

## Are You Fair Credit Reporting Act Compliant?

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Employers who use pre-employment and post-hire background checks must consider various federal, state and local laws and regulations. One important law that must be considered is the federal Fair Credit Reporting Act (FCRA). The FCRA governs the collection, assembly, and use of certain consumer information. The FCRA provides specific rules for businesses making employment decisions based on consumer reports (for example, driving records, a criminal report, employment history, credit check) obtained from third parties. Surveys have shown that almost all employers are now using some form of background checks that likely implicate the FCRA.

Unfortunately, the FCRA can be overly technical. Technical errors, even those causing no actual damages, can become costly because the statute provides damages of \$100 to \$1,000 for each individual violation. Naturally, in a class action setting, the statutory provided damage amounts can quickly become significant, particularly because of the inherent repeat nature of the violations (*e.g.*, the same incorrect form was used with every applicant). Indeed, large and sophisticated employers, including Amazon, Uber and Avis (just to name a few) in just the last year, have entered into multi-million dollar settlements over alleged violations of the FCRA.

As such, it is crucial that employers understand how the law applies. It is helpful to view FCRA compliance as a three-step process:

- First, a proper disclosure and authorization must be used prior to procuring a consumer report. The majority of recent lawsuits have alleged deficiencies in the disclosure and authorization used. The FCRA has specific requirements about what must be in the disclosure and authorization paperwork, what cannot be in the paperwork and how it must be presented. These requirements are very technical.
- Second, notice of the potential for an adverse action must be provided. If anything in the consumer report is going to be used (“in whole or in part”) as a basis for an adverse action, the individual must receive what is called a pre-adverse action letter prior to the employer taking an adverse action. The pre-adverse action letter provides notice of the potential adverse action, contains information about the consumer reporting agency used, and provides the individual a reasonable opportunity to address any mistakes, among others.
- Third, if an adverse action is taken, the individual must be given an adverse action letter. The letter also has technical requirements and must inform an individual that an adverse action was taken because of the information contained in his or her consumer report.

Each step is required and, as discussed above, technical mistakes that result in no harm can still become costly. As such it is critical to ensure that you have proper documentation and processes in place prior to litigation. Once litigation starts, the damage is already done. Further, and critically, it is simply not enough to rely upon documentation provided by the third party performing the background screen. Numerous employers have made this mistake -- and assumed the forms provided by the third party were FCRA compliant -- and it has led to costly litigation. An independent review of your processes and the documentation being used must be conducted.

**If you would like more information, please contact:**

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