

# **Introduction to Pre-Employment Background Screening: The Fair Credit Reporting Act (FCRA), the Legal Use of Criminal Records and Other Background Information and Potential Sources of Legal Liability**

*Presentation for the National Credit Reporting Association (NCRA)*

**November 2003  
New Orleans, LA**

**PART ONE:           Brief Guide to the federal Fair Credit Reporting Act (FCRA), the  
Legal Use of Criminal Records and Other Information**

**PART TWO:           Ten Hidden Traps and Liabilities—the Tip of the Iceberg**

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<sup>1</sup> For additional information on this topic, please visit the **Employment Screening Resources** web site at [www.ESRcheck.com](http://www.ESRcheck.com).

**PART ONE:                    Brief Guide to the federal Fair Credit Reporting Act (FCRA) and the  
Legal Use of Criminal Records and Other Information**

**1. Background screening done by third parties are regulated by the Fair Credit Report Act (FCRA) amended September 30, 1997 (and amended November 1998)**

- A. Purpose and changes:
1. Promote accuracy, fairness and privacy;
  2. Require consumer's written consent and authorization for a report;
  3. Inform consumers of their rights at every step along the way;
  4. Allow consumers to know if information has been used against them;
  5. Give consumer opportunity to correct or object to information that is **inaccurate or incomplete**;
  6. Insure that errors are corrected promptly (usually 30 days instead of a "reasonable time period").
- B. **Sources of Information about the FCRA** (See, [www.FTC.gov](http://www.FTC.gov), or [www.ESRcheck.com](http://www.ESRcheck.com) and go to Research link)
1. The actual text is available on line
  2. Can view the staff letters on line. These letters do not carry the force of law, but they are persuasive. They may eventually form the basis of any commentary published by the FTC (See Cast letter-October 27, 1997)
  3. Commentary for FCRA prior to amendments effective 1997 can be found in 16 CFR Ch. 1(1-1-97 edition)
  4. FTC required documents are also found on the FTC web site. These are:
    - a. Notice to Users of Consumer Reports;
    - b. A Summary of Your rights
    - c. Notice to Furnishers of Information
- C. Important terms--See definitions below
1. **Consumer Report**--Not limited to a traditional credit report. Can include criminal records, DMV, and educational and employment verifications.
  2. **Consumer Reporting Agency (CRA)**--Any third party that for a fee prepares consumer reports.
  3. **Investigative Consumer Report**--Special type of report where information about a person's character is obtained through interviews, such as employment reference checks that asks about job performance. Become an Investigative Consumer report if the report goes beyond factual verification.
  4. **Employment**-- A report is prepared for employment purposes when it is to be used for the purpose of evaluating an applicant or employee for employment, reassignment or retention as an employee.
  5. **Adverse Action**--Denying employment opportunity.

**2. Definition of a Consumer Reporting Agency (CRA)**

- A. Section 603(f) defines a CRA:

(f) 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.

- B. The key concepts are a third-party that "assembles or evaluates."  
C. Per FTC staff letter LeBlanc (June 9, 1998), the terms are not defined in FCRA and are subject to ordinary meaning. FTC indicated that Congress intended for the FCRA to cover a very broad range of activities.

### 3. Who is Covered:

#### A. Licensed Private Investigator:

1. Per Code of Federal Regulations (16 CFR Ch. 191-1997 edition),  
"Private investigators and detective agencies that regularly obtain consumer reports and furnish them to clients may thereby become consumer reporting agencies."
2. The test is whether it is an isolated incident or something regularly done.
3. Per Code of Federal Regulations:  
"Parties that do not "regularly" engage in assembling or evaluating information for the purposes of furnishing consumer reports to third parties are not consumer reporting agencies. For example, a creditor that furnished information on a consumer to a government agency in connection with one of its investigations would not "regularly" be making such disclosures or a fee for on a cooperative basis, and therefore would not become a consumer reporting agency..."

**B. Consumer Reporting Agencies:** Includes national agencies such as Trans Union, Experian or Equifax, as well as regional agencies, screening firms and private investigators who perform pre-employment screening. Issue: Does a Consumer Reporting Agency need to be a licensed investigator?

#### C. Court Record Research firms:

1. In LaBlanc letter (June 9, 1998), FTC indicates that court record research firm that regularly assemble for a fee information for third parties used for consumer reports are CRA's.
2. However, their networks of individual court researchers who have a type of employment relationship are not CRA's. The actual court researcher is not providing information to a third party, but to a research firm that assembles such information.
3. The difference is critical because a court record retrieval firm does not want to become "reseller" under section 607(e), which requires it to act under the same rules that a national credit bureau operates under.
4. If a record research firm has its own employees or a person with an employee type relationships go to a courthouse, then the employee is not a CRA. However, the research firm acts as a CRA when it provides a report to an employer because it is engaging in the "assembling or evaluating" of information.
5. In another letter, Sylter (June 12, 1998) FTC staff further confirms that an employer using "private investigators and record search firm" to retrieve court records triggers the FCRA. However, an individual court researcher is not a CRA
6. Rule revolves around nature of retriever's business. If court retriever is an individual researcher that goes to a courthouse directly in an "employment" type relationship acting on behalf of a record research firm, then they are an agent and not a CRA themselves. If a court retriever in turn has agents or employees, then the business may be a CRA if they are "assembling or evaluating" information.
7. Research firm, even if not operating under 607(e), still has other FCRA obligations. See 607(a), 607(b) and 607(d) below.

#### D. Private Employers doing pre-employment screening:

1. Private employers not considered covered generally when they perform investigations in-house. (See discussing below on various different situations however, where the FCRA could well come into play when investigating current employees.)
2. For employers with entirely separate security departments, argument can be made that the **FCRA** applies. Even though a security department is not technically a third party since it falls under a corporate umbrella, an employee could argue that in a large organization, security is in effect a separate entity and that the protections of the FCRA was intended to apply. (Equal Protection argument')
3. In-house security departments must be aware of three part analysis e.g. Hill vs. NCAA, 7 Cal. 4<sup>th</sup> 1 (1994). (1)Where employer invades an employee's or applicant's protected privacy rights, and there is a reasonable expectation of privacy, then (2) employer must show that

employer has a legitimate reason that is legally authorized or socially beneficial, and that the particular conduct is reasonably calculated to further that aim. (3) Employee or applicant can then show there is a less intrusive alternative.

4. This is the same framework that applies to other workplace privacy issue, such as viewing e-mails, or searching lockers.
5. While it is not unlawful for an employer to conduct its own background checks, with the promulgation of more laws intended to preserve individual rights to privacy, employers are at risk with in-house screening. Many attorneys advise employers to consider the services of a Consumer Reporting Agency (CRA) for reports. By complying with the FCRA, an employer is ensuring privacy rights are protected.
6. Additional problem: What if internal security obtains information that an employer cannot use or possess. A CRA would not forward that. But if internal security possesses, that could be a problem. However, destroying it could also be a problem. All these problems are resolved by outsourcing.
7. Additional problem: What if internal security or employer uses a CRA to obtain information? Then the FCRA rules apply and a consent/disclosure is required. Trap for the unwary: If employer or internal security hires a court researcher that is in fact a CRA, then the FCRA is invoked. The internal investigation is suddenly transformed into a FCRA covered report.
8. Advantage to in-house investigation-employer not restricted to a seven-year search limit still imposed by some states.

4. **Duties and Obligations under the FCRA concerning consumer reports for EMPLOYMENT PURPOSES-Complying with the FCRA in Fifteen (15) basic steps:** (See excerpts from the attached document prepared by the Federal Trade Commission-"Notice to Users of Consumer Reports: Obligations of Users Under the FCRA." This is intended as an introduction only. Each step has its own sub-steps and complexities. Even though many of the FCRA steps fall under the Employers responsibility, many employers are looking to CRA's to help them stay in compliance.

A. **CRA** (Consumer Reporting Agency) must first obtain a certification from the Employer setting out the duty of a user of a Consumer Report for employment purposes. Per (**FCRA 604b**), a user of a consumer report must certify that:

1. User will obtain the required disclosures and written release;
2. User will give the appropriate documents to the consumer if adverse action is intended;
3. User will not use the information in violation of any state or federal equal opportunity law.

B. **Employer** must obtain a clear and conspicuous written disclosure in writing to the consumer before the report is obtained in a document that consists solely of the disclosure (**FCRA 604b**)

C. **Employer** must obtain a written authorization (release) before obtaining a consumer report (**FCRA 604b**)(Disclosure and Release can be combined as long as unnecessary verbiage not included which dilutes consumer's understanding) (New 1998 amendments has special procedures for transportation industry)

Note: **Date of birth** issue on forms creates substantial issues. No nationally accepted forms for pre-employment screening.

D. **Employer** needs additional disclosures for an Investigative Consumer Report (i.e. references interviews) (**FCRA 606**)

(Within 3 days, must notify consumer that an Investigative Consumer Report is being obtained, right to obtain additional information as to the nature and scope of the report, and a copy of the "Summary of Your Rights." Can place on initial consent form. Applicant has right to request from employer further detail on nature and scope of the investigation).

E. **CRA** must follow reasonable procedures concerning identity and proper use (**FCRA 607(a)**): Every consumer reporting agency shall maintain reasonable procedures designed to avoid violations of section

605 (relating to what may be reported) and to limit the furnishing of consumer reports to the purposes listed under section 604. These procedures shall require that prospective users of the information identify themselves, certify the purposes for which the information is sought, and certify that the information will be used for no other purpose. Every consumer-reporting agency shall make a reasonable effort to verify the identity of a new prospective user and the uses certified by such prospective user prior to furnishing such user a consumer report. No consumer-reporting agency may furnish a consumer report to any person if it has reasonable grounds for believing that the consumer report will not be used for a purpose listed in section 604.

- F. **CRA** must take measure to ensure accuracy of report rule (**FCRA 607(b)**). Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates. (Recent cases seem to indicate the "no harm, no foul rule may not apply to mistakes by a CRA. Commonly believed that because of the adverse action procedures under the FCRA, any mistake can be corrected before harm is done. However, in a 2001 case where CRA corrected mistake in 24 hours, court still held CRA could be sued for emotional distress and defamation. Lesson--must have written procedures that are followed and enforced.)
- G. **CRA** must provide the Employer with the FTC prepared summary, "Notice to Users of Consumer reports: Obligations of Users under the FCRA," to an employer (**FCRA Sec. 607(d)**)(See Attached)
- H. **CRA** must provide Employer with FTC summary, "Summary of Your Rights," with every report (FCRA 604(b)(1)(B))(See Attached)
- I. A **CRA** may only include certain items of information in a consumer report (See discussion of **Section 605** below)
- J. If a **CRA** reports items of information on consumers which are matters of public record and are likely to have an adverse effect upon a consumer's ability to obtain employment, the CRA must maintain strict procedures designed to insure that whenever public record information which is likely to have an adverse effect on a consumer's ability to obtain employment is reported it is complete and up to date. For purposes of this paragraph, items of public record relating to arrests, indictments, convictions, suits, tax liens, and outstanding judgments shall be considered up to date if the current public record status of the item at the time of the report is reported. (**Section 613(a)(2)**) (Alternative is to report adverse matter to consumer **under 613(a)(1)**)
- K. When a **CRA** prepares an investigative consumer report, no adverse information in the consumer report (other than information which is a matter of public record) may be included in a subsequent consumer report unless such adverse information has been verified in the process of making such subsequent consumer report, or the adverse information was received within the three-month period preceding the date the subsequent report is furnished. (**Section 614**)
- L. If adverse action is intended, an **Employer MUST** provide the applicant with a copy of the report and the FTC document, "Summary of Your Rights." (**FCRA 604b**)(Purpose is to allow consumer the opportunity to correct any inaccurate or incomplete information. FCRA does not indicate how long consumer must be given to object before the adverse action is actually taken--general advice is that applicant must have a meaningful opportunity to review the materials and to respond. Per FTC stall letters, this is a duty that **can** be delegated to a CRA.)
- M. After adverse action has actually been taken, **Employer** must give notice to applicant, as set forth on page two (2) of the, "Notice to Users of Consumer Reports" (**FCRA 615**) (YES, the law requires TWO notices!! (Per FTC staff, this is a duty that can be delegated to a CRA.)
- N. **CRA** must disclose to a consumer what is in the consumer's file upon request, identify sources and identity everyone who procured a report for employment for the past **two years**, and comply with various rules (e.g.

provide trained personnel who can explain to a consumer any information in the report.) (FCRA 609 and 610)

- O. If applicant contests what is in the report, **CRA** has obligation to investigate and determine if accurate within **30 days**, and to take appropriate actions. Must give notice to furnisher within 5 days. Various other duties depending upon results of re-investigation. (See **FCRA** sections 611 and 612) Must carefully follow a series of rules in terms of various notices and responses. (**CRA** should have an FCRA Compliance procedures in place)

## 5. State Rules

- a. At least 21 states have their own "mini" FCRA. The differences primarily deal with disclosures and procedures in the event of disputed accuracy. Eleven states maintain a stricter limitation on reporting of criminal convictions.
- b. California recently passed legislation that significantly changed the rules in California, called AB 655 and amended by AB 1069 and AB 2868. (See attached article)

## 6. What can you find-What information is covered?

- A. **Is it legal to Ask?** General Rule: if an employer cannot ask about it at a job interview, **CRA** cannot look into it.
- B. See for example the Pre-Employment Guidelines by the California Department of Fair Employment and Housing that lists improper questions. See attached
- C. General Guidelines:
  - 1. Is it job related? (i.e. does it predict job performance)
  - 2. Does it discriminate against a protected class or violate a law on its face? (e.g. Sex, age, marital status, health and physical condition, Americans with Disabilities Act, national origin, religion)
  - 3. Does it have the affect of discrimination, even if neutral on its face
  - 4. Does it violate any privacy laws
  - 5. Does it violate any statutory right (e.g. in Californian, cannot report arrests not resulting in convictions per California Labor Code section 432.7 )

D. The **FCRA** also specifically regulates what can and cannot go into a consumer report. See **FCRA** Section 605. The following are some points concerning specific items based upon both the FCRA and other applicable laws:

### 1. Credit Reports:

- a. Credit reports can tend to exclude certain groups
- b. Should only use if sound business reason
- c. Seven-year rule for collections, suits and judgments, paid tax liens
- d. There are other considerations when using a credit report for employment purposes. **See:**  
<http://www.esrcheck.com/web/articles/article7.html>

### 2. Criminal records:

- a. OLD RULE: Seven year rule from date of disposition, release or parole unless applicant will make over \$75,000 per year
- b. NEW RULE: Amendment signed into law on Nov. 2, 1998 did away with seven year rule-can go back indefinitely
- c. BUT, Congress failed to amend sec. 624, which allows for more restrictive state laws.
- d. In California, Civil Code section 1786.18 (Part of the California Investigative Consumer Reporting Act), provides a seven year rule. (But see new section effective January 2002--may have impact of doing away with seven-year rule?). Other states, such as New York, also have a more restrictive rule

- e. **BOTTOM LINE:** There is no workable national rule. Need a state by state analysis. Furthermore, as a practical matter, it is difficult to go back more than seven years in some jurisdictions
  - f. **Cannot use arrests without research into underlying** facts, etc--well settled rule under Title VII, since it tends to discriminate and can be irrelevant as a predictor of job performance (Cannot use at all in California and a number of other states have significant prohibitions)
  - g. In many states, may consider convictions and pending cases only
  - h. Cannot automatically deny employment due to criminal record--must consider nature and gravity of offense, nature of job, when it occurred, and whether there is a sound business reason to deny employment on the basis of the criminal matter
  - i. Be aware of specific state rules. For example, in California, Labor Code Section 432.7 prohibits employers from asking an applicant about or obtaining information about any arrest or detention not resulting in a conviction or any diversion, and certain marijuana crimes. Also, Labor Commission rules prohibits the consideration of a misdemeanor where a Penal Code section 1203.4 motion was granted
  - j. Problems with private database--although a database is a valuable secondary tool, there are a number of reasons to be cautious in their use.
  - k. Criminal records caution--criminal records are inherently problematic because there is a margin for error. Records are obtained at each relevant courthouse by researchers, and as in any process that depends upon human beings, there is a margin for error. That is why background screening should rely upon a number of overlapping tools.
  - l. Contrary to popular belief, there is no national criminal database available to private employers. Even NCIC (which is restricted) is not perfect.
3. **Bankruptcy records**
- a. Ten year limit
  - b. Fresh Start rule--cannot discriminate on the basis of a bankruptcy
4. **DMV**--constitutes a consumer report (other privacy and legal considerations as well)
5. **Civil records**--seven year rule
6. **Employment references**--if asking anything other than factual verification, this is an **Investigative Consumer Report**. See separate rules for disclosure and sending out notice of consumer rights within three days.
- 6 **Civil and Criminal Penalties for non-compliance. FCRA 616, 617, 619, 621.**

<b>FCRA Section</b>	<b>Type of Non-compliance</b>	<b>Penalties</b>
616	Willful failure to comply with <b>FCRA</b>	Attorney's fees/Punitive damages/\$1,000 nominal damages even if no actual damages
617	Negligent non-compliance	Actual damages/attorney's fees (no punitive damages or nominal damages)
619	Obtaining a report under false pretense	Fine and two years prison
620	Unauthorized disclosure by officer or employee of <b>CRA</b> of consumer information	Fine and two years prison
621	Administrative enforcement against <b>CRA's</b> engaged in a pattern of violations	Civil penalties

## **Definitions:**

The Fair Credit Reporting Act (**FCRA**) is NOT restricted to just traditional credit reports. As of September 30, 1997, it was expanded to significantly increase the obligations of employers who use any "consumer report" provided by a "consumer reporting agency."

Any report prepared by a consumer reporting agency containing criminal, educational, employment history and other types of common reports are covered by the **FCRA**.

### **What is a Consumer Report?**

A consumer report is a report prepared by a consumer reporting agency that consists of any written or oral or other communication of any information by a consumer reporting agency bearing on the applicant's or employee'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 for employment purposes.

### **What is an Investigative Consumer report?**

An Investigate Consumer Report is a special type of consumer report for which the information was gathered through personal interviews of neighbors, friends, or associates of the employee or applicant reported on, or from other personal acquaintances or persons who may have knowledge about information bearing on the applicant's or employee'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 for employment purposes. It includes reference checks with former employers about job performance. However, it would NOT include a verification of former employment limited to factual matters only, such as the date started, date ended, salary or job title. But if asked about eligibility for rehire, then it becomes an investigative consumer report.

### **What is a Consumer Reporting Agency (CRA)?**

A Consumer Reporting Agency, or **CRA**, is any person or entity 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 purposes of furnishing reports to third parties. Includes Private Investigators that "regularly" engage in pre-employment inquiries.

### **What is meant by Employment Purposes?**

A report is prepared for employment purposes when it is to be used for the purpose of evaluating an applicant or employee for employment, reassignment or retention as an employee.

### **What is Meant by Adverse Action?**

Adverse action in relationship to employment means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.

(Excerpt taken from)

## **NOTICE TO USERS OF CONSUMER REPORTS: OBLIGATIONS OF USERS UNDER THE FCRA**

### **I. Adverse Actions Based on Information Obtained From a CRA**

If a user takes any type of adverse action that is based at least in part on information contained in a consumer report, the user is required by Section 615(a) of the FCRA to notify the consumer. The notification may be done in writing, orally, or by electronic means. It must include the following:

The name, address, and telephone number of the CRA (including a toll-free telephone number, if it is a nationwide CRA) that provided the report.

A statement that the CRA did not make the adverse decision and is not able to explain why the decision was made.

A statement setting forth the consumer's right to obtain a free disclosure of the consumer's file from the CRA if the consumer requests the report within 60 days.

A statement setting forth the consumer's right to dispute directly with the CRA the accuracy or completeness of any information provided by the CRA.

### **II. OBLIGATIONS OF USERS WHEN CONSUMER REPORTS ARE OBTAINED FOR EMPLOYMENT PURPOSES**

If information from a CRA is used for employment purposes, the user has specific duties, which are set forth in Section 604(b) of the FCRA. The user must:

Make a clear and conspicuous written disclosure to the consumer before the report is obtained, in a document that consists solely of the disclosure, that a consumer report may be obtained.

Obtain prior written authorization from the consumer.

Certify to the CRA that the above steps have been followed, that the information being obtained will not be used in violation of any federal or state equal opportunity law or regulation, and that, if any adverse action is to be taken based on the consumer report, a copy of the report and a summary of the consumer's rights will be provided to the consumer.

Before taking an adverse action, provide a copy of the report to the consumer as well as the summary of the consumer's rights. (The user should receive this summary from the CRA, because Section 604(b)(1)(B) of the FCRA requires CRAs to provide a copy of the summary with each consumer report obtained for employment purposes.)

### **III. OBLIGATIONS OF USERS OF INVESTIGATIVE CONSUMER REPORTS**

Investigative consumer reports are a special type of consumer report in which information about a consumer's character, general reputation, personal characteristics, and mode of living is obtained through personal interviews. Consumers who are the subjects of such reports are given special rights under the FCRA. If a user intends to obtain an investigative consumer report, Section 606 of the FCRA requires the following:

The user must disclose to the consumer that an investigative consumer report may be obtained. This must be done in a written disclosure that is mailed, or otherwise delivered, to the consumer not later than three days after the date on which the report was first requested. The disclosure must include a statement informing the consumer of his or her right to request additional disclosures of the nature and scope of the investigation as described below, and must include the summary of consumer rights required by Section 609 of the FCRA. (The user should be able to obtain a copy of the notice of consumer rights from the CRA that provided the consumer report.)

The user must certify to the CRA that the disclosures set forth above have been made and that the user will make the disclosure described below.

Upon the written request of a consumer made within a reasonable period of time after the disclosures required above, the user must make a complete disclosure of the nature and scope of the investigation that was requested. This must be made in a written statement that is mailed, or otherwise delivered, to the consumer no later than five days after the date on which the request was received from the consumer or the report was first requested, whichever is later in time.

## **PART TWO: Ten Hidden Traps and Liabilities—the Tip of the Iceberg**

1. FCRA—meeting the requirements
  - a. CRA Requirements
  - b. Employer requirements
  
2. CRA liability for the acts of court researchers—even a mistaken criminal record fixed in 24 hours can be used to sue a CRA:
  - a. What is your due diligence in selecting court researchers (i.e. if a researcher misses a “hit,” can the CRA show due diligence in entrusting the search to that researcher)
  - b. Do you require insurance
  - c. Do you require that they know who is going to the court (how many degrees of separation)
  - d. Do you regularly send salted results
  - e. Do you know their search procedures (i.e. are they using a database?)
  - f. Do you check their references
  - g. Do you give guidelines (“e.g. onsite, don’t ask a clerk for legal advice, etc)
  - h. Do your researchers need to certify certain things (i.e. they are licensed, independent contractors, will follow all laws)
  
3. Who selects the counties to search-you or your clients? (Danger-if the CRA selects the counties, increases legal exposure)
  
4. 50 State Legal Compliance:
  - a. 21 mini State FCRA’s
  - b. Use of criminal records—all over the map (Age of offense, felony vs. Misdemeanor, first one free rules, special dispositions)
  
5. Who puts in the criminal hits and who decides what is or is not reportable?
  
6. Are your criminal searches going back far enough? The case of the crime older than 7 years but released from custody within the seven-year period.
  
7. Are you using/not using statewide databases?
  
8. What are you promising? (FCRA compliance/national criminal search/Social security verification)
  
9. Form over substance-do your forms comply?
  
10. Do you have a privacy, security and compliance rules (such as Onsite visits and verification for Credit bureaus and state MVR compliance rules)?