

Best Practices for Using Credit Checks as a Screening Tool

The practice of including credit checks as part of an applicant background screening process is one of the most debated issues surrounding the background screening industry and the hiring process. Although the use of credit checks has been an acceptable screening tool for more than 40 years, the issue came to the forefront with the proposal of the *Equal Employment for All Act* (H.R. 3149 111th Congress, July, 9, 2009).

The passage of the Fair Credit Reporting Act (FCRA) in 1970 was adopted specifically to balance the rights of consumers by providing them with an opportunity to correct any inaccurate information in their credit file, while still preserving confidentiality and preventing unwarranted privacy intrusions.

Intense scrutiny by government agencies, such as the Equal Employment Opportunity Commission (EEOC) and limitations imposed by several states have restricted the use of credit information in employment screening. The EEOC is particularly concerned that the use of credit checks as an employment screening tool may be used to discriminate against specific groups, noting the Civil Rights Act of 1964. Ongoing increased EEOC enforcement combined with the threat of at least 18 states considering legislation to limit or ban the use of credit checks suggests that savvy employers should consider expanding their efforts to promote and maintain a discrimination-free workplace; specifically with regard to standardizing and approving a work procedure involving on-boarding future employees.



Proceed with Caution

As an industry best practice, employers should have policies and procedures in place that ensure that using credit checks is relevant and fair. The first step is determining if there's a sound business reason to do a credit check on a prospective employee. If it's not directly job related, running a credit check could be considered discriminatory. Conversely, hiring a person with fiduciary responsibilities without running a credit check could be grounds for allegations of negligent hiring.

Due to the EEOC's aggressive pursuit of violators of the Civil Rights Act of 1964, as well as growing number of state regulations moving to impose increasingly strict regulations or even eradicate the practice of using credit checks, it may be prudent for employers to review policy and procedures. Examine how your policies stack up in the current landscape of intense inspection and enforcement. Assess materials, such as employment applications, consent forms, interview guidelines, etc. to ensure that only those credit checks allowed by EEOC guidelines and state laws are conducted, and that no illegal questions are asked. It's also in your best interest to make sure all employees responsible for making employment decisions are aware of the rules and regulations and compliant.

Employer Responsibilities

The FCRA has stringent rules and detailed procedures that must be followed when using credit checks, in part or in whole, to make a hiring decisions, or any other employment decisions.

Before providing an applicant's report, employers are required to let the consumer reporting agency (CRA) that it's in compliance with the FCRA and will not misuse any information in the report in violation of federal or state equal employment opportunity laws or regulations.

Employers are required to obtain written authorization from an applicant before conducting a credit check.

Before a CRA can provide an employer with credit checks, an on-site inspection of the end-user's place of business by a third-party inspection agency must be conducted.

Although employers may use delinquent payment history information as rationale to take adverse hiring action, using bankruptcy information to eliminate an applicant is not permitted.

Adverse Action Procedures

The FCRA procedures for adverse action stipulate that an employer must provide notifications within a specified timeframe to ensure compliance. If employers use a credit check to assess an applicant's suitability for employment and consequently reject that applicant due to information gleaned from the report, they must follow specific rules.

Liability Risk

Failure to comply with FCRA rules may make an employer liable for statutory damages of up to \$1,000 per violation, attorney's fees, and unlimited punitive damages.

The employer is obligated to first provide the applicant with a copy of his or her credit report. In addition, the employer is responsible for providing rejected applicants with an explanation of their rights under the law, as well as providing the applicant with the contact information of the credit reporting agency that provided the information

The FCRA has penalties, including punitive damages and actual damages, for failure to comply with the adverse action provisions.

Provide a pre-adverse action notice. Employers planning to take adverse action on the basis of the credit check findings in the report are required to provide pre-adverse action notification to the affected individual and offer a reasonable amount of time for the individual to respond. This communication must include a disclosure with a copy of the individual's report and a copy of the FTC document, "A Summary of Your Rights Under the Fair Credit Reporting Act."

Employers often ask for a definition of "reasonable time." The FCRA does not give a firm answer to this question. However, the FTC did craft an opinion letter that offered some direction to employers as to what might be a reasonable amount of time. The letter stated that employers should consider the nature of the job, how the employer does business and other factors such as holiday and weekend time.

Provide an adverse action notice. After the adverse action has taken place employers must provide oral or written notification that it has decided not to hire the applicant due to a finding in the report. Verbal or written notification must include the following:

- a) The name, address and phone number of the CRA that supplied the report.
- b) A statement that the agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it.
- c) A notice of the individual's right to dispute the accuracy or completeness of any information the agency furnished.
- d) A notice of the individual's right to an additional free consumer report from the agency upon request within 60 days.

Employers considering bypassing the adverse action duties, e.g., rejecting an applicant due to his or her credit report but using another excuse to deny employment, should be aware that an informational trail of the credit search exists. Unlike criminal record searches that leave no research trail, each time a credit check is requested it's noted as a "soft-hit" on a person's credit history and names the entity that made the request and the purpose of the request.

Timing is everything when it comes to FCRA compliance. Adhering to the schedule of certifications, pre-adverse and adverse action notifications is crucial to avoid non-compliance issues. There are special procedures for certain industries, such as the trucking industry. Consult with your CRA for special provisions. Check with your CRA for state-specific regulations regarding the use of credit reports. Adverse Action Advantage™, an adverse action fulfillment service provided by Accutrace, is an excellent and easy way to ensure ongoing FCRA compliance.

To learn more about best practices for credit checks, please contact an Accutrace screening specialists at 888-548-7223 (888-54 TRACE) or <mailto:sales@accu-trace.com>.

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