



Criminal Background Checks: What are your Rights?
by Susannah Ashton and April Frazier

“There is a need to insure that consumer reporting agencies exercise their grave responsibilities with fairness, impartiality, and a respect for the consumer’s right to privacy.” 15 U.S.C. 1681

Over the last decade, the number of employers conducting criminal background checks has increased rapidly because of the greater accessibility of public records on the Internet and heightened security concerns after September 11. A member survey conducted by the Society for Human Resource Management in 2003 revealed that 80% of its organizations conduct criminal background checks, up from 51% response rate in a 1996 survey.¹ ChoicePoint, one of the leading consumer background companies, conducted around 3.3 million background checks in 2002 alone, which was a 30% increase in one year.² While the number of criminal background checks has grown, the number of persons being denied jobs based upon inaccurate criminal records has also risen.

The Legal Action Center (“LAC”) witnesses first-hand the devastating effects of inaccurate reporting, because clients come through our doors for assistance on a regular basis after being unfairly denied a job due to errors on their criminal record report. Employers and consumer reporting agencies who conduct criminal background checks are required to follow certain reporting standards under Fair Credit Reporting Act (“FCRA”) when conducting these searches, but oftentimes these standards are not followed. As a result, many qualified applicants and current employees are unjustly fired or denied employment. It is important that job seekers and current employees understand their rights concerning criminal background checks, and know how to report FCRA violations. This article will: (1) Discuss employer and consumer reporting agencies duties under FCRA; (2) Explain how a person can report inaccuracies on a criminal record report and misconduct by reporting agencies; and (3) Highlight additional protections in State laws.

What are Employers and Consumer Reporting Agencies Responsibilities under FCRA?

In most cases, employers hire consumer reporting agencies (“CRA”) to conduct criminal background checks. When creating the criminal history report, CRAs may obtain information from various on-line sources including the websites of courts, law enforcement agencies, and correctional agencies. CRAs assemble information from the various sources, evaluate it, and disseminate the information to the employer. There is no universal format that reporting companies must adhere to when reporting criminal record information. Additionally, state rules may impact what types of criminal records may be reported and how much information can be disseminated on the report (see section below *Additional Protections: State FCRA Laws*).

However, what is expressly prohibited under the Fair Credit Reporting Act (15 U.S.C. §1681 *et seq*): **Consumer reporting agencies are not allowed to report arrest records that are more than seven years old.** However, criminal conviction records are not subject to a time limitation for reporting. A common problem that we have identified is that many agencies also maintain databases with information that may ultimately be reused for future checks. Therefore, a job seeker should always request a copy of any report that is issued for to ensure its information is up-to-date, complete and accurate.

FCRA requires consumer reporting agency to follow strict guidelines when a criminal record report is provided to an employer. The goal is to prevent the distribution of inaccurate information by requiring consumer reporting agencies to take reasonable procedures to ensure accuracy, relevancy, and proper use of the information. When an employer uses a consumer background report in its hiring decision, it must do the following:

1. Provide a clear written notice to the job applicant that it may obtain a consumer report³.
2. Obtain written permission from the job applicant to get the report.⁴
3. If the employer intends to not hire an applicant or terminate an existing employee based on the consumer report, the employer must provide a copy of the report and a notice of his/her rights under FCRA to the job applicant or employee before the action is taken⁵. For a copy of the notice of rights issued by the Federal Trade Commission See <http://www.ftc.gov/os/statutes/2summary.htm>.
4. If the employer decides not to hire an applicant or to terminate a current employee based upon a criminal background report, the employer must notify the job applicant that an adverse decision was made as a result of the report and must provide the name, address and telephone number of the consumer reporting agency that provided the report, and inform the person that he or she has the right to dispute the accuracy or completeness of the report.⁶

What if a job applicant or worker finds there are errors on the consumer report that was used against him/her?

If you or someone you know are denied a job or terminated from employment based upon inaccurate criminal record information reported to an employer s/he should:

1. Request a copy of the report.
2. If you find inaccurate or incomplete information in the report, notify the employer and the CRA (in writing) of your intention to dispute the reported information.
3. You should also notify the agency that originally provided the information to the CRA that the information is disputed, and that agency may not furnish the information to any consumer reporting agency without stating that such information is disputed by the

consumer⁷. For example, incomplete information may have been retrieved from a court's website as part of their public information system.

4. In addition, you may request to see the information the CRA's report was based upon. The CRA must provide *all* of the information in the individual's file and the identification of all employers to whom the CRA provided the report to over the past two years⁸.
5. Once you notify the CRA of a possible inaccuracy in the report, the CRA must, free of charge, conduct a reasonable reinvestigation into the disputed information. The CRA has 30 days to conduct the reinvestigation and to report on the status of the information⁹.
6. If the reinvestigation does not resolve the dispute, you may submit a brief, 100-word statement regarding the dispute to the CRA.¹⁰

If the dispute is found to be frivolous, the CRA may terminate the reinvestigation, and must inform you that the reinvestigation is over. If the disputed information is found to be inaccurate, the CRA must promptly delete the information from the record and inform the original provider of the information (i.e. the courts, law enforcement agency, correctional agency, etc.) of the error. Once the information is determined to be inaccurate, it is prohibited from being reported in any future reports.

How do I report Misconduct by a Consumer Reporting Agency (CRAs) or Employer?

Federal Trade Commission ("FTC")

The FTC is the federal organization charged with ensuring that employers and CRAs comply with the provisions in FCRA, and handles complaints regarding violations. Claims of FCRA violations may be submitted:

1. Online at the FTC website, at [https://rn.ftc.gov/pls/dod/wsolcq\\$.startup?Z_ORG_CODE=PU01](https://rn.ftc.gov/pls/dod/wsolcq$.startup?Z_ORG_CODE=PU01);
2. By calling the FTC directly at 1-877-382-4367.
3. By mail at:

Federal Trade Commission
Consumer Response Center
600 Pennsylvania Avenue, NW
Washington, DC 20580

Please be aware that the FTC keeps records of complaints on file and waits until there are enough complaints to establish a pattern or practice of a violating employer or CRA before it takes action. The FTC will only act once a pattern of repeat violations is established. Therefore, it is important for each violation to be reported. Also, please be aware that the FTC does not represent clients on an individual basis, but works to ensure that employers and CRAs are following the FCRA law.

Civil Action

A person also has the right to file a lawsuit based upon FCRA violations. If an employee believes that an employer or CRA has violated any of the provisions of FCRA, such as inaccurate reporting or providing information to unauthorized individuals, the employee may file a claim in federal district court within their state.

In fact, there is a national class action lawsuit (Menefee v. ChoicePoint, Inc., No. 08-CV-00981 (E.D. Pa. filed Feb. 26 2008) that has been filed challenging the operations of ChoicePoint's ESTEEM database. The database contains information on alleged theft cases where a person has been identified by store security but not prosecuted or found guilty in the courts, and the retail industry contributes to and uses this database to monitor alleged retail theft by prospective employees.¹¹ Contact Nadia Hewka (nhewka@cldphils.org) of Community Legal Services of Philadelphia if you or someone you know has been harmed by the ESTEEM database.

Additional Protections: State FCRA Laws

The Fair Credit Reporting Act is a federal law that applies to all states; however, some states have further protections regarding how public record information is maintained and reported and either restrict or partially restrict the reporting of arrest/non-conviction information and/or an employer's use of such information. The states include Alaska, California, Connecticut, Georgia, Hawaii, Indiana, Kentucky, Massachusetts, Michigan, Minnesota, Nevada, New York, Pennsylvania, Rhode Island, Utah, Virginia, and Washington.¹² For example, California prohibits employers from seeking from any source information about an arrest that did not lead to conviction. In New York, consumer reporting agencies may not report information on about an arrest that did not lead to a criminal conviction, unless such charges are still pending. In addition, certain low-level offenses like disorderly conduct known as "violations" may not be reported from New York.

It is important for each person to know their rights in order to take full advantage of their statutory protections. If your state has additional laws concerning criminal background checks, contact your consumer protection department of the State's Attorney General's office to find out more information. If an employer or consumer reporting agency violates the state laws, file a complaint with the State's Attorney General's office or appropriate government agency. (*Please note: State Attorney General Offices usually handle these claims in most jurisdictions, but the information may vary from state to state.*) If the State finds violations, it may bring a lawsuit on behalf of the State resident. In addition, the person may have the right to file a lawsuit independently based upon the state law.

¹ Evren Esen, *SHRM Workplace Violence Survey*, Jan. 2004, at 19.

² SEARCH, *The National Consortium for Justice Information and Statistics, Report of the National Task Force on the Commercial Sale of Criminal Justice Record Information* (2005), available at <http://www.search.org/files/pdf/RNTFCSCJRI.pdf>.

³ See 15 U.S.C. § 1681b(b)(2)

⁴ See 15 U.S.C. § 1681b(b)(3).

⁵ See 15 U.S.C. § 1681b(b)(3).

⁶ See 15 U.S.C. § 1681m(a); *also see* Sharon M. Dietrich, *Expanded Use of Criminal Records and Its Impact on Re-Entry*, March 3, 2006, available at www.abanet.org/cecs.

⁷ See 15 U.S.C. § 1681s-2(a)(3).

⁸ See 15 U.S.C. § 1681g(a).

⁹ See 15 U.S.C. § 1681i(a)(1).

¹⁰ 15 U.S.C. § 1681i(b).

¹¹ <http://www.esteemnet.com/>.

¹² The list of states was compiled by the National Association of Professional Background Screeners for their membership of approximately 500 Consumer Reporting Agencies.