

Overview of the FCRA and Its Amendments

The Fair Credit Reporting Act

The Fair Credit Reporting Act ("FCRA") is the federal law that governs the acquisition and use of most background information on applicants and employees. 15 U.S.C. § 1681, *et seq.* The title of the FCRA is confusing, as it contains the phrase "credit report" and is commonly misinterpreted to mean that only credit reports are covered. The Act's provisions, however, are much broader and apply to both "consumer reports" and "investigative consumer reports." Consumer reports are reports prepared by a consumer reporting agency, such as LexisNexis® Authentication & Screening, that bear on an applicant's or employee's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living, when such information is used, or expected to be used, or collected in whole or in part for "employment purposes." "Employment purposes" include hiring, termination, reassignment, or promotion of an applicant or employee.

In other words, almost any communication of information concerning an applicant or employee from a consumer reporting agency to an employer could potentially be a "consumer report." Common examples of consumer reports include Department of Motor Vehicle record checks, criminal background checks, and credit history checks, when this information is obtained from a consumer reporting agency.

Investigative consumer reports under the FCRA are a subset of consumer reports in which information on an applicant's or employee's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with the applicant's or employee's friends, neighbors or business associates. Common examples of investigative consumer reports are employment verifications and interviews with former employers and coworkers, where there are performed by a consumer reporting agency.

The Fair and Accurate Credit Transactions Act

The Fair and Accurate Credit Transactions Act of 2003 ("FACT Act") was signed into law on December 4, 2003 by President George W. Bush, and amends the Fair Credit Reporting Act ("FCRA"). Among other things, the FACT Act nullifies a controversial opinion letter from the Federal Trade Commission known as the *Vail* letter. The staff attorney who authored the *Vail* letter in 1999 reached the novel conclusion that the FCRA regulates workplace misconduct investigations conducted by third parties, such as private investigators. Title VI of the FACT Act, which became effective when President Bush signed the bill, nullified the *Vail* letter by excluding misconduct investigations from the FCRA's more onerous provisions, including the need for the accused's advance consent to investigate.

Other provisions of the FACT Act are designed to increase consumer protections against identity theft and to improve the accuracy of consumer reports. Among other things, these provisions:

- Entitle every consumer to a free copy of his or her consumer report annually, upon request, from each of the three national consumer reporting agencies ("CRAs");
- Require CRAs to place a fraud alert in a consumer's report if the consumer asserts a good faith suspicion that he or she has been or is about to become a victim of identity theft or other fraud. The alert notifies prospective users that the consumer may be a victim of fraud and requires the user to verify the consumer's identity before issuing credit to the consumer;
- Give consumers the right to "block" information obtained through identity theft from appearing in their consumer reports;
- Require CRAs to provide victims of identity theft with a notice of their rights; and
- Prohibit CRAs from furnishing employment-related consumer reports containing medical information unless the information is "relevant to process or effect the employment transaction," and the consumer provides "specific written consent." This provision likely does not encompass the results of drug tests or pre-employment examinations, as such results usually come within the FCRA's exception for "direct transactions" between the consumer and the CRA.

Consumer Reports vs. Investigative Consumer Reports

The Fair Credit Reporting Act ("FCRA") applies to both "consumer reports" and "investigative consumer reports." As defined by the FCRA, "consumer reports" are reports prepared by a consumer reporting agency (e.g., LexisNexis® Authentication & Screening) that bear on an applicant's or employee's credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living, when such information is used, or expected to be used, or collected in whole or in part, for "employment purposes." "Employment purposes" include hiring, termination, reassignment, or promotion of an applicant or employee.

In other words, almost any communication of information concerning an applicant or employee from a consumer reporting agency ("CRA") to an employer would potentially be a "consumer report." Common examples of consumer reports include Department of Motor Vehicle records checks, criminal background checks, and credit history checks, when this information is obtained from a CRA.

"Investigative consumer reports" under the FCRA are a subset of consumer reports in which information on an applicant's or employee's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with the applicant's or employee's friends, neighbors, or business associates. Common examples of investigative consumer reports are employment verifications and interviews with former employers and coworkers, where these are performed by a CRA.

While most states that have enacted their own fair credit reporting statutes have adopted the FCRA definitions of consumer report and investigative consumer report, it is important to note that California's definitions vary significantly from the FCRA definitions. "Consumer reports" are defined by the California Consumer Credit Reporting Agencies Act ("CCRA") to essentially mean credit reports. The California

Investigative Consumer Credit Reporting Agency Act ("ICRA") defines "investigative consumer report" as a consumer report in which information on a consumer's character, general reputation, personal characteristics, or mode of living is obtained *through any means*. This definition specifically *excludes* "consumer reports" under the CCRA (credit reports) or other compilations of information that are limited to information about a consumer's credit record. Thus, unlike the FCRA, the ICRA does not limit the definition of investigative consumer reports to those obtained through personal interviews by third party agencies. Virtually any report ordered by an employer from a third party for employment purposes (apart from credit reports governed by the CCRA) are considered "investigative consumer reports" under California law. Such reports would commonly include criminal background checks; educational, employment and driving records checks; and licensing and certification confirmation reports.

Fair Credit Reporting Act Compliance

STEP ONE: Disclosure and Written Consent

Before requesting a consumer report, an employer must: 1) provide to the employee or applicant a clear and conspicuous disclosure that a report may be requested (this must be provided in a separate document that does not refer to other subjects); and 2) obtain written consent from the employee or applicant. The applicant's or employee's authorization may be phrased to apply not only to consumer reports related to the job application process, but also to any reports that might be obtained *after beginning* the employment relationship. The example in the Sample Forms fulfills the requirements for both the disclosure and the written consent.

If the employer is obtaining an investigative consumer report, it must provide an *additional disclosure* to the applicant or employee that includes the following information:

- That the employer has requested an investigative consumer report that may include information about the individual's character, general reputation, personal characteristics, and mode of living based on personal interviews with neighbors, friends, associates, or former employers;
- A statement informing the applicant or employee of the nature and scope of the investigation and of his or her right to request further information from the employer as to the nature and scope of the investigation; and
- That the individual may request a summary of rights under the Fair Credit Reporting Act ("FCRA").

The additional investigative consumer report disclosure must be sent to the individual "no later than" three days after the investigative consumer report is first requested, although the timing of this step may be influenced by state law.¹

¹ In California, for example, Step One for credit reports must be accomplished before the report is requested. Step One for investigative consumer reports (not credit reports) must be accomplished no later than three days after the report is first requested. In Maine, the notice must be delivered to the applicant or employee either at the time of the application or not less than three business days before the date on which the investigation is commenced. Finally, in Massachusetts, New Jersey, New York, Oklahoma and Rhode Island, notice of any background check report must be issued prior to requesting the report.

Therefore, the disclosure may be contained in the initial disclosure and authorization to the applicant or employee.

In the event that the employer requests an investigative consumer report outside of the application process, a separate letter disclosing the nature and scope of the investigation and other rights described in this section is required (unless the FACT Act exception applies).

Employers should be aware that if an applicant or employee contacts the employer in writing, and requests information about the nature and scope of the investigative consumer report, the FCRA requires that the employer supply this information *within five days* of the date on which the employer received the individual's request or the date on which the report was requested, whichever is later.

STEP TWO: Certification to the Consumer Reporting Agency

Before obtaining any consumer report (including an investigative consumer report), an employer must provide certification to the Consumer Reporting Agency (CRA) that the consumer report will be used for a permissible purpose. Most, if not all, CRAs will request that the employer sign their certification agreement. You should carefully review these agreements to ensure minimum compliance with applicable law and that no undesirable, additional requirements are incorporated. Under the Fair Credit Reporting Act ("FCRA"), the employer must certify that:

- Disclosure to the applicant or employee has been made *and* written consent has been obtained, as was described in STEP 1;
- Pre-adverse action disclosures will be made if required, as will be described below in STEP 3;
- No state or federal equal employment opportunity laws or regulations will be violated, when the employer uses information from the consumer report;
- And, when requesting an investigative consumer report, the employer must also certify that:
 - The employer has also made the required investigative consumer report disclosure to the applicant or employee, as was outlined above in STEP 1; and
 - If the applicant or employee writes back and requests information from the employer about the nature and scope of the investigative consumer report, as was discussed above in STEP 1, the employer will provide that information as well.

Under the FCRA, the CRA (and not the employer) must, before preparing the consumer report, prepare the certification form and ensure that it is completed by the employer.

STEP THREE: Notification before Taking Adverse Action

The Fair Credit Reporting Act ("FCRA") imposes stringent notification requirements on employers that use consumer report information, in whole or in part, in making an adverse employment decision. Before an employer takes any adverse action

based on such information, it must provide two documents to the applicant or employee:

- A copy of the consumer report; and
- The summary of consumer rights prescribed by the Federal Trade Commission ("FTC"), is included in the Sample Forms.

This procedure allows applicants or employees to see the reports that are used in decisions against them. To protect against potential claims for failure to comply with the FCRA pre-adverse action notification requirement, we recommend that you send the applicant or employee a letter explaining the materials that you are sending them, even though this additional letter is not specifically required by the Act. A sample pre-adverse action letter is included in the Sample Forms.

The FCRA is *silent* about how long an employer must wait before implementing an adverse action based on a consumer report, once the employer has complied with the pre-adverse action disclosure requirements. The FTC has issued staff opinion letters stating that an employer must wait a "reasonable" amount of time before taking final adverse action, and one letter suggests a five-day waiting period is a "reasonable" waiting period, although "the facts of any particular employment situation may require a different time." In light of these letters, an employer may wish to adopt a procedure for allowing applicants and employees adequate time to respond before implementing adverse actions based on consumer reports, in order to avoid potential liability arising from inaccurate reports. The accuracy of consumer reports is primarily the responsibility of the consumer reporting agency.

If the consumer report does not influence the employer's adverse action in whole or even in part, the employer has *no duty* to forward a copy of the report or a summary of consumer rights to the applicant or employee at the pre-adverse action stage. The employer could face troublesome litigation, however, if the consumer report contains negative information and if the applicant or employee alleges that the report did in fact influence the decision to some degree.

If negative information in a consumer report has not influenced the adverse employment actions in whole or in part, the employer should, at the very least, prepare an accurate and complete file documenting the reasons for the adverse action, and stating explicitly that the adverse decision was not based in any way on the information in the consumer report.

Special rules apply under the FACT Act. Employers should consult the FACT Act when taking adverse action after a misconduct investigation.

STEP FOUR: Documents Provided after Taking Adverse Action

After the employer has provided copies of the consumer report and the Federal Trade Commission's summary of Fair Credit Reporting Act ("FCRA") rights to the applicant or employee, and has waited a "reasonable" time period, it may take adverse action.

After taking the action, the employer must provide an "adverse action notice." The letter included in the samples forms may be used to make the final adverse action notification. Although the notice may be provided orally, in writing or electronically, we recommend that the notice be provided in written form so that there is documentary evidence of compliance with the FCRA. The letter must contain:

- Consumer reporting agency ("CRA") contact information, that is, the name, address and telephone number, including a toll-free telephone number, of the CRA that provided the report;
- A statement that the CRA is not the decision-maker and that the CRA is unable to inform the consumer as to the specific reasons why the adverse action was taken;
- A statement of the applicant's or employee's right to obtain an additional free copy of the report. The employee or applicant should have already obtained a copy of the report from the employer before the adverse action, as described above in STEP THREE. The applicant or employee must be informed of his/her right for an *additional*, free copy of the report, directly from the CRA, however.
- A statement of the applicant's or employee's right to dispute the report: The applicant or employee must be informed that he or she has the right to dispute with the CRA the accuracy or completeness of any information in the report.

As with a failure to follow the certification requirements, the employer's failure to comply with these and other notification requirements following an adverse action could expose it to liability for willful or negligent non-compliance.