



Employment Screening Services, Inc.

ESS Client Services
What Employers Must Know
About The FCRA

A federal law called the **Fair Credit Reporting Act (FCRA)** governs pre-screening reports obtained from outside agencies. This law sets out various requirements and rules for pre-employment background reports, called **Consumer Reports**. This law was substantially amended on September 30, 1997, to provide greater privacy protection to consumers, and to ensure that information was accurate and complete.

A **Consumer Report** is much broader in scope than just a credit report. It affects a wide variety of information obtained concerning job applicants. A **Consumer Report** includes criminal and civil records, driving records, civil lawsuits, reference checks and any other information obtained by a **Consumer Reporting Agency (CRA)**. By following the **FCRA**, an applicant's privacy rights are protected.

When engaging the services of a **Consumer Reporting Agency**, both the employer and the **CRA** must follow the four steps described in this report. Failure to do so can result in substantial legal exposures, including fines, damages, punitive damages and attorney's fees.

STEP ONE-- Prior to obtaining a **Consumer Report**, an employer must certify to the **Consumer Reporting Agency (CRA)**, that the employer will follow all the steps set forth in the **Fair Credit Reporting Act**. (Section 604) Specifically, the employer certifies that they:

- Use the information for employment purposes only.
- Not use the information in violation of any federal or state equal opportunity law.
- Will obtain all the necessary disclosures and consents as discussed below.
- Will give the appropriate notices in the event that an adverse action is taken against an applicant based in whole or in part on the contents of the **Consumer Report**.
- If an **Investigative Consumer Report***, is requested, they will provide additional disclosures to the consumer.

STEP TWO--Disclosure to the Applicant and the Applicant's Written Consent. (Section 604)

- A “**clear and conspicuous**” disclosure must be made in writing to the applicant that a “**Consumer Report May Be Obtained for Employment Purposes.**” The disclosure must consist “**solely of the disclosure.**” In other words, it must be on a separate document. The

purpose is to prevent the disclosure from being buried within other employment application documents.

- The applicant must provide written authorization to the employer to procure the report. The disclosure and the written consent may be included on the same document.

* If an employer wishes to receive an “**Investigative Consumer Report**,” the FCRA requires additional disclosures. (Section 606) An Investigative Consumer Report is a type of consumer report that includes information on a consumer's “*character, general reputation, personal characteristics, or mode of living obtained through personal interviews with neighbors, friends, or associates of the consumer.*”

In short, if ESS is asked to conduct reference interviews or obtain any information that goes beyond merely verifying factual matters (such as dates, position, salary, etc) then ESS is being asked to provide an **Investigative Consumer Report**.

- Employers must clearly and accurately disclose to applicants and employees that an Investigative Consumer Report, “including information as to character, general reputation, personal characteristics, or mode of living, may be made.” The disclosure must also inform the consumers of their right to request additional disclosures and of their right to request a written **Summary of the Rights of the Consumer**. These disclosures are covered in the ESS Release and Authorization form. If employers do not provide this initial disclosure, they must do so within three days from the date the request was made.
- If the applicant makes a written request to the employer within a reasonable time after the applicant has received the disclosure described above, the employer has five days to make a complete and accurate disclosure of the nature and scope of the investigation
- Employers must also certify to the Consumer Reporting Agency (ESS) that they will make the above disclosures to the consumer. This certification is included in the ESS Agreement.

STEP THREE--Before taking Adverse Action based in Whole or in Part on the Consumer Report, the employer must:

- Provide the applicant with a copy of the consumer report, and
- Provide the applicant with a **Summary of Consumer Rights**

The purpose of this part of the FCRA is to give applicants and employees an opportunity to view the report that may have an adverse impact on them. If they believe the report to be inaccurate or incomplete, applicants may contact the Consumer Reporting Agency and dispute or explain information in the report. This prevents the possibility of inaccurate or incomplete information from causing an applicant's denial of employment. The Federal Trade Commission (FTC) clearly ruled that an adverse action notice cannot be combined with the consumer report and Summary of Consumer Rights, as this would defeat the purpose of giving the consumer time to dispute the consumer report.

Neither the FCRA nor FTC prescribes any specific language to be used in a pre-adverse action communication. However, in addition to giving applicants a copy of the report and Summary of Consumer Rights, the employer should encourage them to contact the Consumer Reporting Agency (ESS) as soon as possible if they believe any of the report's information to be inaccurate or incomplete.

Once a copy of the report and summary of consumer rights are given to an applicant, the FCRA also does not specify how long the employer should wait before taking adverse action. The intent of the law is to give applicants and employees ample time to read the report and dispute the information if they wish.

STEP FOUR--Notice of Adverse Action (FCRA sec. 615)

After following Step 3, if the employer wishes to proceed with adverse action (based in whole or in part on the consumer report), the FCRA requires them to notify the applicant. The notification must contain certain language:

- The notification should include the name, address, and toll free telephone number of the Consumer Reporting Agency (ESS) that furnished the report.
- The notification should also state that the Consumer Reporting Agency did not make the decision, nor can they provide the consumer with specific reasons why the adverse action was taken.
- The consumer should also be informed that he/she has a right to obtain a free copy of the consumer report from the Consumer Reporting Agency within 60 days. (This is in addition to the consumer's right to a copy of the report as provided for in Step 3. If the applicant does request another copy of the consumer report, he/she should also be sent another copy of the Summary of Consumer Rights).
- The consumer also has the right to dispute the accuracy or completeness of any information in the consumer report with the Consumer Reporting Agency.

Some find it difficult to understand why Congress intended employers to provide applicants and employees with two separate notices – a pre-adverse action notice, and the adverse action notice. However, the FCRA clearly requires both notices. FTC staff has interpreted the law in this manner. The clear intent is to give job applicants and employees the maximum opportunity to correct any errors or omissions in a consumer report that may affect their ability to gain or retain employment.

These requirements are also explained in a document prepared by the Federal Trade Commission entitled, “**Notice to Users of Consumer Reports.**” The FCRA requires this notice be given to users of consumer reports to inform them of their legal obligations.