

SPECIAL INSTRUCTIONS FOR FAIR CREDIT REPORTING ACT

The sample Application for Employment states that the applicant authorizes the employer to conduct certain investigations.

The federal Fair Credit Reporting Act (FCRA) requires employers to follow specific procedures before they can obtain “consumer reports.” A “consumer report” is very specifically defined by FCRA, and you should consult with your company’s legal counsel to determine whether the FCRA rules apply to your company’s use of background checks.

Generally, a company can conduct its own criminal or credit background checks without being subject to the consumer reporting requirements if it does not use a paid third party service. If a third party service is used, a consent form separate from the employment application must be executed by the employee or applicant, with legal notices that comply with the FCRA’s requirements. Check with your company’s legal counsel to confirm that state(s) in which you operate in do not have additional requirements relating to background checking.

When using a third-party vendor to conduct background checks, be sure the vendor is well-versed in the FCRA and in any state laws that may apply where you are doing recruiting/hiring. Check with local HR groups, peers, or other professionals to make sure you are dealing with a reputable and knowledgeable vendor.

Ask the vendor whether it will prepare and send pre-adverse action letters and adverse action letters to applicants, or whether this is left to your company to do. A pre-adverse action letter must be sent to the applicant if the employer is inclined not to hire based on information in the background check. The employer must offer the applicant a reasonable amount of time in which to provide any clarifying information. Five business days is considered reasonable. An adverse

action letter must be sent when the decision not to hire is made based on information in the background check, and the applicant must be provided with specific information so that the applicant can redress any misstatements on his or her background check by contacting the credit reporting agencies directly. Regardless of who will send these mandated notices, be aware of what these responsibilities entail and be prepared to document that each of these steps have been taken -- by the vendor or by your company -- if you decline to hire an applicant based on information revealed by the background check. Note: If the decision not to hire is based on an individual’s lack of qualifications, not information revealed by the background check, the pre-adverse and adverse action letters need not be sent.

In addition to the FCRA requirements, be mindful of the Equal Employment Opportunity Commission’s *guidance on background checking*. While this guidance is detailed and should be carefully read, the essential aspects are to avoid blanket prohibitions of applicants with criminal convictions, and to instead engage in individualized assessments of applicants, taking into account factors such as the accuracy of the background check information, the length of time since the conviction occurred, the job-relatedness of the criminal act and the position being sought, and others. Multi-state employers should also be aware of state “ban-the-box” laws that may limit them from inquiring about applicants’ criminal history.

The Fair Accurate Credit Transaction Act (FACTA) governs how that information is disposed (the “Disposal Rule”). The Disposal Rule applies to paper records and to electronically transmitted or stored consumer information. The Disposal Rule requires entities disposing of such information to take reasonable, specific measures to protect against unauthorized access to or use of the information which is being disposed.