

The Fair Credit Reporting Act

Balancing Individual Rights and the Employer's Need to Know

Why Should I Be Concerned about the Fair Credit Reporting Act?

The Fair Credit Reporting Act (FCRA) is the federal statute that regulates the collection, storage and sale of personal information including, but not limited to, criminal history records, driving records, workers' compensation reports, credit history checks and employer reference checks for employment-related and other purposes. Employment related purposes are defined as "evaluating a consumer for employment, promotion, reassignment or retention as an employee." (Section 603a(h)). Under the FCRA, reports including this personal information can be a "consumer report" and the organizations who collect and provide it to others for a fee or on a corporate basis are considered "consumer reporting agencies."

In September 1997, amendments to the FCRA imposed new requirements on the use of consumer reports for employment purposes, as described in this paper, along with significant penalties for any failure to comply.

The FCRA states that no consumer reporting agency may report any adverse information such as civil suits, civil judgments or records of arrests that from the date of entry antedate the report by more than seven years. However, the October 1998 amendment to the FCRA states that criminal convictions are never obsolete and may now be reported without any time constraints. (Section 605(a)).

This publication is for informational purposes only. None of the information contained herein is intended nor should it be construed as legal advice. If you have questions of a legal nature we urge you to contact your attorney. Also, please note that the summary compliance steps outlined here do not address many details in the law which could affect your use of consumer reports.

GIN has been providing clients with accurate and compliant pre-employment information services for more than six years. Since its inception in 1995, GIN has complied with the federal Fair Credit Reporting Act whenever applicable. GIN has always taken a leadership role in providing information on the new FCRA requirements to employers and customers. Many employers are surprised when they realize the impact of the FCRA on their hiring practices. Most employers consider the FCRA to apply to their hiring process only if they are using "credit reports;" however, the FCRA's reach is much broader.

A Brief History of the FCRA

The Fair Credit Reporting Act was formulated and passed by Congress in 1970 in response to concerns about the accuracy of information in private databanks and the discovery that these databanks were largely unregulated.

Although titled the Fair Credit Reporting Act and focused mainly on the collection and dissemination of credit information, the law governs other information provided in consumer reports by consumer reporting agencies. The FCRA defines a consumer report as any collection and sale of information about an individual's credit, character, general reputation, personal characteristics, or mode of living, if the information is collected for the purpose of determining the individual's eligibility for credit, insurance or employment, and if the report is prepared by a consumer reporting agency. (1) A consumer reporting agency then is any person or entity which assembles and provides this information to a third party, whether for a fee or on a cooperative nonprofit basis. (2)

The law itself, and subsequent interpretations by the Federal Trade Commission, clearly indicates that, in most cases, companies providing background screening information to employers are consumer reporting agencies, providing consumer reports. A Federal Trade Commission interpretation of the FCRA also specifically includes public record information, such as court records and motor vehicle reports, as information within the scope of the FCRA, if it is provided by a consumer reporting agency. (3)

On September 30, 1996, after years of deliberation, congress enacted the Consumer Credit Reporting Reform Act of 1996. This reform act changes many parts of the FCRA. These changes took effect in September 1997 and are intended to improve the accuracy of the information that is gathered by consumer reporting agencies and to protect the privacy of individuals by limiting the availability and use of this information, particularly in the employment setting.

1. FCRA, 15 U.S.C. § 1681 et seq.

Section 603(d)(1) *"The term "consumer report" means any written, oral or other communication of any information by a consumer reporting agency bearing on a consumer's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer's eligibility for*

(A) credit or insurance to be used primarily for personal, family or household purposes;

(B) employment purposes..."

2. FCRA, 15 U.S.C. § 1681 et seq.

Section 603(f) *"The term "consumer reporting agency" means any person which, for monetary fees, dues or on a cooperative nonprofit basis, regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information or other information on consumers for the purpose of furnishing consumer reports to third parties, and which uses any means or facility of interstate commerce for the purpose of preparing or furnishing consumer reports."*

3. Federal Trade Commission Commentary on the Fair Credit Reporting Act

Comments on Section 603(d) Definition of Consumer Report: *"A report solely of public record information is not a "consumer report" unless that information is provided by a consumer reporting agency, is collected or used for the purposes identified in section 603(d) and bears on at least one of the seven characteristics listed in the definition. Public record information relating to records of arrests, or the institution or disposition of civil or criminal proceedings, bears on one or more of these characteristics."*

See also Federal Register 55 Fed. Reg. 18,804 (May 4, 1990) wherein Federal Trade Commission rejected arguments to exempt other public records (e.g. motor vehicle records) from the scope of the Fair Credit Reporting Act.

The FCRA and Employment Practices

Let's take a look at the hiring process and how the FCRA affects this process.

The hiring process involves two key players, the employer and the applicant/employee. Each player has rights and responsibilities in this process.

The employer has a responsibility to the stakeholders of the business (shareholders, employees, owners) to hire and retain safe, honest and competent people. To fulfill this responsibility, the employer has the obligation to obtain complete and accurate information with which to make these decisions.

The applicant has a responsibility to provide complete and accurate information and to honestly portray himself and his skills and abilities. The individual has the right to be measured fairly and the right to know what information is being used to judge his suitability for employment.

In making the hiring or retention decision, employers often seek assistance from others to gather additional information on an applicant and to verify information provided by the applicant. Many times a third party is used to verify and supplement the information provided by the applicant. Many employers understand the value of using third parties such as GIN to gather and verify information on individuals. These employers believe this additional information received from independent sources helps them make the best possible decisions and helps assure that their company will hire and retain safe, honest and competent people.

In this process, the independent information provider has the responsibility to provide current, accurate information and the obligation to confirm that the information provided will be used legally and fairly.

Companies such as GIN that assist employers in gathering information on individuals for employment purposes are often considered consumer reporting agencies under the Fair Credit Reporting Act. Therefore, if a third-party provider of background reports is involved in the hiring process, the provisions of the federal Fair Credit Reporting Act apply to this process.

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A Balancing Act



GIN recognizes that individuals have the right to know what information is being provided about them and to know it is as complete and accurate as reasonably possible. Applicants/employees also need the protection of knowing the information gathered about them by the many consumer reporting agencies in the country will only be distributed to authorized and legitimate users.

At the same time, GIN believes that employers need access to current, accurate information on individuals when making an employment decision. To protect their business and ensure the safety of their workplace, employers must have the ability to verify the information given to them by job applicants/employees.

The FCRA attempts to balance the concerns of both the users and the subjects of consumer reports. The law provides safeguards to keep the information accurate and ensure its ethical use. These are protections you want for yourself as an individual consumer. The FCRA also recognizes the legitimate use of background reports for employment purposes. It recognizes that employers like yourself have an interest in learning as much as possible about a job applicant/employee in order to determine if the individual will be a safe, honest and competent employee.

A Process for Legally Using Background Reports to Hire Safe, Honest and Competent Employees

THE STEPS

The steps required to use background reports as part of your hiring process are easily incorporated into your normal process.

Inform the Individual and Obtain Permission

This should be part of your application process.

Order Background Reports

It is important to control access to the information in these reports.

Provide Individual with Copy of Report

This is a preliminary notice that information in the report may cause you to deny or terminate employment.

Adverse Action Notification

This notifies the applicant/employee that employment has been denied due to information in the report and should be incorporated into your rejection process.

The Details

Let's take a closer look at each step. Chances are you will find you are already doing some of these or they are a simple addition to your current practices.

Inform the Individual and Obtain Permission

Prior to ordering any background reports, you must tell the applicant you are ordering the reports and obtain permission to do so. This notice and disclosure must be clear and conspicuous. The authorization must be a separate form; it cannot be combined with other releases or statements to the applicant. (See Appendix page 7 for sample form.) The easiest time to present the notice and disclosure form and to obtain authorization is during the application process. The notice and disclosure can be part of your application for employment or can be accomplished during an initial pre-screening meeting.

If you are using a third-party such as GIN to check the references provided by the applicant, you must also provide a *Disclosure of an Investigative Report*. GIN has conveniently combined the investigative consumer report and the consumer report disclosures into one form. The FCRA considers a reference check - talking to others about the applicant's personal characteristics - an "investigative report." (See Appendix page 7 for sample form.)

With this disclosure, give the individual a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*. This document, prepared by the Federal Trade Commission, outlines the individual's rights under the law. The FCRA requires that any time a consumer receives information pertaining to a consumer report about himself, it must be accompanied by a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*. (See Appendix pages 9-11 for a copy of this document.)

Order Background Reports

Companies should order the same reports for all employees or reports specific to a job category or department.

The FCRA imposes potentially severe penalties for persons who obtain reports without having a permissible purpose under the law. You should adopt strict procedures in your organization regarding which employees have the ability and authority to access these background reports and the reason they may be ordered. GIN suggests you have employees sign an *Authorized Access Agreement* indicating the employee understands the confidential nature of the information and the penalties for obtaining reports in violation of the law. (See Appendix page 8 for sample form.)

Provide Individual with Copy of Report

If the background reports you receive contain any information which may cause you to not hire or terminate the individual, mail a copy of the report to the individual together with another copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*. (Remember, as indicated above, any time you have a communication with the individual regarding the background report, you must include a copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*.) Include a letter explaining that the report contains information which, if accurate, may cause you not to extend an offer of employment or to terminate the employee. Give the applicant at least five days in which to notify you if the information in the report is not correct.

The Details (continued)

Adverse Action Notification

If you decide not to hire the applicant or terminate an employee based in whole or in part on any information received in the background report, you must notify the individual of this decision. The law refers to a denial of employment as an “adverse action.” (1) The adverse action notice can be given orally, in writing or by electronic means. It must include the following:

1. FCRA, 15 U.S.C. § 1681 et seq.

Section 603(K) (1) (B) (ii) “The term “adverse action” means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.”

1. Notification that you will not be offering employment or that you will be terminating the employee due to information contained in the report,
2. The name, address and telephone number of the consumer reporting agency that provided the report,
3. A statement that the consumer reporting agency did not make this decision and thus cannot tell the applicant the reason for the decision,
4. A notice that the applicant has the right to obtain another free copy of the report within 60 days,
5. A notice that the applicant has the right to dispute the accuracy or completeness of the report with the reporting agency, and
6. A copy of *A Summary of Your Rights Under the Fair Credit Reporting Act* (again).

There is no requirement in the law as to how soon after you make the decision you must notify the applicant. This notification can be incorporated into your normal rejection process.

Although the FCRA has many provisions for the individual consumer to correct information contained in consumer reports, it does not provide recourse for the denial of employment due to a report. In other words, the employer is required to notify the applicant that employment will be denied based on information in a consumer report and provide the applicant with information on how to dispute the information in the report. However, there is nothing in the FCRA which requires that the employer hire the applicant if the information does prove to be incorrect.

Summary

Let’s recap the steps involved:

- ✓ Inform the individual and obtain permission to order reports.
- ✓ Control access to confidential information in background reports.
- ✓ Inform the individual if information in a report is detrimental.
- ✓ Notify the individual if you deny or terminate employment based on information in any report.
- ✓ Always include *A Summary of Your Rights Under the Fair Credit Reporting Act* with any communication with the individual.

That’s really all there is to it! With these few extra steps you have generally ensured that your employment process complies with the FCRA, that you are obtaining the information you need to make sound hiring decisions, and that your applicants are receiving a fair and honest assessment.

Appendix — Sample Documents

NOTICE & DISCLOSURE TO EMPLOYMENT APPLICANT REGARDING PROCUREMENT OF A CONSUMER REPORT

In connection with your application for employment, we may procure a consumer report on you as part of the process of considering your candidacy as an employee. In the event that information from the report is utilized in whole or in part in making an adverse decision with regard to your employment, before making the adverse decision, we will provide you with a copy of the consumer report and a description in writing of your rights under the law.

Please be advised that we may also obtain an investigative report including information as to your character, general reputation, personal characteristics, and mode of living. This information may be obtained by contacting your previous employers or references supplied by you. Please be advised that you have the right to request, in writing, within a reasonable time, that we make a complete and accurate disclosure of the nature and scope of the information requested. Such disclosure will be made to you within 5 days of the date on which we receive the request from you or within 5 days of the the time the report was first requested.

The Fair Credit Reporting Act gives you specific rights in dealing with consumer reporting agencies. You will find these rights summarized on the reverse side of this document.

By your signature below, you hereby authorize us to obtain a consumer report about you in order to consider you for employment.

Applicant's Name: _____
(Please Print)

Applicant's Address: _____

City/State/Zip: _____

Signature: _____

Social Security Number: _____

Give copy with *Summary of Rights Under the Fair Credit Reporting Act* to applicant.
Retain a copy for your files.

Appendix — Sample Documents

CONSUMER REPORT AUTHORIZED ACCESS AGREEMENT

I understand that as a designated representative of my employer, I am authorized to request and receive consumer reports from Global Information Network

I hereby agree that I shall only request consumer reports on applicants for employment or on employees for legitimate employment purposes. I further agree not to obtain these reports on myself, associates or any other person except in the exercise of my official duties for and on behalf of my employer and only for lawful purposes.

I agree to keep confidential the passwords and user identification numbers with which to access reports from GIN and will not share these numbers with other persons who do not have an official responsibility to obtain such reports.

I understand the Fair Credit Reporting Act stipulates that anyone who knowingly and willfully obtains information on an individual from a consumer reporting agency under false pretenses shall be subject to fine and/or imprisonment.

I hereby indemnify my employer, _____
(company name) _____, and GIN from
any actions on my part deemed unlawful by the provisions of the Fair Credit
Reporting Act.

Name: _____
(Please Print)

Signature: _____

Date: _____

A Summary of Your Rights Under the Fair Credit Reporting Act

The federal Fair Credit Reporting Act (FCRA) is designed to promote accuracy, fairness, and privacy of information in the files of every “consumer reporting agency” (CRA). Most CRAs are credit bureaus that gather and sell information about you - such as if you pay your bills on time or have filed bankruptcy - to creditors, employers, landlords, and other businesses. You can find the complete text of the FCRA, 15 U.S.C. 1681-1681u, at the Federal Trade Commission’s web site (<http://www.ftc.gov>). The FCRA gives you specific rights, as outlined below. You may have additional rights under state law. You may contact a state or local consumer protection agency or a state attorney general to learn those rights.

- **You must be told if information in your file has been used against you.** Anyone who uses information from a CRA to take action against you - such as denying an application for credit, insurance, or employment - must tell you, and give you the name, address, and phone number of the CRA that provided the consumer report.
- **You can find out what is in your file.** At your request, a CRA must give you the information in your file, and a list of everyone who has requested it recently. There is no charge for the report if a person has taken action against you because of information supplied by the CRA, if you request the report within 60 days of receiving notice of the action. You also are entitled to one free report every twelve months upon request if you certify that (1) you are unemployed and plan to seek employment within 60 days, (2) you are on welfare, or (3) your report is inaccurate due to fraud. Otherwise, a CRA may charge you up to eight dollars.
- **You can dispute inaccurate information with the CRA.** If you tell a CRA that your file contains inaccurate information, the CRA must investigate the items (usually within 30 days) by presenting to its information source all relevant evidence you submit, unless your dispute is frivolous. The source must review your evidence and report its findings to the CRA. (The source also must advise national CRAs - to which it has provided the data - of any error.) The CRA must give you a written report of the investigation, and a copy of your report if the investigation results in any change. If the CRA’s investigation does not resolve the dispute, you may add a brief statement to your file. The CRA must normally include a summary of your statement in future reports. If an item is deleted or a dispute statement is filed, you may ask that anyone who has recently received your report be notified of the change.

A Summary of Your Rights Under the Fair Credit Reporting Act

- **Inaccurate information must be corrected or deleted.** A CRA must remove or correct inaccurate or unverified information from its files, usually within 30 days after you dispute it. However, the CRA is not required to remove accurate data from your file unless it is outdated (as described below) or cannot be verified. If your dispute results in any change to your report, the CRA cannot reinsert into your file a disputed item unless the information source verifies its accuracy and completeness. In addition, the CRA must give you a written notice telling you it has reinserted the item. The notice must include the name, address and phone number of the information source.
- **You can dispute inaccurate items with the source of the information.** If you tell anyone - such as a creditor who reports to a CRA - that you dispute an item, they may not then report the information to a CRA without including a notice of your dispute. In addition, once you've notified the source of the error in writing, it may not continue to report the information if it is, in fact, an error.
- **Outdated information may not be reported.** In most cases, a CRA may not report negative information that is more than seven years old; ten years for bankruptcies.
- **Access to your file is limited.** A CRA may provide information about you only to people with a need recognized by the FCRA — usually to consider an application with a creditor, insurer, employer, landlord, or other business.
- **Your consent is required for reports that are provided to employers, or reports that contain medical information.** A CRA may not give out information about you to your employer, or prospective employer, without your written consent. A CRA may not report medical information about you to creditors, insurers, or employers without your permission.
- **You may choose to exclude your name from CRA lists for unsolicited credit and insurance offers.** Creditors and insurers may use file information as the basis for sending you unsolicited offers of credit or insurance. Such offers must include a toll-free phone number for you to call if you want your name and address removed from future lists. If you call, you must be kept off the lists for two years. If you request, complete, and return the CRA form provided for this purpose, you must be taken off the lists indefinitely.
- **You may seek damages from violators.** If a CRA, a user or (in some cases) a provider of CRA data, violates the FCRA, you may sue them in state or federal court.

Appendix — Sample Documents

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A Summary of Your Rights Under the Fair Credit Reporting Act

The FCRA gives several different federal agencies authority to enforce the FCRA:

**For Questions or
Concerns Regarding:**

CRAAs, creditors and others not listed below

National banks, federal branches/ agencies of foreign banks (word “National” or initials “N.A.” appear in or after bank’s name)

Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)

Savings associations and federally chartered savings banks (word “Federal” or initials “F.S.B.” appear in federal institution’s name)

Federal credit unions (words “Federal Credit Union” appear in institution’s name)

Banks that are state-chartered or are not Federal Reserve System members

Air, surface or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission

Activities subject to the Packers and Stockyards Act, 1921

Please Contact:

Federal Trade Commission
Bureau of Consumer Protection FCRA
Washington, DC 20580 202-326-3761

Office of the Comptroller of the Currency
Compliance Management, MS 6-6
Washington, DC 20219 800-613-6743

Federal Reserve Board
Consumer & Community Affairs
Washington, DC 20551 202-452-3693

Office of Thrift Supervision
Consumer Programs
Washington, DC 20552 800-842-6929

National Credit Union Administration
1775 Duke Street
Alexandria, VA 22314 703-518-6360

Federal Deposit Insurance Corporation
Compliance & Consumer Affairs
Washington, DC 20429 800-934-FDIC

Department of Transportation
Office of Financial Management
Washington, DC 20590 202-366-1306

Department of Agriculture
Office of Deputy Administrator-GIPSA
Washington, DC 20205 202-720-7051

NOTES

whitepaper

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Balancing Individual Rights and the Employer's Need to Know

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whitepaper



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