

The proceeding is not legal advice, either expressed or implied and is provided for educational purposes only. We recommend you seek the advice of your corporate legal counsel for all aspects of employment law.

Compliance and Client Education: Employer Responsibilities under FCRA

A federal law called the Fair Credit Reporting Act (FCRA), governs background reports obtained from Consumer Reporting Agencies. This law sets out various requirements and rules for pre-employment background reports, called Consumer Reports. This law was substantially amended on September 30, 1997, to provide greater privacy protection to consumers, and to ensure that the information provided was accurate and complete. A Consumer Report is much broader in scope than just a credit report. It affects a wide variety of information obtained concerning applicants. A Consumer Report may include criminal and civil records, driving records, civil lawsuits, education, employment and professional license verification, reference checks and any other information obtained by a Consumer Reporting Agency. By following the FCRA, an applicant's privacy rights are protected. See below for the steps to follow to comply with the FCRA.

When engaging the services of a Consumer Reporting Agency, the employer must follow the Fair Credit Reporting Act (FCRA), and all other applicable state and federal laws. Failure to do so can result in substantial legal exposures, including fines, damages, punitive damages and attorney's fees. Orange Tree recommends that our clients seek the advice of their own legal counsel regarding specific legal responsibilities, to create a screening program specific to their needs, and to assure that our client's policies and procedures related to the use of consumer reports are in compliance with federal and state laws. Orange Tree cannot act as legal counsel to our clients, and cannot provide legal advice.

How to ensure compliance with the FCRA

STEP ONE: An Employer must certify to Orange Tree that it will follow the FCRA (FCRA Section 604)

Prior to supplying a Consumer Report, an employer must certify to Orange Tree - a Consumer Reporting Agency (CRA) - that the employer will follow all the steps set forth in the Fair Credit Reporting Act. These include:

- That the employer will use the information for permissible purposes only.
- That the employer will not use the information in violation of any federal or state equal opportunity law.
- That the employer will obtain all the necessary disclosures and consents as discussed below.
- That the employer will give the appropriate notices in the event that an adverse action is taken against an applicant based in whole or in part on the contents of the Consumer Report.
- That if a special type of consumer report is requested, called an Investigative Consumer Report, the employer will give the additional information required by law.

These requirements are explained further in a document prepared by the Federal Trade Commission entitled, "Notice to Users of Consumer Report." The FCRA requires a Consumer Reporting Agency to provide a copy of that document to every employer who requests a report. This document is provided

to all Orange Tree clients as an attachment to the Subscriber User Agreement document. You can also access the notice here: <http://www.ftc.gov/os/2004/11/041119factaapph.pdf>

STEP TWO: An Employer must obtain a written Release from the applicant and make appropriate Disclosures to the applicant before obtaining a Consumer Report (FCRA Sections 604 and 606)

Before obtaining a Consumer Report from Orange Tree, the employer must obtain an Authorization and Disclosure document:

- There must be a clear and conspicuous disclosure that a report may be requested. This must be provided in a "separate document" from the employment application. The purpose is to prevent the disclosure being buried in an employment application.
- The employer must obtain written consent from the applicant.

The Federal Trade Commission (FTC) clarified that the release and disclosure can be on the same document, as long as the language does not distract from a clear and conspicuous disclosure that a report is being requested.

A special procedure is necessary where the Consumer Reporting Agency is not merely verifying factual matters, such as the dates of employment or salary. Where the Consumer Reporting Agency is asking for information such as job performance, it falls into a special category of consumer report called an "Investigative Consumer Report." When an Investigative Consumer Report is requested, the employer must:

- Disclose to the applicant that an investigative consumer report is being requested, along with a certain specified language. Unless it is contained in the initial Disclosure, the consumer must receive this additional disclosure within three days after the request is made.
- The Disclosure must tell the applicant that they have a right to request additional information about the nature of the investigation.
- If the applicant makes a written request, then the employer has five days to respond with additional information and must provide a copy of a document prepared by the Federal Trade Commission called, "A Summary of Your Rights Under the Fair Credit Reporting Act".

The Orange Tree Sample Authorization and Disclosure document includes the language required for an Investigative Consumer Report, so no additional after-the-fact disclosure is required if the sample document is used by the employer. The employer does still have the additional responsibility to provide the additional information and "A Summary of Your Rights Under the Fair Credit Reporting Act" document if the applicant makes a specific written request.

STEP THREE: If adverse action is intended as a result of a Consumer Report, the employer must follow a pre-adverse action process, and the applicant is entitled to certain documents (FCRA Section 604)

When an employer receives a Consumer Report, and intends not to hire (or retain, or promote) the applicant (or employee) based upon the report in any way, then the applicant has certain rights. Before taking the adverse action, the employer must provide the following information to the applicant:

- Written notice to the applicant that you intend to make a negative hiring decision (see sample below)
- A copy of the consumer report
- The FTC document "A Summary of Your Rights Under the Fair Credit Reporting Act."

Here is a sample letter:

Dear applicant:

You recently applied for a position at <Company Name>. Part of the application process includes authorization for a background verification to be done by a consumer reporting agency.

This communication is to notify you that a decision is currently pending concerning your application for employment with <Company Name>. <Company Name> is considering making an adverse employment decision based on our hiring criteria, including information received in your background profile report from Orange Tree Employment Screening.

A copy of your report is enclosed, as well as a copy of your rights under the Fair Credit Reporting Act.

If there is any information that is inaccurate or incomplete, you should contact Orange Tree Employment Screening as soon as possible so an employment decision may be completed. This should be done in writing. Forms to help expedite this process can be found at <http://www.orangetreescreening.com/otes-reinvestigation.pdf>. If you do not have internet access they can be reached at:

Orange Tree Employment Screening

Attn: Applicant Assistance Team

7275 Ohms Lane

Minneapolis, MN 55439

Phone: 1-800-886-4777

Fax: 1-800-886-0774

Sincerely,

<Company Name>

The purpose is to give an applicant the opportunity to see the report that is being used to make the hiring decision. If the report is inaccurate or incomplete, the applicant then has the opportunity to contact the Consumer Reporting Agency to dispute the contents of the report. Otherwise, applicants may be denied employment without ever knowing they were the victims of inaccurate or incomplete data.

As a practical matter, by the time an applicant is the subject of a Consumer Report, an employer has spent time, money and effort in recruiting, and hiring. Therefore, it is in the employer's best interest to give an applicant an opportunity to explain any adverse information before denying a job offer. If there was an error in the public record, giving an applicant the opportunity to explain or correct it could be to the employer's advantage.

Even if there were other reasons for not hiring an applicant, outside of the negative information discovered in the Consumer Report, the applicant's rights still apply. If the intended decision was based in whole or part on the Consumer Report, the applicant has a right to receive the report. In a situation where the employer feels that they would make an adverse decision anyway, regardless of the report, the employer may still want to follow this procedure for maximum legal protection.

The question that arises is how long an employer must wait before denying employment based upon information contained in a Consumer Report. The Fair Credit Reporting Act is silent on this point. However, the FTC published an opinion that a reasonable period would not be less than 5 business days. The period should be the time that would be needed for an applicant to meaningfully review the report and make known to the employer or the Consumer Reporting Agency any inaccurate or incomplete information in the Consumer Report.

STEP FOUR: Notice must be given to an applicant after adverse action is taken (FCRA sec. 615)

If, after sending out the documents required in Step 3, the employer intends to make the decision final, the employer must take one more step. After a reasonable period of time (generally considered to be not less than 5 business days – see step 3 above), the employer must send the applicant a Notice of Adverse Action informing the applicant that the employer has made a final decision, along with another copy of the FTC form "Summary of Your Rights under the Fair Credit Reporting Act."

The Notice of Adverse Action must contain certain information. The following is a sample letter that contains the necessary statements:

Dear Applicant:

This letter is to notify you that <Company Name> is unable to consider you further for an employment opportunity with our organization. This decision was made in part based on our hiring criteria, which includes information received in a consumer report from an employment screening firm, Orange Tree Employment Screening. Orange Tree Employment Screening did not make the adverse decision and cannot provide you with the reasons for the decision.

In accordance with the Fair Credit Reporting Act, you have previously received a copy of this information and a copy of your rights under this act. You may obtain an additional free copy of this consumer report provided by the Consumer Reporting Agency upon request. You have the right to dispute the accuracy or completeness of any information provided by the Consumer Reporting Agency. Forms to expedite this process can be found at <http://www.orangetreescreening.com/otes-reinvestigation.pdf>. Written requests for an additional copy of your report must be made to:

*Orange Tree Employment Screening, Attn: Applicant Assistance Team
7275 Ohms Lane
Minneapolis, MN 55439
Phone: 1-800-886-4777, Fax: 1-800-886-0774*

*Sincerely,
<Company Name>*

Many employers find it difficult to believe that Congress intended that an applicant be notified twice, both before an adverse action and after. However, the law clearly requires two notices. This is also the interpretation of the Federal Trade Commission Staff. The purpose is to give job applicants the maximum opportunity to correct any incomplete or inaccurate reports that could affect their chances of employment.

Reporting Limitations

The Fair Credit Reporting Act (as well as state law) limits the information that Orange Tree may report to an employer. Section 605 of the FCRA prohibits Orange Tree from reporting the following:

- Bankruptcy cases that antedate the report by more than 10 years,
- Paid tax liens that antedate the report by more than seven years,
- Accounts placed for collection or charged off that antedate the report by more than seven years,
- Civil suits, civil judgments, and records of arrest that antedate the report by more than seven years,
- Any other adverse information, other than records of conviction, which antedate the report by more than seven years,
- Any arrest record older than seven years.

Orange Tree will operate within the reporting limitations imposed by the federal Fair Credit Reporting Act, except in those cases where there is applicable state law that is more limiting than the federal law or where the state law imposes an additional special requirement. In general, Orange Tree will report criminal convictions, open/active/pending records and criminal records with alternative adjudication dispositions (as allowed by state law), and will not report records that are not criminal records (i.e. petty misdemeanors, ordinances, infractions and summary offenses) or cases that have a disposition of dismissed, expunged, reversed, vacated or pardoned. If an employer wishes to not receive information that may otherwise be reported (like pending cases, alternative adjudications, etc.) those requirements can be defined by the employer during the implementation process.

A summary of the states with their limitations and special criminal case reporting requirement is provided below:

| State | Exception |
|------------|---|
| Arkansas | Orange Tree will not report pending felony cases more than 3 years old or pending misdemeanor cases regardless of age. |
| California | Orange Tree will not report convictions where the date of disposition, release or parole antedates the report by more than 7 years. Orange Tree will not report pending cases where the date of disposition antedates the report by more than 7 years. Orange Tree will not report a sexual offender registry record (note that where |

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| | allowed, Orange Tree will report any underlying case associated with a registry record as a criminal record). |
| Georgia | Orange Tree will not report records related to first offenders (except as allowed by statute). |
| Illinois | Orange Tree will not report pending cases including cases where judgment is deferred during supervision. |
| Massachusetts | For records received from the Massachusetts Criminal Offender Record Information repository, Orange Tree will not report felony records older than 10 years or misdemeanor records older than 5 years. |
| Nevada | Orange Tree will not report convictions more than 7 years old. Orange Tree will not report a sexual offender registry record (note that where allowed, Orange Tree will report any underlying case associated with a registry record as a criminal record). |
| New Mexico | Orange Tree will not report convictions where the date of release or parole antedates the report by more than 7 years. |

The states of Kansas, Maryland, Massachusetts, New Hampshire and Washington have exceptions to federal reporting limitations where the information will be used for an employment decision involving an annual salary of less than \$20,000. Orange Tree will assume that all consumers will meet this threshold and thus apply the federal reporting limitations in all cases.

A summary of the states with their limitations and special Bankruptcy and Civil case reporting requirement is provided below:

| State | Exception |
|------------|---|
| California | Orange Tree will not report bankruptcies where the date of order of relief antedates the report by more than 10 years. Orange Tree will not report Suits and Judgments, Paid Tax Liens, and Accounts placed for collection or charged for profit and loss where the date of filing, satisfied judgment or date of entry antedates the report by more than 7 years. |
| Illinois | Orange Tree will not report bankruptcies cases older than 10 years. |
| Nevada | Orange Tree will not report bankruptcies where the date of adjudication antedates the report by more than 10 years. |
| New Mexico | Orange Tree will not report suits, judgments, accounts for collection or paid tax liens which antedate the report by more than 7 years. Orange Tree will not report bankruptcies which antedate a report by 14 years. |

Staying Informed

Orange Tree is committed to helping our clients assure “Best Practice” processes regarding the Fair Credit Reporting Act, the Fair and Accurate Credit Transaction Act, and state analogues, the E-Sign Act, the Driver Privacy Protection Act and the Americans with Disabilities Act. We use several methods to stay abreast of compliance requirements, including:

- Subscription to all 50 state compliance guides through the National Association of Professional Background screeners (NAPBS);
- Subscriptions to numerous industry and legal periodicals including *National Association of Professional Background Screeners*, *Security Management Magazine*, *Workforce Management*, *HR Magazine*, *MN Employment Law Letter* and the *National Law Journal*;
- Membership in industry organizations at the national and local level including the Society for Human Resource Management and the National Association of Professional Background Screeners;
- An annual state by state examination of laws pertaining to background screening;
- Outside Counsel is retained by Orange Tree for further review and follow-up on specific issues pertaining to employment law;
- Active members of the Substance Abuse Program Administrators Association (SAPPA) and the Drug and Alcohol Testing Industry Association (DATIA);
- Orange Tree’s Vice President is a sitting Board Member of SAPAA;
- Member of the Center for Drug Test Information (CDTI) a state-by-state repository for drug testing laws and regulations

The Orange Tree Screening Compliance Committee meets twice monthly to review open questions regarding compliance and best practices, as well as to provide direction and feed back to Orange Tree compliance personnel. Compliance personnel are responsible for keeping clients abreast of the latest rules and regulations regarding compliance, and protecting clients from unnecessary exposure to litigation. Compliance personnel monitor state and federal compliance issues, and inform clients of changes by:

- Mass email notification
- Orange Tree’s bi-monthly e-newsletter
- Orange Trees online Compliance Notes page
- The assigned Customer Care Consultant may contact clients directly when client-specific laws change