



**KEEP
CALM
AND
DON'T
GET SUED**



Don't Get Sued For Background Check Compliance Errors

Simple Steps To Help Minimize Legal Exposure

Forward

Employment background checks are now being used by most organizations. In recent surveys, approximately 73% of employers have reported requiring some form of background check as part of their hiring process. As more companies and human resources departments determine that background checks can protect company assets, keep workers and stakeholders safe, and prevent negligent hiring claims, this number will likely increase.

As background checks become more prolific, more employers are likely to make mistakes implementing these programs and these mistakes can be costly. Since 2014, there has been a 265% increase in employer lawsuits for technical violations of the FCRA alone.

Many lawyers that specialize in employment background checks believe a cottage industry is emerging across America, where serial plaintiffs are applying for numerous jobs just so they can discover if companies are violating employment background check laws.

If any violations are discovered, the plaintiff will threaten the company with a costly class-action lawsuit and then leverage the company into a hefty settlement. The plaintiffs are backed by unethical lawyers who take these cases on contingency and get paid when the cases settle.

Don't Get Sued Summarized

- > Why FCRA Lawsuits Are So Prevalent
- > Properly Using a Disclosure & Authorization Form
- > Remove This Language From Authorization Forms
- > Correctly Implementing The Adverse Action Process

Why FCRA Lawsuits Are So Prevalent

The Fair Credit Reporting Act is the main federal law that governs the use of employment background checks.

A class-action lawsuit filed under this statute allows for damages between \$100 and \$1,000 for each violation dating back five years, which makes for a hefty award or settlement.

This has created a cash-cow situation for plaintiff's lawyers, who know they can walk away with 40% on a contingency case.

For the past three years, the courts presiding over FCRA lawsuits have found in favor of the plaintiff when the defendant did not follow a strict interpretation of the law.

In other words, in cases where the defendant fails to follow the law exactly as written, the plaintiff's team usually prevails.

This is where companies become vulnerable. In many companies - either for convenience or lack of specific knowledge - they are following procedures that are only partially correct. For example, the authorization form is provided as part of a new-hire packet, but the law requires the form to be a stand-alone document.

"This is where companies become vulnerable."



With many household brands getting sued for FCRA violations, like Starbucks, Whole Foods, BMW and others, some unethical people have begun to educate themselves about these laws so they can discover violators, sue them and then leverage them into a settlement.

Properly Using a Disclosure & Authorization Form

The FCRA requires employers to notify an applicant if a background check will be performed and obtain their written permission to do so.

This is done with a Disclosure & Authorization form. The law requires that this be a stand-alone form, not attached to other documents or even combined with other documents.

Companies are at risk for a compliance lawsuit when they attach this form to an employment application or other new-hire document, or even when this form is combined with other documents in an envelope or a new-hire packet.

In order to be compliant, the Disclosure and Authorization form must be provided as a stand-alone document.

The arts & crafts store, Michaels, was sued under this provision for including the form with the employment application. The lawsuit included all those who applied to Michaels through the online job portal in the two years prior to the the suit.

“The law requires that this be a stand-alone form.”



Michaels prevailed in this case but it was tied up in court for more than a year and they suffered bad publicity, reputation problems, lost time and all of the stress and employee morale problems that accompany class-action lawsuits.

Remove This Language From Authorization Forms

Another violation that can occur under the “stand-alone” requirement is the inclusion of “extraneous language” in the disclosure form.

Things like liability waivers, acknowledgements of non-discrimination, consequence for falsifying information and various special conditions are not allowed.

In most cases, the courts have refused to dismiss these lawsuits at an early stage. It is unclear whether a judge or jury will ultimately conclude that an FCRA violation exists in these cases, but the affected employers face significant risk of liability as well as the time, expense and public notoriety related to defending these actions in court.

Take the time to review your background check disclosure and authorization forms now. If there’s any language that looks like it could flag a violation, you should consult an experienced employment lawyer and ask them to craft a legally defensible form.

“Courts have refused to dismiss these lawsuits”



Having an experienced lawyer develop a new form may cost you anywhere from \$500 to \$2,000 but this is far less than the costs associated with defending a lawsuit, including the potential for lost business, productivity problems, recruiting problems and lost talent, which can directly and severely damage your company.

Correctly Implementing The Adverse Action Process

Refusing to hire someone based on information revealed in a background check is called "Adverse Action" and the FCRA defines specific steps an employer must follow when it decides to do so.

It's a two stage process with requirements that different documents be delivered to the candidate in each stage, and there's a time component as well.

In the first stage, the employer is supposed to deliver a letter stating something was revealed in the background check which might result in exclusion from consideration.

This is supposed to be delivered with a copy of the FCRA Summary of Rights and a copy of the completed background check.

After waiting a "reasonable amount of time" for the candidate to respond, which at least one court has said is five business days after the candidate receives the letter, the employer is then supposed to send a second letter confirming the adverse action.

"It's a two-stage process"



These specific steps and the specific language that must be included in the letters can be found online by searching for the phrase "Using Consumer Reports: What Employers Need to Know." The Federal Trade Commission has a webpage with specific instructions on following this process.

Conclusion

Employment background screening is now a critical step in the hiring process. By following the basic steps in this guide, you will go a long way to protecting your company from FCRA litigation.

About SafestHires

In an effort to deploy new software designed to speed up turnaround time, drive additional cost savings and satisfy other HR software needs, like mobile recruiting, applicant tracking, paperless on-boarding and payroll services, SafestHires was launched in partnership with veteran screening provider Precise Hire.

Led by a team of co-founders who are US Navy Veterans, SafestHires uses the same servers, security features, software team and customer service team that has made Precise Hire an industry leader for the past 15 years.

Our FCRA-Certified technicians and customer service agents collaborate to ensure you get the safest screening experience possible. You also get easy ordering, superior customer care, accurate information, and rapid turnaround at the most economical rates in the market.

Additionally, our software development team created a simplified user-interface backed with multiple layers of data protection so that ordering a background check is as easy as a Google search, only backed with government level security.

Because the employment background-screening industry is highly regulated, we require our senior customer service agents to earn their FCRA Certification and they must have at least 10 years industry experience. They are also required to properly educate every new customer on screening Best Practices and what to expect when receiving a person's background information.

We are not lawyers so any recommendations in this document should not be taken as legal advice. You should always consult an experienced attorney before making modifications to your screening program.