
KALEVA LAW OFFICES

TO: KLO CLIENTS
FROM: KALEVA LAW OFFICE
SUBJECT: FCRA AND BACKGROUND CHECKS
DATE: MARCH 10, 2013

The Fair Credit Reporting Act (FCRA) is a federal law that imposes requirements on employers that use third-party consumer reporting agencies (CRAs) to obtain consumer reports or investigative reports on job applicants or current employees. A “consumer report” is any written, oral, or other communication of any information by a CRA bearing on an individual’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 individual’s eligibility for employment. 15 U.S.C. § 1681a(d)(1). A CRA is any person or entity that regularly engages in the practice of assembling information on individuals for the purpose of furnishing consumer reports to third parties. 15 U.S.C. § 1681a(f).

Generally, criminal background checks and employment reference checks are consumer reports because they contain information about a person’s “character, general reputation, personal characteristics or mode of living” and are created by a third-party. An “investigative consumer report” in any part of a consumer report that relies on personal interviews with neighbors, friends, or associates of the individual to gather character, general reputation, personal characteristics, or mode of living information. 15 U.S.C. § 1681a(e).

Whether the FCRA is applicable to an employer depends on who conducts the investigation. Reports containing information based solely on experiences between the individual and the person making the report are excluded from the “consumer report” definition. 15 U.S.C. § 1681a(d)(2)(A)(i). The exception in 15 U.S.C. § 1681a(d)(2)(A)(i) directly applies to a “reference check” performed by school district personnel. In other words, FCRA is not applicable when school district personnel contact the applicant’s listed references to inquire, generally, about the applicant’s employment history and job performance at the reference’s work site. *Letter to Pickett*, <http://www.ftc.gov/os/statutes/fcra/pickett.shtm> (FTC 1998).

When a third-party CRA conducts the background check or the employment reference check, it falls under FCRA. 15 U.S.C. § 1681(a)(4), (b). If the CRA performs personal interviews and provides a report that includes information from that interview (more than mere fact-checking), this portion of the consumer report qualifies as an “investigative consumer report.” *Letter to Hinkle*, www.ftc.gov/os/statutes/fcra/hinkle.htm (FTC 1998). This distinction becomes important because additional guidelines apply when investigative consumer reports are used.

The FCRA explicitly allows employers to use consumer reports to help with employment decisions. 15 U.S.C. § 1681b(a)(3)(B). Under the FCRA, however, the employer is required to give disclosures to both the CRA and the applicant when it uses a CRA's consumer report to screen applicants. The employer must certify to the CRA that:

- The employer provided the proper disclosures to the applicant,¹
- The employer will follow the proper procedure if the applicant is not hired,² and
- The information from the consumer report will not be used in violation of Federal and State equal employment opportunity laws.³

In addition to the CRA disclosures, the employer is required to give the applicant separate disclosures prior to requesting a consumer report. The applicant must receive a clear and conspicuous written disclosure that informs her that a consumer report may be obtained and that the report may be used in the employment decision. This written document must be separate from the application packet. The employer must also get written authorization from the applicant before obtaining the consumer report. This authorization can be a signed version of the previously described disclosure. 15 U.S.C. § 1681b(b)(2)(A).

Additional disclosures apply if the employer decides, based in part on the report, not to hire the applicant. In such a case, the employer must provide:

- Notice of the adverse action,⁴
- A written or electronic copy of their credit score, if the score is obtained,⁵
- Notice of the name, address, and telephone number of the CRA that furnished the report,⁶
 - Notice that the applicant can obtain a free copy of the consumer report from the CRA within 60 days,⁷
 - Notice that the applicant can dispute the accuracy or completeness of any information in the consumer report with the CRA,⁸

¹ 15 U.S.C. § 1681b(b)(1)(A)(i).

² *Id.*

³ 15 U.S.C. § 1681b(b)(1)(A)(ii).

⁴ 15 U.S.C. § 1681m(a)(1).

⁵ 15 U.S.C. § 1681m(a)(2)(A).

⁶ 15 U.S.C. § 1681m(a)(3)(A).

⁷ 15 U.S.C. § 1681m(a)(4)(A).

⁸ 15 U.S.C. § 1681m(a)(4)(B).

- A statement that the CRA did not make the adverse decision and the CRA will be unable to provide the applicant any specific reasons for the adverse decision,⁹
- A copy of the report,¹⁰ and
- A copy of *A Summary of Your Rights Under the Fair Credit Reporting Act*.¹¹

If part of the consumer report requested qualifies as an investigative consumer report, more disclosures are necessary. The employer must notify the applicant in writing within three days after the report is requested that an investigative consumer report may be requested. 15 U.S.C. § 1681d(a)(1)(A). This notification must clearly and accurately describe that personal interviews may be conducted to obtain information as to character, general reputation, personal characteristics, or mode of living. In addition, the written notice should disclose that the applicant has the right to request a written summary, from the employer, concerning the nature and scope of the investigation. 15 U.S.C. § 1681d(a)(1). The employer must also disclose to the CRA that it made the proper disclosures to the applicant and it will complete a nature and scope written summary if the applicant requests it. 15 U.S.C. § 1681d(a)(2).

If the applicant makes a written request for the nature and scope of the investigative consumer report, the employer must make a complete and accurate written summary of the nature and scope of the investigation within five days. This report must be delivered in writing to the applicant. 15 U.S.C. § 1681d(b).

In conclusion, if a school district requests background information such as a criminal background check from a third-party, it must abide by the requirements of the FCRA. In agreeing to the terms and conditions with a third-party in order to obtain a background check, the district most likely satisfies its disclosures to the CRA. The district needs to be sure it is making the correct disclosures to the applicant if it is using a third-party CRA. If the district does not adhere to the FCRA requirements, it opens itself up to potential fines and civil liability including punitive damages and attorney's fees.

⁹ 15 U.S.C. § 1681m(a)(3)(B).

¹⁰ 15 U.S.C. § 1681b(b)(3)(A)(i).

¹¹ This document is maintained by the Consumer Financial Protection Bureau and available at: <http://www.ftc.gov/bcp/edu/pubs/consumer/credit/cre35.pdf>.