

Fair Credit Reporting Act Compliance Guide

EMPLOYER'S COMPLIANCE GUIDE
TO THE
FAIR CREDIT REPORTING ACT
(EMPLOYMENT ASPECTS)

FAIR CREDIT REPORTING ACT

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FAIR CREDIT REPORTING ACT

I. INTRODUCTION

Applicant/employee background reports can be vital tools for employers, especially in the hiring process and sometimes during employment. The following pages contain guidelines and sample documents for obtaining and using certain background reports, known as “consumer reports” in accordance with the Fair Credit Reporting Act (“FCRA”).

A. Increased Applicant and Employee Rights

Amendments to the FCRA significantly increased the rights of applicants and employees to receive certain disclosures and to choose whether to authorize certain background reports. Given the increase in litigation over privacy interests, employers (as well as their attorneys and investigators) are well-advised to pay close attention to the detailed requirements of the FCRA.

B. What is a “Consumer Report?”

An employer triggers FCRA obligations when it requests a “consumer report,” a term which includes a broad category of reports from a “consumer reporting agency” containing any information “bearing on a consumer’s credit worthiness, credit rating, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living.” Reports such as driving records, criminal records, credit reports, and many other reports normally constitute “consumer reports” when an employer obtains them for employment purposes from a third-party, consumer reporting agency such as a credit-reporting company, an insurance company, or an investigative firm.

C. What is an “Investigative Consumer Report?”

A special subset of consumer reports, called “investigative consumer reports,” contain information obtained by a consumer reporting agency through personal interviews with neighbors, friends, associates, acquaintances, or others with knowledge of the consumer. For example, an investigative consumer report could include a report prepared by an investigator who interviews an applicant’s former employers on behalf of the prospective employer. If an employer intends to obtain an investigative consumer report, the FCRA imposes additional disclosure requirements in addition to all of the requirements that apply to ordinary consumer reports.

D. What if an Employer Obtains Information Directly from Public Records?

Sometimes employers themselves go directly to original governmental sources to obtain records (such as department-of-motor-vehicles records, local or state criminal records, courthouse records, etc.). Based upon recent informal opinions of staff attorneys at the Federal Trade Commission (“FTC”), as well as a few older court decisions, reports obtained in this manner are not FCRA-covered consumer reports (although there is a slight risk of a contrary interpretation by the FTC based on an early, informal FTC guideline which we have questioned before the FTC without receiving a formal answer). On the other hand, if an employer retains a third party to obtain and evaluate reports for employment purposes, the third party who goes to governmental sources for such reports will normally be considered a consumer reporting agency providing consumer reports.

II. IMPORTANT DEFINITIONS

The Fair Credit Reporting Act defines many key terms in the text of the statute itself.

A. “Consumer Report”

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; or (C) any other purpose authorized in the FCRA.

B. “Investigative Consumer Report”

The term **“investigative consumer report”** means a consumer report or portion thereof in which information on a consumer’s character, general reputation, personal characteristics, or mode of living is 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.

C. “Consumer Reporting Agency”

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.

D. “Adverse Action”

For employment purposes, the term “adverse action” means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

III. USING CONSUMER REPORTS

For employers using consumer reports, the FCRA requires the following steps:

A. Provide Prior Written Disclosure to the Applicant and/or Employee.

The disclosure of intent to obtain reports must be a “stand-alone” document containing only this disclosure, but it may also include a section for the applicant’s or employee’s authorization. (See attached sample *“Disclosure of Intent to Obtain Consumer Reports or Investigative Consumer Reports and Authorization”* at Appendix 1). The disclosure must tell the applicant/employee that a consumer report or an investigative consumer report may be obtained for employment purposes.

The attached disclosure document covers both consumer reports and investigative consumer reports, and it offers the applicant/employee the opportunity to request additional information regarding the nature and scope of an investigation if the employee checks the appropriate box.

For hiring purposes, employers should give this document to applicants along with the employment application. This document may also be given to current employees, and it is designed to be usable for multiple reports over time.

B. Obtain Signed Authorization from the Applicant and/or Employee.

The employer must obtain the applicant’s or employee’s signed authorization before requesting either a consumer report or an investigative consumer report. For convenience, we combined this authorization with the disclosure described in Step A, above. See, *“Disclosure of Intent to Obtain Consumer Reports or Investigative Consumer Reports and Authorization”* (Appendix 1).

C. Make the Certification to the Consumer Reporting Agency.

An employer must certify to the consumer reporting agency that the employer follows proper procedures and uses the reports only for employment purposes. An employer may send a consumer reporting agency a single certification to cover all

future reports requested for employment purposes. Most consumer reporting agencies will provide employers with a certification form, however, we attach a recommended certification at Appendix 2.

D. Give Written Notice Before Taking “Adverse Action.”

Before taking an adverse action (such as not hiring the applicant) based in whole or in part on information contained in a consumer report, an employer must give the applicant or employee the following documents:

- A copy of the consumer report or investigative consumer report
- A copy of the “*Summary of Your Rights Under The Fair Credit Reporting Act*” (copy included in Appendix 3).

The FCRA does not require a cover letter for this step, but we recommend that you use a cover letter to provide some explanation and a written record. Appendix 4 contains a suggested “*Pre-Adverse Action Notice*” for this purpose.

An employer must provide the report and the *Summary of Rights* to the applicant or employee a reasonable period of time before actually taking adverse action. A “reasonable period of time” depends on the circumstances including such factors as the industry, the employer’s business needs and past practice, and the information in the report.

E. Give Written Notice After Taking “Adverse Action.”

When an employer actually takes adverse action based in whole or in part on a consumer report or investigative consumer report, the employer must give the applicant or employee a written notice of the adverse action along with specific information about the consumer reporting agency which provided the consumer report. Appendix 5 contains a sample “*Adverse Action Notice*.”

F. Special Rule for Workplace Misconduct Investigations

Employers have always been free to conduct internal investigations using their own employees without risk of triggering the FCRA. Effective March 31, 2004, Congress stepped in to ensure that employers who want to hire an outside expert to investigate certain types of workplace misconduct should not be bound by all of the FCRA’s notice, authorization, and disclosure requirements. The amendment to the FCRA

provides a simpler procedure for handling certain types of reports to employers. Specifically, the amendment applies to a report from an outside investigator hired by an employer where:

- (1) the oral or written report is made to an employer 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 written policies of the employer;
- (2) the report is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and
- (3) the report is not provided to any person except (A) the employer or an agent of the employer, (B) a government officer, agency, or department, (C) any self-regulatory organization with regulatory authority over the employer or employee, or (D) as otherwise provided by law.

For reports such as those described above, there is no advance-notice or authorization requirement, and the only disclosure obligation on the employer will be this: After taking any adverse action based in whole or in part on such a report, the employer must disclose to the employee a summary containing the nature and substance of the report. In that summary, the sources of information acquired solely for use in preparing the report do not need to be disclosed.

IV. USING INVESTIGATIVE CONSUMER REPORTS

Using an investigative consumer report may require an additional step if the applicant or employee requests additional information. The applicant or employee may request (1) disclosure of the nature and scope of the investigation to be conducted and/or (2) a summary of consumer rights prepared by the Federal Trade Commission. If an applicant or employee requests this information, provide the attached "*Response to Request for Information Regarding Investigative Consumer Report*" (Appendix 6) with appropriate enclosures.

To satisfy a request for information regarding the "nature and scope" of the investigation, you may attach a blank copy of the form that the consumer reporting agency will use in making its investigative consumer report. If the consumer reporting agency does not have an investigation form, you should contact your Fisher & Phillips LLP attorney for alternative "nature and scope" disclosure suggestions.

To satisfy disclosure number (2), you should provide a copy of "*A Summary of Your Rights Under the Fair Credit Reporting Act*" at Appendix 3.

When an applicant or employee makes a proper written request for information regarding an investigative consumer report, an employer must respond in writing within **five days** after one of the following:

- (a) receiving the applicant or employee's request for the information, **or**
- (b) the date on which the employer first requests the investigative consumer report, whichever date is later.

V. DOT-COVERED EMPLOYEES.

For employers considering applicants for driver positions subject to DOT regulation or state transportation or safety regulations, the FCRA allows for oral (instead of written) disclosures to applicants, and oral authorizations from applicants, regarding some consumer reports. Also, the written "pre-adverse action notice" may be replaced with an appropriate notification given to the applicant within three business days after the adverse decision.

These oral procedures may be used if, at the time of procuring the consumer report or causing the report to be procured, the only interaction between the driver applicant and the employer in connection with the employment application has been by mail, telephone, computer, or other similar means. In contrast, if the driver applies in person, these oral procedures may not be used, and the employer must use written FCRA disclosures, authorizations, and notices.

VI. THE COSTS AND PENALTIES OF NON-COMPLIANCE

The FCRA provides the following remedies and penalties:

A. Liability

For **negligent failure** to comply, the FCRA authorizes individual suits for actual damages, attorney's fees, and costs. Federal and state agencies are also authorized to sue for such relief, to seek injunctive relief, and to recover up to \$1,000 per violation in lieu of actual damages.

For a **willful failure** to comply, an individual may also recover punitive damages and may recover up to \$1,000 in lieu of proving actual damages. For a **knowing violation** involving a pattern or practice of noncompliance, the FTC may also bring an action seeking a civil penalty of up to \$2,500 per violation.

For obtaining information from a consumer reporting agency under **false pretenses**, the penalties include a fine and/or imprisonment for up to two years. For unauthorized disclosure of information by a consumer reporting agency, the penalty is also a fine and/or imprisonment for up to two years.

B. Limitation on Liability

The FCRA contains a limitation on liability for certain users of consumer reports who maintain reasonable procedures for compliance. The FCRA states that no person may be held liable for a violation of certain disclosure and certification requirements if the person shows by a preponderance of the evidence that the person maintained reasonable procedures to assure compliance with those subsections of the law.

C. Managing Potential Liability

Some employers maintain in-house access to consumer reporting databases. Because of the potential for abuse, employers should warn employees with such access about the potential liability and that they must not obtain information on an individual without the proper disclosure, authorization, and purpose. We suggest a memo as set out in Appendix 7.

APPENDIX 1

Attached: DISCLOSURE OF INTENT TO OBTAIN CONSUMER REPORTS OR INVESTIGATIVE CONSUMER REPORTS (AND AUTHORIZATION)

Two pages (Copy A and Copy B of the following document) are provided together to the applicant/employee (one copy to sign/return and one copy to keep).

Copy A - - Sign and Return this Page for Filing

**DISCLOSURE OF INTENT TO OBTAIN
CONSUMER REPORTS OR INVESTIGATIVE CONSUMER REPORTS**

For employment purposes, the Company may obtain consumer reports on you as an applicant or from time to time during employment. "Consumer reports" are reports from consumer reporting agencies and may include driving records, criminal records, etc.

For such employment purposes, the Company may also obtain investigative consumer reports. Some reference checks by a consumer reporting agency fall into this category. An "investigative consumer report" is a consumer report in which information as to character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, associates, acquaintances, or others. You have a right to request disclosure of the nature and scope of an investigation and to request a written summary of consumer rights.

AUTHORIZATION

I authorize the Company to obtain consumer reports and/or investigative consumer reports regarding me from time to time for employment purposes.

Signature: _____ Date: _____

Print Name: _____ SSN: _____

Driver's License Number: _____ State: _____

Other Driver's Licenses Held in Past 5 Years: _____

Print Maiden or Other Names Under Which Records May be Listed: _____

Date of Birth (to be used only for proper identification): _____

If the Company requests an investigative consumer report and you would like to receive a disclosure of the nature and scope of the investigation and a written summary of consumer rights, check here:

Copy B - - Applicant/Employee Keeps this Page

**DISCLOSURE OF INTENT TO OBTAIN
CONSUMER REPORTS OR INVESTIGATIVE CONSUMER REPORTS**

For employment purposes, the Company may obtain consumer reports on you as an applicant or from time to time during employment. "Consumer reports" are reports from consumer reporting agencies and may include driving records, criminal records, etc.

For such employment purposes, the Company may also obtain investigative consumer reports. Some reference checks by a consumer reporting agency fall into this category. An "investigative consumer report" is a consumer report in which information as to character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, associates, acquaintances, or others. You have a right to request disclosure of the nature and scope of an investigation and to request a written summary of consumer rights.

AUTHORIZATION

I authorize the Company to obtain consumer reports and/or investigative consumer reports regarding me from time to time for employment purposes.

Signature: _____ Date: _____

Print Name: _____ SSN: _____

Driver's License Number: _____ State: _____

Other Driver's Licenses Held in Past 5 Years: _____

Print Maiden or Other Names Under Which Records May be Listed: _____

Date of Birth (to be used only for proper identification): _____

If the Company requests an investigative consumer report and you would like to receive a disclosure of the nature and scope of the investigation and a written summary of consumer rights, check here:

APPENDIX 2

[COMPANY LETTERHEAD]

[CONSUMER REPORTING AGENCY]
[STREET ADDRESS]
[CITY, STATE, ZIP]

Date

RE: CERTIFICATION TO CONSUMER REPORTING AGENCY

To Whom It May Concern:

For employment purposes, our Company seeks to obtain consumer reports and/or investigative consumer reports on applicants and/or employees. In accordance with the Fair Credit Reporting Act (FCRA), our Company certifies to you as follows:

1. Our Company has complied with FCRA Section 604(b)(2) by providing the consumer an appropriate disclosure of intent to obtain consumer reports. We have also complied with FCRA Section 606(a)(1) by disclosing the definition of investigative consumer reports and informing the consumer of the right to request additional disclosures regarding an investigation and to request a written summary of consumer rights. The Company will provide those additional disclosures as required.
2. The consumer has authorized us in writing to obtain consumer reports, including investigative consumer reports.
3. The Company will comply with FCRA Section 604(b)(3) by providing the consumer a copy of the consumer report and the FTC's written description of consumer rights before taking any adverse action based in whole or in part on the report.
4. Information from the consumer report will not be used in violation of any applicable federal or state equal employment opportunity law or regulation.
5. Our Company will use the consumer report for employment-related purposes and for no other purpose.

Sincerely,

For the Company

APPENDIX 3

Attached: “A Summary of Your Rights Under the Fair Credit Reporting Act”

A copy of the following document, along with a copy of the individual’s consumer report, must be provided to the individual before taking adverse action based in whole or in part on information contained in the individual’s consumer report.

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 for 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.

- **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 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.

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

FOR QUESTIONS OR CONCERNS REGARDING:	PLEASE CONTACT:
CRAs, creditors and others not listed below	Federal Trade Commission Consumer Response Center FCRA Washington, DC 20580 202-326-3761
National banks, federal branches/agencies of foreign banks (the word "National" or initials "N.A." appear in or after bank's name)	Office of the Comptroller of the Currency Compliance Management, Mail Stop 6-6 Washington, DC 20219 800-613-6743
Federal Reserve System member banks (except national banks, and federal branches/agencies of foreign banks)	Federal Reserve Board Division of Consumer & Community Affairs Washington, DC 20551 202-452-3693
Savings associations and federally chartered savings banks (the words "Federal" or initials "F.S.B." appear in federal institution's name)	Office of Thrift Supervision Consumer Programs Washington, DC 20552 800-842-6929
Federal Credit Unions (the words "Federal Credit Union" appear in institution's name)	National Credit Union Administration 1775 Duke Street Alexandria, VA 22314 703-518-6360
State-chartered banks that are not members of the Federal Reserve System	Federal Deposit Insurance Corporation Division of Compliance & Consumer Affairs Washington, DC 20429 800-934-FDIC
Air, surface, or rail common carriers regulated by former Civil Aeronautics Board or Interstate Commerce Commission	Department of Transportation Office of Financial Management Washington, DC 20590 202-366-1306
Activities subject to the Packers and Stockyards Act, 1921	Department of Agriculture Office of Deputy Administrator - GIPSA Washington, DC 20250 202-720-7051

APPENDIX 4
PRE-ADVERSE ACTION NOTICE

[COMPANY LETTERHEAD]

Date

[APPLICANT/EMPLOYEE]
[STREET ADDRESS]
[CITY, STATE, ZIP]

Re: Consumer Report

Dear _____:

You authorized us to obtain a consumer report on you in connection with your application for employment or current employment with us.

This letter is to inform you that [COMPANY NAME] is considering making an employment decision about you based in whole or in part on information contained in this consumer report. We provide you with the attached information:

- (a) a copy of the consumer report; and
- (b) a description in writing of your rights under the Fair Credit Reporting Act, as prescribed by the Federal Trade Commission.

If you believe the information in the report is incorrect, please provide written documentation IMMEDIATELY.

If an adverse decision affecting your employment occurs based in whole or in part on the report, you will receive additional information.

Sincerely,

For [COMPANY NAME]

APPENDIX 5
ADVERSE ACTION NOTICE

[COMPANY LETTERHEAD]

Date

[APPLICANT/EMPLOYEE]
[STREET ADDRESS]
[CITY, STATE, ZIP]

Dear: _____:

1. Your recent application for employment has been denied, or your current employment has been terminated, based in whole or in part on information contained in a consumer report.
2. The consumer reporting agency providing this report was:
Name: _____
Address: _____
Phone: _____
Toll-free phone [if applicable]: _____
3. The above-named consumer reporting agency did not make the decision to take the adverse employment action and is unable to provide you the specific reasons why the action was taken.
4. You have the right under law to obtain an additional free copy of your consumer report from the above-named consumer reporting agency. **You have sixty (60) days from the date you receive this notice to request this free copy of your consumer report.**
5. You also have the right under law to dispute with the above-named consumer reporting agency the accuracy or completeness of any information contained in your consumer report.

Sincerely,

For [Company Name]

APPENDIX 6
RESPONSE TO REQUEST FOR INFORMATION REGARDING
INVESTIGATIVE CONSUMER REPORT

[COMPANY LETTERHEAD]

DATE

NAME

ADDRESS

CITY, STATE, ZIP CODE

Re: Your Request For Information Regarding Investigative Consumer Report

Dear _____:

This letter responds to your written request for information concerning the nature and scope of investigation requested to prepare an investigative consumer report in connection with your employment or application for employment.

1. A report has been requested from _____, whose street address is _____. A copy of a blank report form used in the investigation may be attached for your reference if it is available. The investigation will seek interviews with neighbors, friends, associates, acquaintances, or others who may be able to provide information concerning your character, general reputation, personal characteristics, mode of living, prior employment, or occupation. More specifically, the investigation will seek information regarding _____.
2. As you requested, we enclose a summary of consumer rights prepared by the Federal Trade Commission.

Sincerely,

For [Company Name]

APPENDIX 7
WARNING MEMO TO EMPLOYEES HANDLING INFORMATION

[COMPANY LETTERHEAD]

MEMORANDUM

Date:

To:

From:

Subject: FAIR CREDIT REPORTING ACT

The Fair Credit Reporting Act, a federal law, regulates the use of credit information and other personal information from consumer reporting agencies. The law now provides **LIABILITY** for any person who misuses such credit information or personal information. Any person who obtains such information under false pretenses can also be fined and sentenced to prison for up to two years.

In addition to potential civil or criminal liability, employees who handle this kind of information also are subject to **IMMEDIATE TERMINATION** if they violate the Fair Credit Reporting Act by obtaining or using such information without proper disclosure, authorization, and purpose. If you have any questions about these matters, please discuss them with your supervisor.