The information contained in this presentation is not legal advice. Please consult with your legal counsel for questions regarding your legal responsibilities.

Background Checks Done Right

A Legal and Compliance Update to Help Keep You Out of Court

SCCE's 10th Annual Compliance & Ethics Institute
Angela Bosworth, JD
Executive Vice President, OPENonline

Angela is an attorney who specializes in hiring issues, privacy, FCRA and state regulatory issues surrounding the background screening and hiring process. She brings over 20 years of legal experience to her role as Executive Vice President of OPENonline, and is a frequent speaker on compliance and regulatory issues that impact hiring.

What Is a Background Check?

- Social Security Trace
- Criminal History (including Sex offender)
- Motor Vehicle Report
- Employment Verification
- References
- Pre-Employment Credit Report*
- Education Verification
- Profession License Verification/Sanctions check
- Civil Records
- Workers’ Compensation (post employment)
Why Conduct Background Checks?

► Improve Productivity
► Reduce Employee Turnover Costs
► Protect Your Employees by Providing a Safer Work Place
► Avoid Negligent Hiring and Retention Litigation
► Reduce Likelihood of Workplace Violence
► Reduce Opportunity for Theft and Criminal Activity

Who Should be Screened?

Consider the following:
► Screening all employees
► Screening only designated positions
► Volunteers
► Contract Employees
► Consultants
► Vendors (some may require all vendors to have a screening program)

In all cases, consider the job responsibilities and whether the information sought in the background check is related to the position.
Employers’ Responsibilities

► Understand Employer Requirements under the FCRA
  • Permissible Purpose
  • Certification
  • Disclosure/Authorization
  • Adverse Action
► Comply with Fair Treatment and Anti-Discrimination Laws
► Understand State Specific Considerations, Credit Reports, and Social Media

Employer’s Responsibilities: The FCRA

The Fair Credit Reporting Act (FCRA)
15 USC Section 1681

1. Employer must have permissible purpose (ie, screening potential applicants for employment) to obtain a consumer report
2. Employer must certify that permissible purpose before obtaining a consumer report (see definition), and certify that the employer will not violate any state or federal laws
3. Employer must provide appropriate disclosure and authorization to the applicant prior to obtaining a consumer report
4. Employer must follow the required adverse action procedures
Consumer Report Defined

A consumer report is any information (written, oral or other communication) reported by a Consumer Reporting Agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics or mode of living that is used or is expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for:

A) credit or insurance to be used primarily for personal, family, or household purposes;
B) employment purposes;
C) or any other purpose authorized under 15 USC 1681b

When Does the FCRA NOT Apply?

► “In-house” background checks (state law may still apply)
  • Careful here—if you are using a third party to collect information the act still applies
► Some business workplace investigations (misconduct)
► Business to Business due diligence not involving consumers
► Fraud or criminal investigations not connected with a consumer transaction
► Investigative legal research
► Consult with legal counsel if you have any questions as to the application of the FCRA to your practices
1. Permissible Purpose

Employment is a Permissible Purpose

- The term “employment purposes” when used in connection with a consumer report means:
  
  A report used for the purpose of evaluating a consumer for employment, promotion, re-assignment or retention as an employee.

- Employment purpose is not limited to pre-employment, and may involve other decisions such as promotion, pay increase, demotion, or reassignment of duties.
2. Certification by Employer

User Certification is made by the Employer to the Consumer Reporting Agency (Background Screening Provider) and MUST include certification that:

1. The employer will provide a disclosure to the applicant BEFORE procuring a background report
2. The employer will obtain written authorization BEFORE procuring a background report
3. The employer will not use the information in the report in violation of any state or federal equal opportunity laws
4. The employer will use the background report only for permissible purpose

Certification by Employer (cont.)

5. The employer will follow adverse action procedures if a negative employment action is considered
6. The employer has received a copy of the Notice to Users of Consumer Reports: Obligations of Users under the FCRA

- Certification is usually covered in initial contract with CRA
- Background screening company maintains a copy
3. Disclosure to the Applicant

Disclosure to the consumer is required prior to obtaining a report

► User of the information must make a clear and conspicuous disclosure, in writing, consisting solely of the disclosure*, that a consumer report might be obtained
► Detail what information will be requested (credit, criminal history, driving record, etc)
► Must obtain authorization from the consumer in writing**

*may be combined with the authorization
**DOT Exceptions

Disclosure to the Applicant (cont.)

► Disclosure and consumer authorization can be combined into one document (often referred to as the “release” or also the “Notice and Acknowledgment” form)
► This form may not be combined with an application for employment or other employment form
► This form may include a place for additional information needed for the background check (DOB, SSN, DL number)
► This form may be submitted electronically
► Language attempting to have consumer waive rights under the FCRA is prohibited, and will likely invalidate authorization
Employer must retain the original document.

**Practice tip:** Offer a copy to the applicant.

Sample Combined “Disclosure” and “Authorization” Form

“Evergreen” Releases

Employers may word the authorization in such a way as to request the right to additional, ongoing reports throughout the course of employment. An “Evergreen” release allows for ongoing background reports at any time during application process or tenure of employment. This may be desired to allow employers to conduct periodic investigations, drug screening, or for annual reviews.

(BUT NOT IN CALIFORNIA)

FTC Ruling: Frank James Letter, August 5, 1998

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Don’t Do This

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4. Adverse Action

- The adverse action provisions of the FCRA apply to employers when an adverse employment decision is based in whole or in part on the consumer report

- **Two Step Process:**
  1. Pre Adverse Action
  2. Notice of Adverse Action
Step One: Pre-Adverse Action

Notice of Pre-Adverse Action*

Before action is taken based in whole or in part on the background report, the employer must provide to the consumer (the applicant or employee) to whom the report relates:

- A copy of the report
- The “Summary of Rights” published by the FTC in section 609(c)(3)
  - See 604 (b)(3)

*Not required for some DOT regulated employers

Step One: cont.

- The “Summary of Rights” published by the FTC
  - This is a two page document
  - Do not shrink it/condense it/abbreviate it
  - Ask your vendor for the form or obtain from ftc.gov
  - Make available in other languages if need be
Step Two: Notice of Adverse Action

Notice of Adverse Action:
If the employer intends not to hire, or take other adverse action based in whole or in part on the background check, the employer must provide a second notice:*  
► State that the adverse action is based in whole or in part on the information contained in the background check provided by the CRA (background screening company)  
► State that the CRA did not make the decision and cannot provide specific information about the basis of the decision  
► Include the name, address and toll free number of the CRA  
► State that the individual has a right to dispute the accuracy of the information  
► And the individual has a right to request a free copy of the report within 60 days (See Section 615)  

* DOT regulated employers may comply verbally.

Why Two Steps?
► Waiting period between letters: “meaningful opportunity to review material and respond”  
► Point is to PROTECT CONSUMERS and allow consumers enough time to respond before adverse action is taken  
► Five days was deemed a reasonable amount of time by the FTC  
(see FTC opinion letter to Harold Hawkey, December 18, 1997)
You Can Outsource It

► CRA’s may fulfill the employer’s ministerial duties and may send letters on employer’s behalf
► Employer retains full responsibility for duties and will still be subject to enforcement and/or liability
(see FTC opinion letter to Michael Rosen, June 9, 1998)

Hunter v. First Transit, Inc

► Settlement reached 03/03/11
► $5.9M settlement—$4.2M to be shared by plaintiffs
► Class action filed against: First Transit and First Student, subsidiaries of First Group America, Inc.
► Suit allegation: First Group obtained consumer reports (background checks) about the Plaintiffs for employment purposes without proper disclosure or written authorization
► Suit allegation: Defendants used consumer reports to take adverse action without providing Plaintiffs with a copy of the report or the FTC Summary of Rights
What is significant about this case?

- **Largest settlement on record** for violations of employers duties under the FCRA as it relates to the background screening process
- Settlement applies to both employees and rejected applicants
- Each worker could receive between $2,000 and $4,000

First Group Settlement

- Suit alleged that First Group did NOT always obtain the disclosure PRIOR to the completion of the background check. Background checks were being requested from their vendor days and even weeks before the applicants signed the authorization form
- Suit alleged that the Disclosure, in some instances, contained a release of liability

Look at your HR practices—when do you collect the disclosure form/release?
Do not include disclaimers or releases of liability on your consent forms.
First Group Settlement

- Plaintiffs alleged that adverse action was taken against them, and that they did not receive a copy of their report and the FTC Summary of Rights before suffering adverse action.
- Plaintiffs alleged that First Transit and First Student did not comply with the requirements of the FCRA when taking adverse action.

How are you sending the notices? What is your process? Do you keep a log? Can you prove that you sent proper adverse action notice?

Sample Adverse Action Letters


What is at Stake for Employers?

- Failure to follow these procedures can lead to lawsuits
- Plaintiffs’ bar is aggressively pursuing these cases
- 15 M Americans are out of work. Rejected applicants are looking for recourse when they are not hired
- **No caps** on damages for FCRA Claims
- 2010 was a record year—14,000 FCRA and FDCPA cases estimated
- FTC is enforcing as well

Class Action Suits are Being Solicited
Penalties under the FCRA

- Claims of willful non-compliance carry possible statutory damages of $100 to $1000 per violation, attorneys' fees, and unlimited punitive damages
- Negligent non-compliance claims do not provide for statutory damages, but instead allow for actual damages, attorneys’ fees, and unlimited punitive damages
- Most FCRA class actions against employers assert statutory damages claims

FCRA Summary: Follow These Steps

Employers must have permissible purpose (ie, screening potential applicants for employment)

Employer must certify that purpose before obtaining a consumer report (background check), and certify that the employer will not violate any state or federal laws

Employer must provide appropriate disclosure and authorization to the applicant

Employer must follow the required adverse action procedures including providing a copy of the report and FTC Summary of Rights.
Comply With Anti-Discrimination Laws (Title VII, EEOC)

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, gender, national origin, and other protected classes.

Two types of discrimination in employment/hiring:
1. Prohibits employers from making hiring decisions based on race.
2. Prohibits employers from using selection procedures that have “Disparate Impact”.

EEOC

- The Equal Employment Opportunity Commission (EEOC) enforces Title VII. The EEOC publishes guidelines about the appropriate use of criminal information in the employment screening process.
- EEOC Guidelines establish what employers must consider based on the potential impact on protected groups and minorities.
Considering Criminal History: EEOC Guidelines

► What is the nature and the gravity of the offense? 
   (is a parking meter violation relevant to the job?)
► How long ago was the offense? 
   (the relevance of some crimes may lessen over time, such as a minor misdemeanor possession charge as compared to a murder conviction)
► What is the nature of the job being applied for? 
   (A moving traffic violation may only be relevant if driving is involved as a job requirement.)
► Determine whether the applicant is likely to have committed the alleged conduct.
   The EEOC has found that there must be a Business Justification for the use of some criminal records. The business justification must establish job relatedness and credibility—that the individual actually committed the action for which he or she was arrested.

Disparate Impact

Definition:

When an employer’s decision making or selection process is neutral on its face, but has an adverse impact on a protected class under Title VII
Proving Disparate Impact

- Plaintiff must prove the challenged practice or selection device has a substantial adverse impact on a protected group
  - Typically, this proof is offered through statistical comparisons, which may be challenged by the defendant
- Employer’s defense is to show that the practice is job-related for the position in question and consistent with business necessity
- Plaintiff may still prevail by showing the employer has refused to adopt an alternative employment practice which would satisfy the employer’s legitimate interests without having a disparate impact on a protected class (less discriminatory)

Cases involving Criminal History or Use of Credit

- *El v. SEPTA (2007)*: Plaintiff was denied job due to a “bright line” policy. 40 yr. old gang related homicide conviction. Court upheld SJ for the employer saying plaintiff did not produce sufficient evidence. Mixed result for employers.
- *EEOC v. Freeman*: pending class action brought by EEOC involving criminal and credit
- *Arroyo v. Accenture*: pending case alleging criminal history is being used without showing business necessity
- *Hudson v. First Transit* (settled 2011): school bus transportation giant settled class action claim alleging a blanket policy
- *EEOC v. Kaplan*: pending case alleging use of credit caused disparate impact discrimination
**Fair Treatment/EEO Take Aways**

- Avoid blanket policies that deny employment based on application of credit or criminal history.
- Allow consideration of mitigating factors and allow a candidate to refute information.
- Consider business necessity for credit and criminal.
- Be prepared to articulate and always document the company basis for checking credit and criminal history.
- State Laws: Hawaii, Pennsylvania, Wisconsin and New York all require criminal record check be rationally related to the job.

**Screening Applicants Using Social Media**

- Twitter, Facebook, LinkedIn contain a trove of information on candidates and can be easily searched for skills, expertise, job titles.
- Other sources include Google, blogs, chat rooms, forums, YouTube
- Recruiters and employers can get a glimpse of a person in a candid environment that is not job-specific, thus may reveal info not usually available in a conventional application and interview process.
Be Careful with What You See

► State restrictions on use of private behavior in employment decisions (CA, NY, CO, ND)
► Privacy issues
► Personal appearance (tattoos, piercings) can lead to possible discrimination (weigh against the legitimate need for a professional workforce).
► Drinking or Drug use (ADA concerns?)
► Accuracy: Content is user generated and may not be based in facts. Difficult to verify
► Discrimination Concerns: likely to contain information related to age, sex, race, religion, marital status, disabilities, sexual orientation, religion, political orientation.
► Is a search site a consumer reporting agency? If so, all notice provisions apply, as well as adverse action.

State Law Protection

► State Laws
  • Four states provide protections for off-duty lawful activity: California, Colorado, New York, and North Dakota.
  • 8 states protect the use of lawful products: Illinois, Minnesota, Missouri, Montana, Nevada, North Carolina, Tennessee, and Wisconsin
Policies and Best Practices for Social Media

- Develop policies on the use of social media in the hiring process
- Consider removing the search process from the decision maker
- Make sure “screeners” and all HR personnel are well versed in Title VII protected class status and applicable laws
- Draft policies on what may and may not be considered
- Consider asking applicants to disclose or provide access to information as part of the process (consult with legal counsel)

- Consider providing applicant with the opportunity to respond/dispute accuracy
- If information is relevant to a bona fide occupational qualification (BFOQ), communicate to the applicant with the advice of legal counsel
- Be aware of state laws
- Review website privacy policies and limitations of use
- If you engage a third party, be sure to follow FCRA
  - Authorization and disclosure
  - Adverse action
Thank You!

Angela Bosworth
abosworth@openonline.com

@angelabosworth

linkedin.com/in/angelabosworth

For a copy of PDF slides, contact marketing@openonline.com

Follow Us!

@BackgroundPros

The 10 Commandments of Immigration Compliance

Presented by Kevin Lashus and Todd Johnson
+ What should we be concerned with?

- Thou shall comply with immigration compliance best practices
- Thou shall be aware of the I-9 requirements
- Thou shall not condone discriminatory practices
- Thou shall understand E-Verify laws and requirements
- Provide training to ensure your Form I-9s are correct
- Thou shall only accept genuine documents using the reasonableness standard
- Thou shall not take the use of electronic I-9s lightly
- Thou shall verify all remote employee forms
- Honor the government’s mandate to take compliance seriously and acknowledge ICE could arrive on anyone’s door
- Thou shall establish written standard operating procedures (SOP)s

+ The Immigration Reform & Control Act of 1986

- Established an employment eligibility verification requirement utilizing the Form I-9 to collect data on all new hires

- Established an anti-discrimination provision designed to keep employers from discriminating against people because of a foreign accent, national origin, or the fact they don’t look “American”, employers may also not commit "document abuse" by requiring more or different documents in a way that discriminates.
+ Who Must Complete an I-9?

- All employees hired after November 6, 1986
- Re-hired employees, if the original I-9 is beyond the retention date or otherwise unavailable

Simple, yet the devil IS in the details

- The I-9 process is designed to assure that we do not knowingly hire workers who are ineligible to work in the United States
- Clearly document that Fresh Direct does everything required in a responsible and conscientious manner to verify:
  - That EVERY employee is who he/she says he/she is AND
  - That EVERY employee is eligible to work in the United States

+ By When Must the I-9 Be Completed?

- Section 1 is to be completed by the employee at the time employment begins (Day 1)
- Section 2 must be completed by the employer by the 3rd business day after I-9(Thursday Rule)
- Section 3 must be completed before a person’s EAD expires or at the time an update becomes necessary. This is governed by the expiration date entered when the employee marks attestation box 3.
+ **Basic Rules**

- Employee should *always* be given the choice of what documentation to present
- You cannot ask to see specific immigration documentation
- Do not over document
  - One List A document
  - Or one from List B and C
- Must be completed *after* employee is hired, no prescreening

+ **Section 2-Who does what?**

- You take the documents from the Employee
- You complete the form in front of them
- You copy the documents (back and front) but work off the originals
- You make sure that you have the correct ORIGINAL documents
- You ensure that you establish the identity of the employee
- Verify employment eligibility by reviewing the authenticity of the documents
And the other Documents?

Reviewing the Documents

- If documents appear to be genuine, you must accept them, unless you have knowledge to the contrary.

- However, if you have knowledge that they are not legitimate, you should not accept them.

- Does the card look tampered with?

- Is something spelled wrong on the document, like United States?

- YOU ARE NOT A DOCUMENT POLICEMAN but must employ the reasonable person standard.
Permanent Resident Card

- Alien Registration Number
- Expiration
- Coding that matches the number
- Expiration of card, not Status
- Document Number vs. A Number

Older Resident Alien (Permanent Resident) Cards

- Last issued in August 1989 – look at the person’s age
- Only white cards (no expiration date) are valid, not pink cards (expired)
- Wavy lines through the photo
- Seal is superimposed over top of photo
Permanent Resident Cards

1997 Revision
- Laser-engraved photograph (should not be raised)
- Hologram
- Optical memory strip on back of card containing individual's photograph and card information

2004 Revision
- INS becomes DHS
- Photographs change from ¾ view to full-facial view on September 1, 2004

Employment Authorization Document (EAD)

- Previous versions of card will turn red when light is shined through them from below
- Seal with off-center circle comprised of agency text
- Hologram
- Fingerprinting and signature may be waived depending on source of work authorization
The Receipt Rule

Receipt Rule

- You may NOT accept a “Receipt Notice” from USCIS confirming the filing of a Employment authorization document or the extension of same.

- DHS regulations only permit an employer to accept an application receipt for:
  - A replacement Alien Registration Receipt Card
  - A replacement Social Security Account Card

- If you receive such a receipt, record the identification number and make a notation on the top of the I-9 indicating the need for a future update.

Reverification

Must be done by the expiration date of employment authorization.
Section 3 of the I-9

- Only Use Current version of the Form I-9

We need to be monitoring for Section 3 updates when an employee checks the attestation box in Section 1 that says:

“An Alien authorized to work until_______”

Section 3 will need to be completed on or before the date listed above

- Your company needs to obtain proof of the employee’s continuing ability to work in the U.S.
- Only verify work eligibility information
- Section 1 controls the reverification date

Section 3

- Employee needs only show documentation establishing continued ability to work – we are not looking at the identity as this is someone we already “know”

- Begin sending reminders at 120 days
  - Continue to send reminders to the employee at 30 day intervals until new documentation is presented
  - Should the expiration date arrive and no new documents are presented, the employee must be terminated and removed from payroll immediately

- Identification cards do not need to be reverified when they expire

- Permanent Resident Cards should not be reverified when they expire
Retention of I-9s

Discard them as soon as legally permissible

Retention

- I-9 must be kept for:
  - Three years from the date of hire
    Or
  - One year after the termination of the employee’s employment

WHICHEVER IS LATER!

Example:

DOH: 01/01/2009
TERM DATE: 03/01/09
DISCARD DATE: 03/01/12

DOH: 01/01/2008
TERM DATE: 07/01/09
DISCARD DATE: 07/01/12
Penalties for noncompliance

The money adds up

Constructive vs. Actual Knowledge

It is unlawful to knowingly hire or continue to employ an unauthorized alien.

Constructive knowledge includes having information that would lead a person to reasonably conclude that person is not authorized to work in the United States.

This may include, but is not limited to, situations where an employer:

✓ **Fails to complete or improperly completes** the Form I-9

✓ Employer Fails to sign the I-9 form

✓ Employer does not assure that the employee properly completed Section 1 of the form, such as by failing to enter an expiration date for employment authorization when the employee indicates that he is an alien with employment authorization (attestation box 3)
### Civil Penalties:
**Hiring or Continuing to Employ an Unauthorized Worker**

<table>
<thead>
<tr>
<th>Offense</th>
<th>Penalty Per Alien</th>
</tr>
</thead>
<tbody>
<tr>
<td>1st</td>
<td>$375-$3200</td>
</tr>
<tr>
<td>2nd</td>
<td>$3200-$6500</td>
</tr>
<tr>
<td>3rd</td>
<td>$6500-$16000</td>
</tr>
</tbody>
</table>

### Civil Penalties:
**Paperwork or Technical Violations***

<table>
<thead>
<tr>
<th>Offense</th>
<th>Penalty Per Alien</th>
</tr>
</thead>
<tbody>
<tr>
<td>$110</td>
<td>$1100</td>
</tr>
</tbody>
</table>

*On or after 9/29/1999*
E-Verify
The Devil’s in the Details

E-Verify Basics

- The best thing that is currently available
- Statistics still have substantial non-confirm rate for initial review
- Government data bases are not updated quickly
- Federal Contractors have been mandated to use E-Verify as the government claims it will lead by example and contracts awarded on or after September 8, 2009 are mandated to use the system and flow down the requirement
- State Laws
PROS & CONS OF E-VERIFY

First the Pros:

- Relatively easy system to use for new hires
- Free system to ensure businesses are not hiring undocumented workers
- Provides affirmative defense that the employer did not “knowingly” hire an undocumented worker
- Good PR - Clear message to the public: Company is socially responsible
- Photo Screening Tool- Assist in detecting document fraud
- Will improve as other biometrics are added

PROS & CONS OF E-VERIFY

And the Cons:

- Not a "safe harbor" from worksite enforcement
- Agree to permit DHS and SSA to visit work sites to review E-Verify records and other employment records related to E-Verify
- Opportunity & Resource Costs
  - Time: entering data, dealing with TNCs, finding replacement workers, E-Verify training
  - Cost estimates: $9k per year for any company over 500 employees, or less than 1 percent of expected revenue for small entities—much higher
- Employers are bound by the terms of the MOU
- Discrimination suits based on improper application of E-Verify and MOU standards
Responsibilities

- Unless you are a Federal Contractor, E-Verify must ONLY be used to verify NEW hires, and must be initiated after the employee accepts the position (hire date) and within 3 days of the employee’s actual start date.

- E-Verify procedures must be applied to ALL new hires, regardless of nationality or citizenship status.

- Must have a training and audit protocol in place to review E-Verify and the I-9 process together.

- Must display the E-Verify Poster in an area visible to prospective and existing employees to show that it is an E-Verify Participant (English and Spanish Versions).

- Must display the Anti-Discrimination Poster issued by the Office of Special Counsel for Immigration – Related Unfair Employment Practices, Department of Justice (DOJ) in an area visible to prospective employees (English and Spanish Versions).

Kevin Lashus  
Tel 512.320.7219 | Fax 512.320.7210  
lashusk@GTLAW.com | www.gtlaw.com

Todd L. Johnson  
Senior Special Agent DHS/ICE (Retired)  
Workplace Compliance Partners, LLC  
Tel 480.717.7217