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Finding Red Flags Without Raising Any Employee Background Checks Under The Fair Credit Reporting Act

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Checking Up Without Messing Up

- Every day you evaluate new applicants for open jobs or current employees for promotion, reassignment or retention
- You have a great policy in HR
 - Obtain a Consumer Report
- But under the Fair Credit Reporting Act (FCRA) you may make the applicant/employee a plaintiff against your company before you even decide to hire, promote, reassign, or retain him/her

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Flood of FCRA Class Action Lawsuits



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What Is the FCRA

- Regulates the collection, dissemination, and use of consumer information
- Primary federal law regulating employment background checks
- Applies to all employment background checks conducted by a third party whether they include a credit report or not
- 15 U.S.C. § 1681, *et seq.*



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Important Note:

- Complying with the FCRA does NOT mean complying with all laws applicable to background checks
- The FCRA regulates the procedure for obtaining a background check
 - The “how” to request a background check
- Other laws (not the topic of today’s presentation) regulate:
 - At what point in the application process you may request a background check
 - What information you may request in a background check
 - What information in a background check may form the basis of adverse employment actions

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Definitions

- Consumer Report
 - Any written, oral, or other communication of any information by a consumer reporting agency bearing on an individual’s:
 - Credit worthiness/standing/capacity,
 - Character,
 - General reputation,
 - Personal characteristics, or
 - Mode of living
 - Which is used or expected to be used for a permissible purpose
 - “Employment purposes” are permissible
 - Evaluating an individual for employment, promotion, reassignment, or retention as an employee

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HUSCH BLACKWELL**Examples of Consumer Reports**

- Employment records
- Military records
- Educational records
- Professional licenses
- Professional affiliations
- Criminal records
- Driving records
- Civil case records
- Workers' compensation records
- Bankruptcy filings
- Credit history
- Medical information
- Bank information
- Insurance information

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HUSCH BLACKWELL**Definitions (Continued)**

- Investigative Consumer Report
 - A consumer report in which information about an individual's character, general reputation, personal characteristics, or mode of living is obtained through personal interviews with neighbors, friends, associates, or others with whom the individual is acquainted

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HUSCH BLACKWELL**Definitions (Continued)**

- **Consumer Reporting Agency**
 - Entity that, for monetary fees or on a cooperative nonprofit basis, regularly engages in the practice of assembling or evaluating information on individuals for the purpose of furnishing consumer reports to third parties
- **Adverse Action (for employment purposes)**
 - Not hiring
 - Not promoting
 - Terminating
 - Demoting

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HUSCH BLACKWELL**Requirements for Employers:
Three Stages**

1. **Before Obtaining a Consumer Report**
15 U.S.C. § 1681b
2. **Before Taking an Adverse Action**
15 U.S.C. § 1681b
3. **After Taking an Adverse Action**
15 U.S.C. § 1681m

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1. Before Obtaining a Consumer Report: Four Parts

- A. Clear and Conspicuous Written Disclosure
- B. Written Authorization
- C. Compliance Certification
- D. “A Summary of Your Rights Under the Fair Credit Reporting Act”
 - <https://www.consumer.ftc.gov/articles/pdf-0096-fair-credit-reporting-act.pdf>
 - Application by mail, telephone, computer, or other similar means
 - Investigative Consumer Reports

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Part A: Clear and Conspicuous Written Disclosure

- Informs the employee/applicant that a consumer report may be obtained for employment purposes
- Must be in a document that consists “solely” of the disclosure
 - Note: Do not think about conserving paper by including multiple key points all in one document
 - **One exception**: the document may include the written authorization

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DISCLOSURE & AUTHORIZATION: THIS NOTICE MUST BE SENT TO THE EMPLOYEE/APPLICANT BEFORE THE EMPLOYER OBTAINS A BACKGROUND CHECK

[LETTERHEAD]

AUTHORIZATION FOR BACKGROUND INVESTIGATION

I understand that [Employer] may obtain or have prepared a consumer report for employment purposes, concerning my prior employment, military record, education, professional licenses, professional affiliations, credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, criminal background, and/or mode of living.

By signing below, I am authorizing [Employer] to obtain a consumer report on me as part of [Employer]'s background screening process. I further authorize [Employer] to obtain additional consumer reports on me for employment purposes at later dates during my employment.

By my signature below, I also acknowledge that [Employer] has provided me with a summary of my rights under the Fair Credit Reporting Act.

SIGNATURE:	DATE:
PRINTED NAME:	D/O/B:
SS#:	

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Part A: Clear and Conspicuous Written Disclosure (Continued)

- Certain states have additional requirements:
 - California
 - Minnesota
 - New York
 - Oklahoma
 - Washington

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Part A: Clear and Conspicuous Written Disclosure (Continued)

- Additional requirements for **Investigative Consumer Reports**
 - 15 U.S.C. § 1681d
 - Written disclosure to the employee/applicant (delivered no later than 3 days after requesting the report) that informs him/her:
 - That an investigative consumer report including information as to his/her character, general reputation, personal characteristics and mode of living (whichever are applicable) may be made
 - That s/he has the right to request disclosure of the nature and scope of the investigation

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DISCLOSURE & AUTHORIZATION: THIS NOTICE MUST BE SENT TO THE EMPLOYEE/APPLICANT BEFORE THE EMPLOYER OBTAINS A BACKGROUND CHECK

COMPREHENSIVE VERSION: INCLUDES INVESTIGATIVE CONSUMER REPORT DISCLOSURES

[LETTERHEAD]

AUTHORIZATION FOR BACKGROUND INVESTIGATION

I understand that [Employer] may obtain or have prepared a consumer or investigative consumer report for employment purposes, concerning my credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, criminal background, and/or mode of living.

The types of information that may be obtained include, but are not limited to: credit reports, social security number verification, criminal records checks, public court records checks, driving records checks, educational records checks, employment verification, personal and professional references checks, licensing and certification checks, etc. The information contained in the reports may be obtained from private and/or public record sources, including sources identified by me in my job application or through interviews or correspondence with my past or present coworkers, neighbors, friends, associates, current or former employers, educational institutions, or other acquaintances.

I understand that I have the right to request more information about the nature and scope of any investigative consumer report by submitting a request to [Contact at Employer].

By signing below, I am authorizing [Employer] to obtain a consumer or investigative consumer report on me as part of the [Employer]'s background screening process. I further authorize [Employer] to obtain additional consumer or investigative consumer reports on me for employment purposes at a later date during my employment.

By my signature below, I also acknowledge that [Employer] has provided me with a summary of my rights under the Fair Credit Reporting Act.

SIGNATURE:	DATE:
PRINTED NAME:	D/O/B:
SS#:	

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HUSCH BLACKWELL**Part B: Written Authorization**

- Electronic authorization
 - Zalenski, FTC Informal Staff Opinion Letter (May 24, 2001)
 - *Miller v. Quest Diagnostics*, No. 2:14-cv-04278-SRB, 2015 WL 545506 (W.D. Mo. Jan. 28, 2015)
- Authorization for consumer reports throughout the person's employment

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HUSCH BLACKWELL**Part C: Compliance Certification**

- Certify to the consumer reporting agency that:
 - The company notified the individual and received his/her permission to obtain a consumer report
 - The company complied with all of the FCRA requirements
 - The company will not discriminate against the individual or otherwise misuse the information, as provided by any applicable federal or state equal opportunity laws or regulations

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Part C: Compliance Certification (Continued)

- Additional requirements for Investigative Consumer Reports

15 U.S.C. § 1681d

- Certify to the consumer reporting agency that:
 - The company has made the additional disclosures required for investigative consumer reports (see slide 15)
 - The company will comply with providing the employee/applicant with written disclosure of the nature and scope of the investigation (if requested) within 5 days of the request

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Written Disclosure Issues

- Employment Applications
- Release of liability language
 - Inclusion violates FCRA
 - *Singleton v. Domino's Pizza, LLC*, No. CIV. A. DKC 11-1823, 2012 WL 245965 (D. Md. Jan. 25, 2012)
 - *Reardon v. ClosetMaid Corp.*, No. 2:08-cv-01730, 2013 WL 6231606 (W.D. Pa. Dec. 2, 2013)
 - Inclusion does not violate FCRA
 - *Smith v. Waverly Partners, LLC*, No. 3:10-CV-00028-RLV-DSC, 2012 WL 3645324 (W.D.N.C. Aug. 23, 2012)
 - *Burghy v. Dayton Racquet Club, Inc.*, 695 F. Supp. 2d 689 (S.D. Ohio 2010)

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- FTC's website: "minor additional information"
 - "Confuse" or "detract from" standard
- Examples
 - Home Depot USA, Inc.
 - Publix Super Markets, Inc.

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HUSCH BLACKWELL**2. Before Taking an Adverse Action**

- Before taking adverse action based in whole or in part on the consumer report, you must provide the individual with:
 - A. Notice of preliminary decision to take adverse action
 - B. A copy of the report
 - C. *"A Summary of Your Rights Under the Fair Credit Reporting Act"*
- Examples:
 - Amazon.com, Inc.
 - Dollar General Corporation

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PRE-ADVERSE ACTION DISCLOSURE: THIS NOTICE MUST BE SENT TO THE APPLICANT BEFORE S/HE IS FORMALLY REJECTED BASED IN PART ON A BACKGROUND CHECK

[LETTERHEAD]

[Date]

[Applicant's Name]
[Applicant's Address]

RE: Your Application For Employment With [Employer]

Dear [Applicant's Name]:

You previously authorized [Employer] to conduct a background check for employment purposes regarding your history. Enclosed is a copy of your report that [Employer] recently obtained from [Name of Credit Reporting Agency]. Also enclosed is a copy of "A Summary of Your Rights Under the Fair Credit Reporting Act" – a document setting forth your rights with respect to the report being provided to you. [Employer] has made a preliminary decision [to take adverse action] based on the results of your report.

Should you want to dispute or explain any of the information on the enclosed report, please contact [Employer], as well as [Name of Credit Reporting Agency] as soon as possible.

[Employer] will notify you shortly regarding its final decision on your application for employment.

Sincerely,

[Name]
[Title]

Enclosures: Consumer Report
Summary of Your Rights Under the Fair Credit Reporting Act

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2. Before Taking an Adverse Action (Continued)

- Certain states have additional requirements:
 - California
 - Massachusetts
 - New Jersey
 - New York
 - Washington

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Timing Issues

- Purpose: allow the consumer to dispute any information
- “Reasonable period” not defined by FCRA
- 5 business days
 - H.R. Rep. 103-486 at 40 (1994)
 - *Reardon*, 2013 WL 6231606, at *12
- Be smart about the amount of time you give applicants/employees

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3. After Taking an Adverse Action

- Within 3 days of taking adverse action based in whole or in part on the consumer report, you must provide the individual with:
 - A. Notice that an adverse action has been taken based in whole or in part on a consumer report
 - B. The name, address, and telephone number of the agency that provided the report
 - C. A statement that the agency did not make the adverse decision and is not able to explain why the decision was made
 - D. A statement of the individual's right to request from the consumer reporting agency, at no charge, the information in the individual's file if the individual requests the report within 60 days
 - E. A statement of the individual's right to dispute directly with the agency the accuracy or completeness of any information provided by the agency

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ADVERSE ACTION NOTICE. THIS NOTICE MUST BE SENT TO THE APPLICANT WHEN S/HE IS FORMALLY REJECTED BASED IN PART ON A BACKGROUND CHECK, BUT AFTER THE APPLICANT HAS RECEIVED HIS/HER PRE-ADVERSE ACTION DISCLOSURE LETTER

[LETTERHEAD]

[Date]

[Applicant's Name]
[Applicant's Address]

RE: Your Application For Employment With [Employer]

Dear [Applicant's Name]:

We wish to advise you that we cannot give you any further consideration for employment [or promotion, or transfer] with [Employer]. This decision was influenced by information contained in a report, made at our request by:

[Consumer Reporting Agency]
[Address]
[Telephone]

You have the right to obtain a free disclosure of your file from the consumer reporting agency if you make a request to the agency in writing within 60 days. (Provide your name, Social Security number, date of birth & mailing address).

You have the right to dispute directly with the consumer reporting agency the accuracy or completeness of any information provided by the consumer reporting agency.

The consumer reporting agency did not make the adverse employment decision and is not able to explain why the decision was made.

[Employer] appreciates your interest in this position and wishes you the best of luck in your future endeavors.

Sincerely,

[Name]
[Title]

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3. After Taking an Adverse Action (Continued)

- Example: Swift Transportation
- Certain states have additional requirements:
 - California
 - New York

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Disposal Requirements

- Must properly dispose of consumer reports by taking reasonable measure to protect against unauthorized access
 - Burning, pulverizing, or shredding papers
 - Destroying or erasing electronic media
- Purpose: prevent information from being read or reconstructed
- 16 C.F.R. § 682

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Exceptions to FCRA's Requirements

- Employers who hire an outside party to investigate workplace misconduct or compliance with laws/regulations
 - In such instances, employers need only provide the individual with a summary of the nature and substance of the communication upon which the adverse action is based
 - The source of the information need not be disclosed
 - Employers are not required to provide this summary unless and until they take an adverse employment action based on the information from the investigator

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HUSCH BLACKWELL**Exceptions to FCRA's Requirements
(Continued)**

- Certain employers in the transportation industry regulated by the Department of Transportation
 - Oral consent to obtain a consumer report in lieu of written authorization
 - If the driver does not apply in person
- Certain federal government agencies involved in national security investigations
 - No need to provide the individual with a copy of the report or a description of his/her rights before taking an adverse action

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HUSCH BLACKWELL**Consequences of Negligent Violations**

- The employer is liable to the individual for:
 - Any actual damages sustained by the individual; and
 - In the case of any successful action to enforce liability, the costs of the action and reasonable attorney's fees

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Consequences of Willful Violations

- The employer is liable to the individual for:
 - Any actual damages sustained by the individual **or** damages between \$100 and \$1,000;
 - Punitive damages; and
 - In the case of any successful action to enforce liability, the costs of the action and reasonable attorney's fees

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Proving “Willful”

- Knowing or reckless disregard of statutory duty
Safeco Ins. Co. of Am. v. Burr, 551 U.S. 47 (2007)
 - Objectively unreasonable belief

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Consequences of Obtaining Report Under False Pretenses or Knowingly Without a Permissible Purpose

- The company is liable:
 - To the individual for actual damages sustained by the individual **or** \$1,000, whichever is greater; and
 - To the consumer reporting agency for actual damages sustained by the consumer reporting agency **or** \$1,000, whichever is greater

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Most Popular Claims Against Employers

1. Before obtaining a consumer report: The written disclosure was not in a document that consisted “solely” of the disclosure
2. Before taking an adverse action: The employer failed to provide any pre-adverse action notice **or** provided the notice but did not wait an appropriate amount of time before taking final adverse action

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Reasons for the Increase in Lawsuits

- Lure of statutory damages
 - No cap
 - No requirement that consumers be harmed
- Widespread publication of multi-million dollar settlements
- Pro-plaintiff outcomes in some federal courts
- Greater familiarity with the law

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Conclusion & Questions

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