

Background Screening

The FCRA

And You

An Overview of the Fair Credit Reporting Act, the Hiring Process and its Impact on the Employer and Candidate



THE
Cedalius
GROUP™

The Cedalius Group
404.963.9772
info@thecedaliusgroup.com
www.thecedaliusgroup.com





Carl Diaz, CEO

As a risk consultant and business developer, Carl is focused on innovative, compliant, comprehensive background research and HRM / ATS on-boarding systems that meet the needs of today's highly diverse personnel pool.

He is a long-standing member of The Society of Human Resource Mgmt, a former CSO (Chief Security Officer), former Vice President of Human Resources, and Adjunct Professor of Criminology. He is a Senior Member of The American Society of Industrial Security (ASIS).

Carl's goal is to provide organizations with the insight and systems that support the advocacy of their personnel and the protection of their assets, earnings, and reputation.

From Our CEO...

The background screening industry is certainly not what it was five years ago, or even two years ago. And it will continue to morph and develop as businesses and individuals understand more and more the need for compliant and thorough background screening.

Whether domestic or international, the research of businesses and individuals has become an absolute necessity. Due to insurance and liability exposures, general security issues, risk mitigation, candidate selection requirements, and corporate compliance, today's screening criteria must be exact and accurate. Consumer reporting agencies (CRAs) no longer have the luxury of providing lackadaisical research – no more lapsed data banks or the reporting of un-adjudicated information. Enforcement by the Fair Credit Reporting Act (FCRA) as well as the Equal Employment Opportunity Commission (EEOC) demand that every effort is made in providing fair and equitable research.

In this e-book, we will attempt to explain in simplified terms the components of today's basic requirements and the obligations of *all* parties involved in the background screening process. In a time when litigation is at an all-time high against both CRAs and employers, the effort to exceed expectations and provide exceptional quality to both employers and their candidates continues to be a challenge.

As a Consumer Reporting Agency accredited by *The National Association of Professional Background Screeners (NAPBS)*, The Cedalius Group is pleased to present to you the essentials of what dictates as the necessary processes to which each company must comply, as well as the laws to which all clients, CRAs, and candidates must abide by. This e-book provides the insight necessary to make an educated decision regarding today's background screening industry and your hiring process.

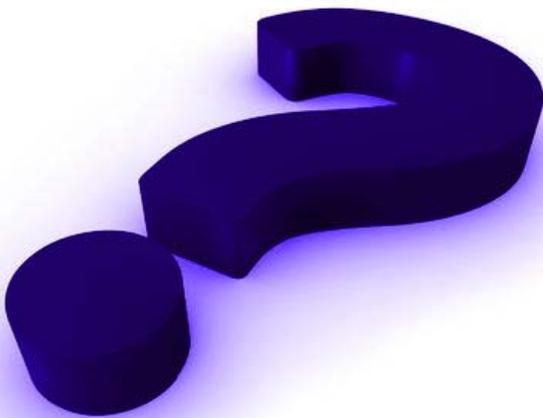
Remember to always be prudent in your choices.

**Chief Executive Officer
January, 2017**

What is the FCRA?

The Fair Credit Reporting Act (FCRA) is a federal law that governs how a consumer reporting agency (CRA) handles consumers' personal information. It is designed to protect the integrity and privacy of both private and public data. The FCRA requires consumer reporting agencies--and the entities that report information to them and others--to ensure that information is fair and accurate, and kept private. The FCRA protects consumer's right to access and to correct any inaccuracies in credit and consumer reports while providing remedies if a consumer reporting agency or information furnisher violates consumers' rights.

Due to widespread issues with credit reporting agencies with little to no oversight, Congress passed the law in 1970 to protect consumers' information regarding credit information. Due to the broad nature of the language in the law, employment background screening regulation also fell under the FCRA's purview and does to this day.



***From 2015 to 2016
FCRA related
Lawsuits against
Employers and their
Information Providers
increased by over
500% -ACA International***

The world of employment background screening has become much more complex over the past few years. As the industry becomes more pertinent and essential, employment litigation also climbs to what is now at an all-time high.

It is important, now more than ever, for everyone involved in the screening process to thoroughly understand their obligations as well as their rights. In the next few video presentations, the Cedalius Group will share insight about the key players involved in these processes, their inter-connected relationship and the effects of the ever developing rules, regulations, requirements, and compliance protocols that are becoming the new norm.

FCRA Compliance

FCRA compliance is more important now than ever before. Class action lawsuits all across the country are costing companies millions of dollars due to FCRA violations that could be easily avoided.

A few of the usual culprits include:

- 1. Ban the Box** – This is legislation that prevents employers from asking about criminal history at the application stage. 24 states have such laws on the books for state employees, with nine – CT, HI, IL, MA, MN, NJ, OR, RI, and VT – extending the protection to applicants of private employers, as well. Additionally, more than 100 cities, counties, and municipalities have also adopted “ban the box” laws.
- 2. Credit Check Limitations** – 10 states currently prohibit the use of credit checks for employment purposes, and some states require certain limits according to the type of job being offered, the work that will be performed, and the salary attached to the position.
- 3. Authorization and Disclosure Forms** – These forms for background checks **MUST** be offered to the applicant separately from the rest of the application in order to be considered compliant. The forms must contain no extraneous information, and must be written in “clear and conspicuous” language.



COMPLIANCE

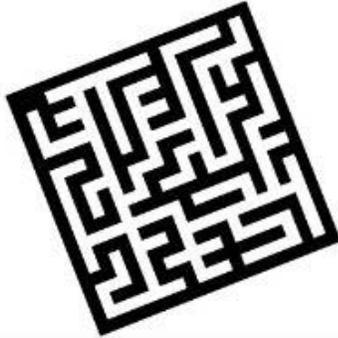
In July 2016:

- 35% of all consumer litigation plaintiffs had sued at least once before under consumer litigation statutes.
- Over 890 individual companies were sued, but 1.6% from June 2016
- 266 consumers filed lawsuits under the FCRA, including 23 class action lawsuits
- The top five courts where such lawsuits were filed were in: Chicago (80), Los Angeles (72), Atlanta (59), Las Vegas (43), and Brooklyn (42)
- To date for 2016, 2,237 FCRA-related lawsuits have been filed by consumers

Source: <https://webrecon.com/slip-slidin-away-fdcpa-trending-down-5-months-in-a-row-debt-collection-litigation-cfpb-complaint-stats-july-2016/>

1st

Fair Credit Reporting Act



FCRA

15 U.S.C. § 1681 et seq.

"clear and conspicuous"

"strict procedures"

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The FCRA was originally intended to function primarily for credit issues, but the language was written in such a vague manner that background checks inherently fell under the FCRA, as well. To tighten up some of the ambiguity, there have been several **major** amendments to the FCRA that have shaped the law as we know it today.

- **In 1996**, changes were made to the FCRA via the Consumer Credit Reporting Reform Act to allow organizations to share information in credit reports, and to provide for a limited preemption of stronger state laws on credit.
- **In 2003**, Congress enacted the Fair and Accurate Credit Transactions Act, which, in part, allows consumers to obtain a free credit report every year.
- **In 2010**, the newly created Consumer Financial Protection Bureau (CFPB) began sharing responsibility with the Federal Trade Commission to enforce the FCRA
- **And, just recently, In 2015**, the CFPB cracked down on two major background screening providers for failing to "take reasonable measures" to insure the accuracy and security of the information they provide. Together, the two CRAs paid \$13 million dollars in restitution and penalties.

Obligations of the Employer

Employers have an obligation to take certain steps under the FCRA to ensure that the information collected on their candidates is used in a fair and consistent manner.

Employers have several obligations in order to remain compliant with the FCRA. First, employers must tell the applicant that they will be conducting a background check and inform the applicant that information obtained from that report will be used in making the decision whether to make an offer of employment. This notice must be in writing, and in a “standalone” format. Also, employers must obtain written permission from the applicant before proceeding with a background investigation.

If the employer plans to re-screen on a periodic basis throughout the candidate’s employment, they need to include “clear and conspicuous” language to that effect in the document that the applicant signs. Finally, employers must certify to their credit reporting agency (CRA) that they have notified the applicant and received their permission to request a consumer report; that they have complied with all FCRA requirements; and that they will not discriminate against the candidate based on the information returned in their consumer report.



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Having a clearly defined background screening process, approved by legal counsel, is one of the first steps to ensuring compliance and avoiding costly litigation during the hiring process. Partnering with a professional, accredited background screening provider is critical.

Employers should also consider advisements from the EEOC when hiring:

- Eliminate blanket policies and conduct individualized assessments on every candidate
- Ensure accuracy of criminal records obtained by third party CRAs
- Provide applicants with notice of possible adverse actions and an opportunity to provide additional information regarding arrests or convictions found.
- Ensure that any and all adverse action based on criminal history is sufficiently job-related and consistent with business necessity, including
 - the duties and nature of the job
 - nature and gravity of the offense committed
 - the time that has passed since the offense and/or completion of the jail sentence.



Before Taking Adverse Action

If the employer disqualifies a candidate for hire or promotion based on information obtained in a consumer report, the applicant must be provided with a notice that includes a copy of the consumer report, and a copy of “A Summary of Your Rights Under the Fair Credit Reporting Act”.

Adverse Action

An adverse action is a denial of employment or any other decision related to employment purposes that could potentially result with an adverse affect on any current or prospective employee’s employment

ECOA § 701 (d)(6)

The applicant should always be informed of any adverse information in their files.

After Taking Adverse Action

If adverse action is taken against an applicant (or employee) as a result of a consumer report, the FCRA requires that candidate must be notified within a reasonable amount of time.

This notice must include:

- The name, address, and phone number of the CRA that supplied the report
- A statement that the CRA had no part in making the decision to take adverse action and that the CRA will not be able to give specifics regarding the decision that was made
- Notice that the candidate has the right to dispute the accuracy of the information provided by the CRA, and the right to request an additional free report within 60 days
- Finally, the FCRA requires that, once the employer is finished with a candidate’s consumer report, it must be securely disposed of by burning, pulverizing, or shredding paper documents, or disposing of electronic information so that it can’t be read or reconstructed.

Applicant's Rights

The purpose of the FCRA is to promote fairness, accuracy, and privacy of information in consumers' files. In other words, one of the main purposes of the FCRA is to protect the job applicant. If a potential employer takes adverse action against an applicant based on information in their background check, the applicant can exercise their rights in response.

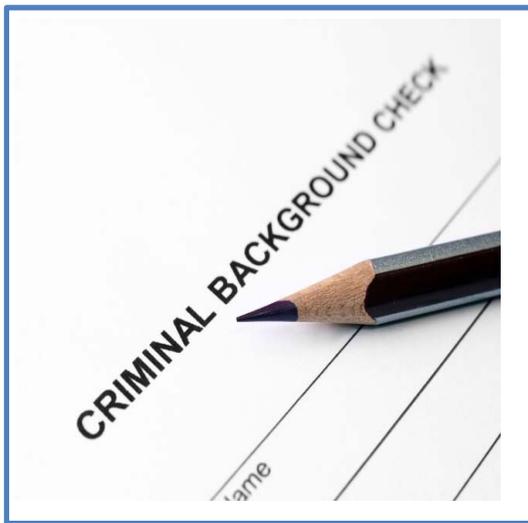
Since the applicant is at the heart of FCRA protection, it is paramount that employers make sure to partner with they are well informed. Ease of access to remedies, to dispute processes, and to information will streamline any questions and create a better experience for applicants as they navigate through any potential problems.



In 2016, the number of FCRA consumer lawsuits filed in the U.S. to 3,960. For 2017, the number is expected to continue to increase.

While hiring managers and human resources departments navigate the many regulations involved with employment law in general, there are many rights that applicants hold when dealing with the FCRA.

It is important that employers review these rights with their legal counsel to ensure that all areas have been identified and addressed throughout the hiring process.



Breakdown of Applicants' Rights

Applicants must be told if information in their consumer report was used by an employer to reject the application, rescind a job offer, or deny a promotion or reassignment. Further, applicants has the right to be given the contact information for the CRA that pulled the consumer report.

- Applicants have the right to request and obtain all of the information in their consumer report file. Applicants are entitled to this for free if they have had adverse action taken against them as a result of their consumer report; if they have been the victim of identity theft or fraud; if their file contains inaccurate information as a result of fraud; if they are on public assistance; or if they are unemployed but expect to apply for a job within 60 days.
- Applicants have the right to dispute incomplete or inaccurate information. If an applicant reports to the CRA that pulled their file that there is incorrect information in the file, the CRA has an obligation to investigate (unless the dispute is frivolous).
- If the CRA finds that incorrect information is, indeed, included in the applicant's consumer report, they are required to remove or correct it, usually within 30 days.
- CRAs cannot legally report outdated negative information. In most cases, that is seven years old, though bankruptcies can be reported for ten years. Higher level executives and positions with governmental oversight may also require a lengthier look into the background of the applicant.
- Access to applicant's consumer report is limited – CRAs can only provide it to people and agencies with a valid need, such as employers, creditors, and landlords.
- Applicants must give their permission for an employer to obtain their consumer report. If they do not provide written consent for a background check, the employer cannot legally hold information in it against them.
- Applicants may seek compensation for damages caused by a CRA or employer who violates their rights under the FCRA in regard to their consumer report or background check.
- Identity theft victims and active duty military personnel have additional rights

APPLICANT'S RIGHTS



SOME CONSUMERS HAVE SPECIAL RIGHTS - SUCH AS ACTIVE MILITARY AND VICTIMS OF IDENTITY THEFT

APPLICANTS MAY SEEK COMPENSATION FOR DAMAGES CAUSED BY A CRA OR EMPLOYER WHO VIOLATES THEIR RIGHTS UNDER THE FCRA IN REGARD TO THEIR CONSUMER REPORT OR BACKGROUND CHECK.



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FCRA Violations can cost Employers between \$100 - \$1,000 per violation. Lawsuits brought by the earlier of two years after the date of the plaintiff's discovery of the violation, or five years after the date on which the violation occurred can easily result in multi-million dollar class action cases for larger employers.

The FCRA allows an applicant or an employee to pursue a private right of action against an employer for "negligently" or "willfully" failing to comply with any of the FCRA's requirements with respect to that individual. The statute of limitations for violations of the FCRA requires that an action must be brought by the earlier of:

- Two years after the date of discovery by the plaintiff of the violation
- Five years after the date on which the violation that is the basis of the alleged liability occurred.

The range of available damages varies for negligent and willful violations. An employer that negligently fails to comply with any requirement of the FCRA with respect to an applicant or employee is liable for:

- Actual damages sustained by that individual; and
- Reasonable attorneys' fees and costs.

The FCRA also sets forth remedies for willful violations of the statute. There are three different types of damages available for a willful violation:

Actual damages or statutory damages ranging between \$100 and \$1000

Punitive damages

Attorneys' fees and costs.

Duties of a CRA

CRAs have 5 basic duties to ensure compliance under the Fair Credit Reporting Act:

1. Maintain “**reasonable procedures**” to assure the highest level of accuracy.
2. Provide consumer reports to only those with a “**permissible purpose.**” Examples of such purpose include for employment, in response to a credit transaction, or for insurance underwriting. Simple curiosity is NOT a permissible purpose.
3. Conduct **reinvestigations** in the event of a consumer dispute. Reinvestigation requires the CRA to make a reasonable effort to determine the validity of the original results.
4. Make all proper and required **disclosures** to the consumer whose data is being gathered. This includes obtaining proper **authorization** from the individual for whom data will be collected.
5. Properly **dispose** of consumer information via shredding, burning, or pulverizing. This disposal requirement also applies to electronically-gathered data.

An additional complication under the FCRA is the fact that several states, including California, Nevada, Massachusetts, and Kentucky, have their state-FCRA laws. Under the federal laws governing the FCRA, when the state law is more stringent than the federal law, the state law shall prevail. For example:

- In Kentucky, CRAs are not permitted to maintain any information against a consumer regarding charges in a criminal case that DID NOT result in a conviction.
- In Massachusetts, CRAs cannot use information about arrests, convictions, or indictments more than seven (7) years old, unless the applicant will make \$20,000 or more annually.
- In California AND Nevada, the use of sex offender registries is forbidden for employment and other purposes?



What's Next for Background Screening?

We expect that the next big thing in background screening will be fingerprinting. We are prepared for this challenge and are developing our national Fingerprinting and Badging Program. It will be accessible, convenient and cost-effective for all levels of clients and candidates.

A word of caution... Until fingerprint databases catch up to the quality of the records found at the court level – until there's a federal law mandating when state records are uploaded and recorded at the federal level – there will continue to be challenges with fingerprinting that impede its success.

Traditional background screening research will remain the primary source of most accurate and complete information until the federal laws and the quality of information meet greater standards– this will definitely not happen overnight.



Continuing Threats to Background Screening

The three biggest threats to the background screening industry today are:

- Automation
- Legal issues
- Compliance

The Cedalius Group LLC is the background screening provider you can trust. We strive to understand *your* needs so that we can develop solutions that meet and exceed your expectations. Our screening solutions allow you to make informed decisions based on the most accurate and comprehensive information available while helping you maintain the highest level of compliance with local, state, and federal agencies and regulations.

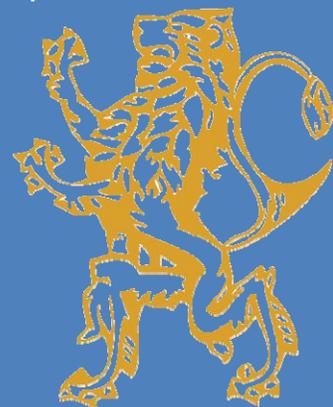
Our comprehensive background screening services include criminal, credit reports, drug screening, E-Verify, and international searches. We work with a wide variety of industries and are equipped to develop a customized program for your organization. Our web-based platform provides you easy access to your information 24/7 and has been developed to provide maximum system flexibility. What's more, our platform easily integrates with Applicant Tracking Systems (ATS), giving you a better overall experience.

We are an accredited member of the National Association of Professional Background Screeners (NAPBS) and our team members have held positions in the following industry leading committees:

- Government Relations Committee
- Best Practices Committee
- Best Practice/Education Task Force Committee
- Litigation Avoidance Committee
- Employee Screening Litigation Tracking Group

The challenges you face today with employment, candidate, and vendor screening are tremendous, from regulation-driven requirements and compliance issues to a litany of other potential liabilities. It is important to have a partner that understands your specific needs and goals and will work to protect your reputation.

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