

HONIGMAN MILLER SCHWARTZ AND COHN LLP
SUMMARY OF COMPLIANCE REQUIREMENTS CREATED BY THE
FAIR CREDIT REPORTING ACT

Using Consumer Reports For Employment Purposes

The Fair Credit Reporting Act (FCRA), a federal law, modified by the Fair and Accurate Credit Transactions Act (FACTA), creates compliance requirements for employers using or contemplating using a “consumer report” from a “consumer reporting agency” for employment purposes. Generally, any third party organization regularly engaged (usually for a fee) in conducting background checks on an applicant’s fitness for employment, including current employees being considered for promotions, is a “consumer reporting agency” and the report is a regulated “consumer report.” The purpose of this summary is to highlight the areas of concern for employers who will use “consumer reports” in connection with employment decisions.

Disclosure to Consumer is Required

Before obtaining a consumer report the employer must first obtain written consent from the consumer (e.g., an applicant). The disclosure to the consumer that a consumer report may be obtained for employment purposes must be stated in clear terms and on a separate form. As to medical information from a consumer reporting agency, the consumer must provide specific written consent “that describes in clear and conspicuous language” how it will be used, the information must be relevant to the particular employment decision, and disclosure must be limited to those who need to know.

Employers are urged to obtain the FCRA-mandated written consent at the outset of the employment relationship when eager job applicants are most willing to sign. Otherwise, the employer will have to obtain consent from current employees, which may be more problematic, before obtaining a consumer report for reasons such as the need to investigate employee theft, fraud, or other misconduct.

Please contact us if you need a form or notice that complies with applicable law.

Use of Consumer Report as Basis for Adverse Action

If an employer uses information in a consumer report to take adverse action—which is defined as “denial of employment or any other decision for employment purposes that adversely affects a current or prospective employee”—it must first comply with the FRCA’s notice requirements.

There are two notice requirements. First, *before* taking any adverse action based, in whole or in part, on the consumer report, the employer must provide the consumer with a copy of the consumer report and with a description in writing of the rights of the consumer (the Federal Trade Commission’s (FTC’s) Summary of Rights under the FCRA). This type of notice is known as a “pre-adverse” action notice. Second, the employer must also provide a separate notice *at the time* it takes adverse action based on information in the consumer report. This notice is known as an “adverse action” notice. The notice may be oral, written, or electronic, and must include the name, address, and telephone number of the consumer reporting agency preparing the report (including a toll free number if available), tell the consumer how to obtain a free copy of the report, and explain the right to dispute the accuracy of any information in the report directly with the agency. Given the nature of the information to be disclosed, it would be prudent to put this notice in writing.¹

The FRCA does not specify how much time must elapse between the pre-adverse action notice and the adverse action notice. Under the current interpretation, the two notices cannot be in the same document and employers must allow “reasonable time” before sending the adverse action notice.

Employee Investigation Communications Exempt from FCRA Requirements

Section 611 of the FACT added a new section to the FCRA to provide that communications to an employer by an outside third party retained to investigate suspected workplace misconduct or compliance with legal requirements or with the

¹ Michigan does not impose requirements and responsibilities beyond those contained in the FRCA. However, certain other states impose additional requirements and responsibilities.

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employer's preexisting written policies do not constitute a "consumer report" for purposes of the FCRA. Under these circumstances, the employer may obtain consumer reports without first giving notice to and obtaining consent from the consumer. The revision to the FCRA was made to address the unintended consequences of deterring employers from using outside law firms to investigate alleged employee misconduct, including racial discrimination and sexual harassment claims. However, after the employer takes adverse action based in whole or in part on information obtained pursuant to the investigation, the employer must disclose to the employee a summary of the nature and substance of the report on which the action is based. The employer does not have to provide a copy of the report or a pre-adverse action notice.

Consequences of Failing to Comply with the FCRA

A consumer may bring a civil action in federal court against the employer for its failure to comply with the FCRA. The consumer may collect actual damages resulting from the employer's non-compliance, as well as the costs incurred as a result of bringing the action and reasonable attorney's fees (determined by the court). In addition, for a willful failure to comply the court may also award punitive damages. The FTC and other federal agencies also have the power to bring an action in federal court and collect civil penalties based on an employer's non-compliance with the FCRA.

CONCLUSION

The requirements of the FCRA should not prevent employers from using consumer reports to aid in their employment-related decisions. Nonetheless, care must be exercised in this area. The attorneys at Honigman are well-prepared to assist employers to ensure their compliance with the requirements of the FCRA. Please contact one of the Honigman attorneys listed below if you have questions concerning the FCRA.²

² The information contained in this Summary is not legal advice. This summary is provided by Honigman Miller Schwartz and Cohn LLP (Honigman) in order to familiarize employers with the general employment-related requirements of the FCRA and help ensure their compliance with the law. Every situation calls for unique legal analysis.

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