

Revisiting The Law On Background Screening With A Twist

by
Barry J. Nadell

The federal Fair Credit Reporting Act 15 U.S.C. § 1681 et seq. (FCRA) is the law of the land regarding background screening although §624 provides for any state laws which may be more restrictive. For example, the FCRA allows consumer reporting agencies to report criminal convictions as far back as the conviction occurred; however twelve states limit such reporting to seven years from the date of the conviction, parole, or release from prison. Of the twelve states, four allow reporting beyond seven years if the subject earns or is expected to earn a particular threshold amount. See chart below:

California	§1785.13.6 & §1786.18.7	7 years
Colorado	CRS §12-14.3-105.3	7 years \$75K Income Exception
Kansas	§50-704	7 years
Maryland	§14-1203	7 years
Massachusetts	MGL § 93-52	7 years
Montana	MCA § 31-3-112	7 years
Nevada	NRS § 598C.150	7 years
New Hampshire	HRS §359-B:5	7 years
New Mexico	§56-3-6	7 years
New York	ART 25- §380-j	7 years \$25K Income Exception
Texas	CH 20 §20.05	7 years \$75K Income Exception
Washington	RWC 19.182.040	7 years \$20K Income Exception

Two of the main provisions of the FCRA; however, are not altered by any state law. These are the rules employers must follow regarding DISCLOSURE and ADVERSE ACTION. Notwithstanding, the recently passed Fair and Accurate Credit Transactions Act of 2004 (the FACTAct) offers employers a “twist”.

Section 604(b)(2) of the FCRA, in general states that a person may not procure a consumer report, or cause a consumer report to be procured, for employment purposes with respect to any consumer, unless a clear and conspicuous disclosure has been made in writing to the consumer at any time before the report is procured or caused to be procured, in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; and the consumer has authorized in writing. Such authorization may be made on the same disclosure document. Therefore, when outsourcing background screening, the employer must use a separate document from the employment application as disclosure. (See FTC Staff Opinion Letter December 18, 1997 to Harold R. Hawkey)

Further in general, in using a consumer report for employment purposes, before taking any adverse action based in whole or in part on the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates a copy of the report; and a description in writing of the rights of the consumer, as prescribed by the Federal Trade Commission under section 609(c)(3). (Commonly known as the “FTC Rights Document”).

Now for the “twists”! There are two exceptions. The first is where a consumer is applying for a position over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of §31502 of title 49, or a position subject to safety regulation by a State transportation agency; and as of the time at which the person procures the report or causes the report to be

procured the only interaction between the consumer and the person in connection with that employment application has been by mail, telephone, computer, or other similar means.

Under this exception, if a consumer applies for employment by mail, telephone, computer, or other similar means, at any time before a consumer report is procured or caused to be procured in connection with that application, the person who procures the consumer report on the consumer for employment purposes shall provide to the consumer, by oral, written, or electronic means, notice that a consumer report may be obtained for employment purposes, and a summary of the consumer's rights under section 615(a)(3); and the consumer shall have consented, orally, in writing, or electronically to the procurement of the report by that person.

In addition, Adverse Action rules are amended under this exception wherein the person must provide to the consumer to whom the report relates, in lieu of normal notices required, within 3 business days of taking such action, an oral, written or electronic notification that adverse action has been taken based in whole or in part on a consumer report received from a consumer reporting agency; of the name, address and telephone number of the consumer reporting agency that furnished the consumer report (including a toll-free telephone number established by the agency if the agency compiles and maintains files on consumers on a nationwide basis); that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide to the consumer the specific reasons why the adverse action was taken; and that the consumer may, upon providing proper identification, request a free copy of a report and may dispute with the consumer reporting agency the accuracy or completeness of any information in a report. If the consumer requests a copy of a consumer report from the person who procured the report, then, within 3 business days of receiving the consumer's request, together with proper identification, the person must send or provide to the consumer a copy of a report and a copy of the consumer's rights as prescribed by the Federal Trade Commission under §609(c)(3).

The second exception can be found under Section 603(x) of the FCRA added by the FACTAct, and creates an exclusion for prior written or oral disclosure for investigative consumer reports and consumer reports when the communication is made to an employer in connection with an investigation of suspected misconduct relating to employment; or compliance with Federal, State, or local laws and regulations, the rules of a self-regulatory organization, or any preexisting written policies of the employer. Thus, no disclosure form would be required, and as such this exception would alter the original FTC Staff Opinions issued April 5, 1999 to Judi A. Vail, Esq. and August 31, 1999 to Ms. Susan R. Meisinger if the same questions were posed to the Federal Trade Commission today.

This exception is available if the communication is not made for the purpose of investigating a consumer's credit worthiness, credit standing, or credit capacity; and the communication is not provided to any person except to the employer or an agent of the employer; to any Federal or State officer, agency, or department, or any officer, agency, or department of a unit of general local government; to any self-regulatory organization with regulatory authority over the activities of the employer or employee; as otherwise required by law.

When taking Adverse Action due to such investigation based in whole or in part on the report, the employer shall disclose to the consumer a summary containing the nature and substance of the communication upon which the adverse action is based, except that the sources of information acquired solely for use in preparing an investigative consumer report need not be disclosed. In other words, the employer may remove the names of sources that relate to any interviews with persons required in the investigation but may not remove sources of items researched in a consumer report like criminal information, drivers' license information, or other such sources of factual data.

About Barry J. Nadell:

Barry Nadell is President and co-founder of InfoLink Screening Services, Inc., a national provider of employment background screening, drug testing and physicals. He is a founding member and on the board of directors of the National Association of Professional Background Screeners and the Association of Consumer Reporting Agencies. As the established industry expert on the legal issues of employment background screening, he speaks nationally on the subject and has been a featured speaker at the national conventions for the Society for Human Resources Management, National Human Resource Association, Professionals in Human Resources, American Society for Industrial Security, Association of Threat Assessment Professionals, and many other organizations. Mr. Nadell has written articles for several magazines, has been featured on television including The Bloomberg Report and ABC News with Peter Jennings, and has been interviewed on more than hundred live talk radio programs. Although not an attorney, Barry is an associate member of the American, California State and Los Angeles Bar Associations specializing in labor and employment issues, and is a member of several human resources, management and security associations. In 2002, Barry assisted the California Legislature in amending legislation and in 2004 he wrote and sponsored a bill to allow employers to provide reference information without fear of defamation lawsuits. He has testified in the California legislature on these and other bills important to human resource and security professionals. For more information call (800) 990-4473 x1324 or visit www.infolinkscreening.com.