting an investigative consumer report, the prospective employer must clearly and accurately disclose to the applicant in writing, by mail or otherwise delivered, that (a) an investigative consumer report may be obtained, and (b) the applicant has the right to request additional information concerning the nature and scope of the consumer report. This disclosure can be made in the disclosure and authorization form described above.
2. With the disclosure and authorization form, the prospective employer should consider providing the applicant with a document prepared by the Federal Trade Commission (FTC), entitled "A Summary Of Your Rights Under The FCRA." Employers can obtain this document form HIRE-SAFE or from the FTC's Web site.
3. Upon request to the prospective employer, the applicant is entitled to a statement explaining the nature and scope of the investigation underlying the investigative consumer report. This disclosure must be made in writing, mailed or otherwise delivered to the applicant, not later than five (5) days after (a) the date on which the applicant's request for disclosure is received, or (b) the prospective employer requests the report, whichever is later.

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*A copy of the FTC's Summary of Rights form is available online at <http://www.ftc.gov/bcp/online/pubs/credit/fcrasummary.pdf>.*

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Employers in the transportation industry regulated by the Department of Transportation (DOT) may benefit from one significant variation on the procedures described above. For certain truck driving positions, the prospective employer is not required to obtain a written signature on the authorization form. This exception recognizes that truck drivers frequently apply for trucking jobs while on the road, making it difficult for the prospective employer to obtain the driver's signature.


The exception is a narrow one: prospective employers still are required to provide the notice described above orally, electronically, or in writing and are still required to obtain the applicant's consent to procure a background screening report, albeit the consent can be oral – over the telephone, for example. Employers in the transportation industry should consult their legal counsel to determine whether they can take advantage of this exception.

### **STEP 3: Pre-Adverse Action Notice**

The FCRA establishes a procedure that employers are required to follow when taking "adverse action" on a job applicant (or employee) based in whole or in part on information contained in a background report. "Adverse action" means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

For example, this would apply if an employer rejects a job applicant based upon a felony conviction reported in a pre-employment background report and determines not to hire even if the employer also relied on other factors, such as lack of educational qualifications, in deciding to reject the applicant.

When an employer intends to take an adverse action based in whole or in part on information contained in the applicant's background report, the employer first



must provide the applicant with a “pre-adverse action” notice that includes a copy of the background report. This notice allows the applicant to review the information that may result in rejection of the application to determine if the information is correct and to be able to contact HIRE-SAFE to dispute information in the report that the applicant believes to be inaccurate or incomplete.

The reality of background screening is that while every reasonable effort can be made by the background screening company to provide accurate information, cases of identity theft, instances of multiple individuals having the same personal “identifiers” (e.g., name, date of birth, county of residence, etc.), and instances of inaccurate public records do occur, which could lead to inaccurate information inadvertently being included in a background report.

This notice is called a “pre-adverse action” notice because the employer must provide it prior to rejecting the applicant (or taking adverse action against an employee). This pre-adverse action notice informs the applicant that the employer may take adverse action based in whole or in part on the results of the pre-employment background report obtained from the background screening company. The employer must include two documents with this notice:

1. A copy of the applicant’s background report; and
2. The “Summary of Rights” form prepared by the FTC.

An employer is not required to document proof of delivery to, or receipt by, the applicant. Doing so, however, will assist the employer if a dispute ever arises over whether the employer provided to the applicant the pre-adverse action notice.

Employers in the transportation industry who are regulated by the Department of Transportation and are permitted to take advantage of the exception described in Step 2, above, are not required to provide a pre-adverse action notice. These employers

are required to provide an adverse action notice as described in Step 4, below.

#### **STEP 4: Adverse Action Notice**


If the employer decides to take adverse action with respect to the applicant based in whole or in part on the background screening report, the employer must inform the applicant of such action in an adverse action notice. The employer must provide the applicant “reasonable time” to dispute information contained in the background report before taking adverse action.

The text of the FCRA itself does not state the precise amount of time that must pass after supplying the pre-adverse action notice before taking the adverse action. However, the available legal authorities suggest a minimum of five (5) business days.

The adverse action notice must include the following information:

1. A description of the adverse action being taken, e.g., rejection of the application, and that the action has been taken based in whole or in part on information contained in the background report;
2. The name, address and toll-free telephone number for HIRE-SAFE;
3. A statement that the background screening company did not make the decision to take adverse action and is unable to provide the reason for such decision; and
4. A notice of the applicant’s rights to obtain a free copy of the background report from the background screening company and to dispute information contained in it with the background screening company.

An employer is not required to document proof of delivery to, or receipt of, the adverse action notice. Doing so, however, will assist the employer if a dispute ever arises over whether the employer provided to the applicant the adverse action notice.



While employers in the transportation industry are not required to provide the pre-adverse action notice to applicants for positions that qualify for the exception described in Step 2, above, these employers are required to provide the same adverse action notice that all other employers are required to provide.

The transportation employer must provide the notice within three (3) days of making its adverse action decision. The notice may be provided orally, electronically, or in writing. As noted above, providing the notice in a form that can be documented will assist the employer if a dispute ever arises over whether the employer provided to the applicant the adverse action notice

### **Learning More**

For additional information about the FCRA and other laws applicable to employment background screening, employers should consult their legal counsel.

### **About the Author**

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Mr. Fliegel has extensive experience defending national and local employers in state, federal and administrative litigation, including high-stakes class actions. He regularly works with unionized and non-union employers to develop and implement lawful policies and compliance programs. Mr. Fliegel has

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Mr. Fliegel is a prolific author and lectures on employment law topics around the Country. He has been quoted in many publications, including U.S. News and World Reports, the Los Angeles Times, the Wall Street Journal, the San Jose Mercury News and numerous HR periodicals. Mr. Fliegel is also a member of the Editorial Advisory Boards for Thompson Publishing Group's Family and Medical Leave Handbook and the Employer Resource Institute's California Wage & Hour Advisor and California Employer Advisors publications.

With more than 750 attorneys, 47 locations and a practice that extends into every area of workplace law, Littler Mendelson's employment practice is the nation's largest, and they regularly advise and defend many of the world's leading corporations.

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## Frequently Asked Questions

### *May employers request background screens before making a conditional job offer?*

The FCRA does not prevent employers from requesting background screens before making conditional job offers. Presently, Hawaii is the only state that prevents employers from inquiring into an applicant's criminal background before making conditional job offers, although legislation is pending in other states.

### *May employers ask job applicants to state their date of birth in order to process background screens?*

The FCRA and related state laws do not prevent employers from asking job applicants to state their date of birth in order to process background reports. In fact, background screening companies generally need date of birth information to process background reports that include criminal records. Because most criminal records are indexed at the criminal courthouse based on name and date of birth "identifiers," without date of birth information the background screening company may not be able to accurately report criminal records.

On the other hand, the federal Age Discrimination in Employment Act ("ADEA"), as interpreted by the EEOC, prohibits employers from directly or indirectly eliciting information about a job applicant's age without a "permissible purpose." Asking job applicants to disclose their date of birth in a background-report authorization form (preferably one that is kept inaccessible to the individuals making the employment decision, so that they do not have access to date of birth information) arguably does not run afoul of the ADEA. However, without a "permissible purpose" within the meaning of the ADEA, employers should not otherwise elicit age-related information.

### *May employers incorporate into an employment application language authorizing a background report?*

No, a separate authorization form is required by the FCRA and some state fair credit reporting laws. Using a separate authorization form from an employment application also makes sense from the standpoint of minimizing the risk of age discrimination claims. As noted in Q3, the ADEA prohibits employers from eliciting information about a job applicant's age without a "permissible purpose."

### *Should background reports be stored in separate, confidential files?*

Yes. Background reports and related documentation (e.g., completed applicant authorization forms) should be made available only to personnel with a need to access the information, and should be stored in a secure location, preferably under lock and key and/or password protected.

### *How long must employers retain background reports?*

While the FCRA regulates the method of destruction of background reports (see Q6), the FCRA does not require a specific retention period for background reports. The statute of limitations for actions arising under the FCRA is the earlier of either (i) five (5) years from the date of the alleged violation, or (ii) two (2) years after the violation was known or should have been known to the plaintiff. Arguably, therefore, it is prudent for employers to retain background screening reports, applicant authorization forms, and pre-adverse and adverse action notices for the five (5) year statute of limitations period.

### *How must employers destroy background reports once they decide to do so?*

If and when an employer decides to dispose of background reports, regulations published by the FTC mandate certain procedures to protect against improper use of the discarded background reports. These regulations require that any person who receives and maintains a background report, or other documents containing information derived from the background report, for a business purpose must take reasonable measures to protect against unauthorized access to, or use of, the information during or in connection with its disposal. Examples of “reasonable measures” include the burning, pulverizing or shredding of papers containing such information so that they cannot practicably be read or reconstructed, and the destruction (e.g., by “simply smashing the material with a hammer”) or erasure (or “wiping”) of electronic media containing consumer information.

An employer may want to consider, among others, the following data security measures in connection with its use, storage and destruction of background reports:

1. Developing a written information security program that contains administrative, technical, and physical safeguards.
2. Developing reasonable measures to protect against unauthorized access to, or use of, background screening information;
3. Implementing, and monitoring compliance with, policies and procedures that require the destruction and shredding of papers containing background information when no longer needed so that the information cannot practicably be read or reconstructed;
4. Implementing, and monitoring compliance with, policies and procedures that require the destruction or erasure of electronic media containing background screening information when no longer needed so that the information cannot practicably be read or reconstructed;
5. Utilization of services of a reputable disposal company;
6. Implementing, and monitoring compliance with, policies and procedures that protect against unauthorized or unintentional disposal of consumer information; and
7. Personnel education and training.

### *If the law prohibits an employer from asking job applicants certain questions, may the employer seek the information indirectly through a background screening company?*

The provision of the FCRA relating to “investigative consumer reports” (i.e., reports involving in-person interviews) and some state fair credit reporting laws, such as California’s, prohibit a background screening company from providing information in violation of any fair employment laws, such as Title VII and the ADA.