



FCRA Compliance for Employers Using Consumer Background Checks

The [Fair Credit Reporting Act](#) (FCRA) is a federal law that restricts how consumer information may be gathered, shared and used. While many of its requirements apply only to businesses that compile and provide consumer information (such as credit or criminal background data) to third parties, the FCRA also regulates employers that obtain this type of information to screen applicants or employees for employment.

The law's requirements for employers are designed to help individuals ensure that the information consumer reporting agencies have about them is accurate and is not used to unfairly deprive them of employment opportunities.

This Compliance Overview outlines the steps an employer must take to comply with FCRA.

LINKS AND RESOURCES

- "[Background Checks: What Employers Need to Know](#)," a joint publication of the Federal Trade Commission and Equal Employment Opportunity Commission.
- [Interim final rule](#) regarding FCRA notices, including the [revised Summary of Consumer Rights](#), which is required as of Sept. 21, 2018 (employers must provide this notice before taking any adverse action based on a consumer report).

This Compliance Overview is not intended to be exhaustive nor should any discussion or opinions be construed as legal advice. Readers should contact legal counsel for legal advice.

HIGHLIGHTS

BEFORE BACKGROUND CHECK

Before obtaining information about an individual from a consumer reporting agency, an employer must:

- Notify the individual that the information may be used for employment purposes;
- Get the individual's written permission; and
- Certify its FCRA compliance to the consumer reporting agency.

OTHER NOTICE REQUIREMENTS

Employers that conduct background checks using consumer reporting agencies also have FCRA obligations:

- Before taking any adverse action based on a consumer report; and
- After taking any adverse action based on a consumer report.

OBTAINING CONSUMER REPORTS FOR EMPLOYMENT PURPOSES

The FCRA imposes requirements on employers that obtain consumer reports from **consumer reporting agencies** (CRAs) for **employment purposes**. Under the law, a CRA is any entity that regularly assembles or evaluates consumer credit or other information for the purpose of selling consumer reports to third parties. When used for employment purposes, a **consumer report** includes any information obtained from a CRA that an employer uses or expects to use in evaluating an individual for employment, promotion, reassignment or retention and that bears on the individual's:

- Credit worthiness;
- Credit standing;
- Credit capacity;
- Character;
- General reputation;
- Personal characteristics; or
- Mode of living.

EMPLOYER REQUIREMENTS PRIOR TO OBTAINING CONSUMER REPORT

An employer that wishes to obtain an individual's consumer report from a CRA must first:

- Provide the individual with **written notice** that the report may be used for decisions about his or her employment; and
- Obtain the individual's **written permission** to get the report (this may be part of the written notice).

In addition, the employer must **certify** to the CRA that it:

- ✓ Has given the required written notice to the individual;
- ✓ Has obtained the individual's written permission to get the consumer report;
- ✓ Will comply with all FCRA requirements; and
- ✓ Will not discriminate against the individual or otherwise misuse the information in violation of federal or state equal opportunity laws or regulations.

Written Notice and Permission Requirements

An employer's written notice to an individual regarding its use of his or her consumer report for employment purposes must meet certain requirements under the FCRA. Specifically, the notice must be:

- ✓ Clear and conspicuous; and
- ✓ In a document that consists solely of the notice.

In general, this means that the notice must stand alone from any other documents and may not include any extra information that could confuse or distract from the notice.

Although the FCRA allows the document containing the notice to also include an individual's written permission for the employer to obtain his or her consumer report, courts have ruled that the written notice may **not**:

- ✗ Include other notices or incorporate other documents by reference;
- ✗ Allow the individual to make other acknowledgements (such as that he or she understands the notice is not an offer of employment) or agreements (such as to release the employer from liability);
or
- ✗ Be part of an employment application or other document.

Investigative Reports

Employers that use reports based on personal interviews concerning an individual's character, general reputation, personal characteristics and lifestyle have additional obligations under the FCRA. These include notifying the individual in writing that the employer may request or has requested an investigative consumer report and that the individual has a right to request additional information, including a summary of the report.

TAKING ADVERSE EMPLOYMENT ACTIONS BASED ON CONSUMER REPORTS

The FCRA requires employers to provide notices both before and after taking any adverse actions against an individual if the actions are based—in any part—on information in the individual's consumer report. The law does not specify the amount of time an employer must wait between providing the pre- and post-adverse action notices, which are described in more detail below. In general, however, employers should provide a reasonable opportunity for an individual to explain or dispute the accuracy of his or her consumer report before taking any adverse action against him or her.

Under the FCRA, adverse actions include firing an employee, refusing to hire an applicant and any other employment decision that adversely affects an employee or applicant.

Before Adverse Employment Action

Before making a final decision to take an adverse action against an individual based on information in his or her consumer report, an employer must provide the following to the individual:

- A copy of the consumer report; and
- A [Summary of Consumer Rights](#) (employers should ensure that they use the updated model notice required as of Sept. 21, 2018, or an alternative notice that meets the “substantially similar” requirements contained in this [interim final rule](#)).

After Adverse Employment Action

Once an employer takes an adverse action against an individual based on information in his or her consumer report, the employer must notify the individual (either orally, in writing or electronically) of:

- The adverse action; and
- The fact that the decision to take the action was based on information in the individual's consumer report.

In addition, the employer must provide the individual with written or electronic notice indicating:

- The name, address and phone number of the CRA that sold the report;
- That the CRA did not make the employment decision and cannot give specific reasons for it; and
- That the individual has a right to dispute the accuracy or completeness of the report and to get an additional free report from the CRA within 60 days.

KEEPING AND DISPOSING OF CONSUMER REPORTS

The FCRA does not impose any specific recordkeeping requirements on employers. However, employers that receive consumer reports from a CRA should generally keep them for at least five years in case of a lawsuit.

Also, when disposing of any consumer reports they have received from a CRA (along with any information gathered from the reports), employers must take reasonable and appropriate steps to prevent unauthorized access to or use of the information. For example, paper documents should be burned, pulverized or shredded, and electronic files should be erased or destroyed so that they cannot be read or reconstructed. More information about disposing consumer reports is available [here](#).

ENFORCEMENT

Individuals who believe an employer has violated the FCRA's notice provisions may file a lawsuit against the employer by the earlier of either:

- **Two years** after the violation is discovered; or
- **Five years** after the violation occurred.

In FCRA lawsuits, courts may order a noncompliant employer to pay:

- Actual or statutory damages;
- Attorney's fees;
- Court costs; and
- Punitive damages (for willful violations).

ADDITIONAL BACKGROUND INFORMATION

The FCRA is a federal law that restricts how consumer information may be gathered, shared and used. As noted above, while one of the FCRA's main purposes is to promote accuracy in consumer credit reports maintained by consumer reporting agencies, the law also:

- Regulates entities (including employers) that use consumer information; and
- Requires that certain notices be provided to individuals who undergo background checks by their employers or prospective employers.

In May 2018, Congress passed the Economic Growth, Regulatory Relief, and Consumer Protection Act to amend the FCRA as follows, effective Sept. 21, 2018:

- Nationwide consumer reporting agencies must provide national security freezes (which protect against identity theft by restricting prospective lenders’ access to a consumer’s credit report) free of charge to consumers who request them; and
- Whenever the FCRA requires that a consumer receive either the Summary of Consumer Rights or the Summary of Consumer Identity Theft Rights, a notice regarding the new security freeze right must also be provided.

The changes also extend the amount of time a “fraud alert” must remain in a consumer’s file with a nationwide credit reporting agency, from 90 days to one year. A fraud alert informs prospective lenders that a consumer may have been an identity theft victim and requires them to take steps to verify the identity of anyone seeking credit in the consumer’s name.

Updated Model Notices

On Sept. 12, 2018, the U.S. Bureau of Consumer Financial Protection (Bureau) issued an [interim final rule](#), which includes new model notices that reflect the changes made by Congress in 2018. Employers must use these new models, or notices that are substantially similar to them, **as of Sept. 21, 2018**. The table below lists the new models and provides an overview of the events that trigger the requirement to provide them to a consumer.

MODEL NOTICE	MUST BE PROVIDED:
Summary of Consumer Rights (also available in Spanish)	When considering any potential adverse employment action based on a background check report received from a consumer reporting agency.
Summary of Consumer Identity Theft Rights (also available in Spanish)	Any time a consumer notifies a consumer reporting agency that he or she is a victim of identity theft (although the requirement to provide this notice does not apply to employers in general, an employer that uses a credit reporting agency for background checks should ensure that the agency provides it).

Substantially Similar Forms

According to the Bureau’s interim final rule, an alternative form for either of the two notices listed above will be considered substantially similar to the new models (and therefore compliant with the FCRA) if it

includes all the same information shown on the appropriate new model form but has the security freeze notice placed in a location that is different from where it is located on the new model form.

In addition, an alternative form for the **Summary of Consumer Rights** will be considered substantially similar to the new model (and therefore compliant with the FCRA) if it includes **both**:

- ✓ The Bureau's old model form (published on Nov. 14, 2012) or a substantially similar form; and
- ✓ A separate page that includes the notice of security freeze rights (as stated on the new model form).

These two conditions also apply to an alternative form for the **Summary of Consumer Identity Theft Rights**, except that, for this notice, the separate page must also state the following before or after the notice of security freeze rights: "The minimum duration of initial fraud alerts changed from 90 days to one year effective September 21, 2018." The interim final rule also allows an alternative form for the Summary of Consumer Identity Theft Rights to **exclude** the following sentence, which appears before the security freeze notice on the new model form: "The following FCRA right applies with respect to nationwide consumer reporting agencies."