

A top-down view of a desk with a laptop, glasses, a pen, and a stapler. The laptop is on the left, the glasses are at the top right, and the pen is on the right side. The background is a light, neutral color.

Work**Smarts** Half-Day Seminar

Don't Drop the Ball on FCRA Compliance

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 Spencer**Fane**[®]

Fair Credit Reporting Act

The FCRA promotes accuracy, fairness, and privacy of information in the files of consumer reporting agencies.

- Regulates:
 - Information furnished to consumer reporting agencies
 - How consumers may dispute information in their consumer reports
 - Requesting and using consumer reports
- The FCRA imposes duties on:
 - *Consumer reporting agencies*, which prepare consumer reports
 - *Furnishers*, which provide information to consumer reporting agencies
 - *Users of consumer reports*, which use consumer reports for a variety of reasons

Statutory Scope for Employers

- How does it work in practice in the employment context?
 - Employers request consumer information from *consumer reporting agencies* (e.g., Equifax, TransUnion and Experian) >>>
 - *Consumer reporting agencies* obtain information from furnishers of information (e.g., credit card companies, banks, and mortgage banking institutions) >>>
 - This information is reported back to employers (e.g., the “users” of consumer reports)
- FCRA addresses the concern that employers might use consumer reports in a manner that violates privacy rights of applicants and employees
 - Applies to most background checks
 - Covers non-credit information, not just ‘credit reports’
- Highly technical, deceptively simply procedural requirements for employers

Statutory Scope

An employer's obligations under the FCRA are triggered when it

- Requests a **consumer report** or **investigative consumer report**
- From a **consumer reporting agency**
- Which is used, or is expected to be used, as a factor in establishing the **consumer's eligibility for employment purposes** (e.g., hiring, retention, promotion, and reassignment).



Step-By-Step Compliance for Employers

Step-By-Step Compliance for Employers

1. Determine whether the FCRA applies to hiring process / background check.
2. Provide written disclosure to applicant / employee.
3. Obtain signed authorization from applicant / employee.
4. Certify compliance to the consumer reporting agency.
5. Give written notice *before* taking an adverse employment action.
6. Give written notice *after* taking an adverse employment action.

1. Determine whether the FCRA applies

Does your company obtain *consumer reports* for employment purposes?

- The term “**consumer report**” means:
 - any written, oral, or other communication of 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 for the purpose of serving as a factor in **establishing the consumer's eligibility for employment purposes.**

1. Determine whether the FCRA applies

Examples of Consumer Reports

- Motor vehicle department records
- Criminal background checks
- Credit reports
- Education verifications
- Employment verifications

Examples of What are *Not* Consumer Reports

- Social security number verifications
- Reports of basic identifying information
- E-Verify
- Reports of publicly-available information obtained directly by employer
- Employment references verified directly by an employer
- Drug tests provided directly to an employer

1. Determine whether the FCRA applies

Does your company obtain *investigative consumer reports*?

- The term “**investigative consumer report**” means
 - a consumer report obtained through **personal interviews with neighbors, friends, or associates of the consumer** reported on or with others with whom he is acquainted or who may have knowledge concerning any such items of information.

1. Determine whether the FCRA applies

Does your company obtain consumer reports from consumer reporting agencies?

- The term “consumer reporting agency” means **any person** that regularly **assembles or evaluates consumer information** (from a variety of sources, such as credit card companies, banks, and public records), **to prepare and provide consumer reports to third parties.**
 - Consumers have a right to know what is in the files of a consumer reporting agency and to report incomplete or inaccurate information.
 - Consumer reporting agencies must correct or delete inaccurate, incomplete, or unverifiable information.

2. Provide written disclosure to applicant / employee

An employer may not procure a consumer report for employment purposes, unless a **clear and conspicuous disclosure** has been made in writing to the consumer before the consumer report is procured, in a **document that consists solely of the disclosure**.

- a) Disclosure in writing and in a stand-alone format
- b) Cannot be included with an employment application
- c) No liability waivers in the disclosure
- d) You can include minor additional information in the notice, but only if it does not confuse or detract from the notice
- e) For investigative consumer reports, include a statement of the right to request disclosure of the nature and scope of the investigation and a summary of consumer rights

2. Provide written disclosure to applicant / employee

Permissible Disclosure: *Walker v. Fred Meyer, Inc.*, 953 F.3d 1082 (9th Cir. 2020)

We (the Kroger family of companies) will obtain one or more consumer reports or investigative consumer reports (or both) about you for employment purposes. These purposes may include hiring, contract, assignment, promotion, reassignment, and termination. The reports will include information about your character, general reputation, personal characteristics, and mode of living.

We will obtain these reports through a consumer reporting agency. The consumer reporting agency is General Information Services, Inc. GIS's address is P.O. Box 353, Chapin, SC 29036. GIS's telephone number is (866) 265-4917. GIS's website is at www.geninfo.com.

To prepare the reports, GIS may investigate your education, work history, professional licenses and credentials, references, address history, social security number validity, right to work, criminal record, lawsuits, driving record and any other information with public or private information sources.

You may inspect GIS's files about you (in person, by mail, or by phone) by providing identification to GIS. If you do, GIS will provide you help to understand the files, including communication with trained personnel and an explanation of any codes. Another person may accompany you by providing identification.

If GIS obtains any information by interview, you have the right to obtain a complete and accurate disclosure of the scope and nature of the investigation performed.

2. Provide written disclosure to applicant / employee

Impermissible Disclosure: *Gilberg v. Cal. Check Cashing Stores, LLC*, 913 F.3d 1169 (9th Cir. 2019)

The scope of this notice and authorization is all-encompassing; however, allowing CheckSmart Financial, LLC to obtain from any outside organization all manner of consumer reports and investigative consumer reports now and, if you are hired, throughout the course of your employment to the extent permitted by law.

- The Court held: The disclosure is not reasonably understandable.
 - The beginning of the sentence does not explain how the authorization is “all-encompassing” and how it would affect an applicant’s rights.
 - The second-half of the sentence following the semicolon lacks a subject and is incomplete.

3. Obtain signed authorization from applicant / employee

An employer must obtain the applicant's or employee's **signed written authorization** before requesting either a consumer report or an investigative consumer report.

- a) Best practice, the authorization should be separate from disclosure
- b) If you want the authorization to allow you to obtain consumer reports throughout the person's employment, say so clearly and conspicuously
- c) Generally, it is permissible to include a waiver of liability in an authorization.

4. Certify compliance to the consumer reporting agency

An employer must certify to the consumer reporting agency that the employer

- Notified the applicant or employee and received permission
- Complied with all of the FCRA requirements
- Will not discriminate against the applicant or otherwise misuse the information

Reminder: Evaluate your contract with the consumer reporting agency.

- Disclosure and authorization forms provided by the consumer reporting agency
- Indemnification provisions

5. Give written notice *before* taking an adverse employment action

- Before making any final employment decisions based on information contained in a consumer report, an employer must first provide:
 - Notice that includes a **copy of the consumer report** relied upon in making the employment decision
 - **Summary of rights** that includes the contact information of the Consumer Financial Protection Bureau
- Wait at least five days before taking any final action!
 - Delaying final action gives the person notice to review the report and dispute the information provided therein

6. Give written notice *after* taking an adverse employment action

- After deciding not to hire (or taking an adverse employment action) based on information in a consumer report, an employer must provide:
 - Notice to the applicant / employee of the adverse employment action.
 - The consumer reporting agency's contact information.
 - A statement that the consumer reporting agency:
 - Did not make the decision not to hire the applicant; and
 - Cannot provide the applicant with the specific reasons for the adverse decision.
 - A statement that the applicant / employee has the right to contest the information in the consumer report with the reporting agency.

6. Give written notice *after* taking an adverse employment action

- If credit scores are used to screen applicants, the post-adverse action notice must include:
 - The applicant's current credit score.
 - The range of possible credit scores.
 - All key factors that adversely affected the score.
 - The date the credit score was created.
 - The name of the person or entity that provided the credit score or file.

Disposing of Consumer Reports

- When an employer is done using a consumer report, it should **retain a copy** in a personnel file.
- **Securely dispose** of all other copies so that the information cannot be read or reconstructed:
 - Burn, pulverize, or shred papers containing consumer report information
 - Destroy or erase electronic files containing consumer report information

Special Rule for Certain Employee Investigations

- A report made to an employer is not a “consumer report” when:
 - Made in connection with an investigation of (a) suspected misconduct relating to employment or (b) compliance with federal, state, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting policies of the employer.
 - The report is not made for the purpose of investigating a consumer’s credit worthiness, credit standing, or credit capacity.
 - The report is not provided to any person except the employer or an agent of the employer, the government, or self-regulatory organization.
- After taking any adverse action based upon such an investigation, an employer must disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based.

Violations and Penalties

- High Exposure / Risks
 - Easy to file lawsuits – boilerplate allegations by ‘cottage industry’ of FCRA attorneys
 - Class actions / systemic violations
- Damages
 - Statutory damages of \$100 to \$1,000 for each violation
 - Actual damages (for negligent violations)
 - Punitive damages
 - Attorney fees and costs

Other Considerations

- Disparate Impact Violating Anti-Discrimination Laws
 - An employer's neutral policy may **disproportionately impact** some individuals protected under Title VII of the Civil Rights Act, if not **job-related and consistent with business necessity**.
 - Develop a targeted screen and **individualized assessment** considering at least (1) the **nature of the crime**, (2) the **time elapsed**, and (3) the **nature of the job**.

Certain State Laws Supplement FCRA Requirements

- **Arizona:** Credit reporting statute prohibits employers from requesting or requiring any waiver of rights
- **California:** Gives applicants the right to review an investigative consumer report, even if there is no adverse action
- **Connecticut:** Prohibits covered employers from requiring that an applicant consent to obtaining a credit report as a condition of employment
- **Massachusetts:** Requires disclosure to an applicant or employee of their right to have a copy of the report provided upon request

Certain State Laws Supplement FCRA Requirements

- **Minnesota:** Requires employers to notify individuals who are the subject of a consumer report of their right to receive a copy of the report
- **Pennsylvania:** Criminal History Record Information Act governs what criminal records an employer can obtain and how the information may be used in employment decisions
- **Vermont:** Prohibits the use of credit reports and credit history for employment, except under narrow circumstances, which cannot serve as the sole basis for an employment decision
- **Washington:** Prohibits consumer reports containing information on the employee's creditworthiness, credit standing, or credit capacity, unless the information is either (i) required by law or (ii) substantially job-related and the employer's reasons for using the information was given to the applicant or employee in writing.

Thank You



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