



The Ultimate Guide To **BACKGROUND CHECK COMPLIANCE**

New ban-the-box rules taking effect all over the country complicate FCRA compliance. And with stepped-up EEOC enforcement, you must tread carefully when considering candidates with criminal records. This step-by-step guide helps you stay on the right side of all these laws.

If recent class action lawsuits and EEOC actions have you scrambling to review your hiring practices, you're not alone. Even seasoned HR pros have questions about how to play by background check and fair hiring rules.

Focusing on just a few key areas can go a long way toward keeping your compliance house in order, according to Elizabeth McLean, FCRA Compliance Analyst and Attorney for GoodHire. These hot areas provide the highest return on your compliance investment.

Like most HR professionals, you probably look into job candidates' backgrounds before hiring them. When you use a vendor to run a background check, you have to follow federal, state, and even local laws that regulate employment screening.

The Fair Credit Reporting Act (FCRA) is a federal law that sets out requirements for employment screeners like GoodHire, which the law calls consumer reporting agencies (CRAs). The FCRA also sets rules that the employers who use the reports must follow.

Note that the FCRA only applies when an employer uses a third-party screener to perform a background check. If you send your own employees to the county court house or have them investigate applicants through online court databases, then the FCRA does not apply.

In the past few years, even huge companies have been hit over and over again with class action lawsuits that allege FCRA violations. The danger of an FCRA violation lies in the availability of statutory damages. For each violation, an employer can be forced to pay up to \$1,000.

Imagine you're a large company with an online application. You have thousands of applicants a year, and provide an electronic background check consent form to each. If that form isn't compliant, you can be looking at a payout of \$1,000 per applicant, plus attorney's fees. This causes a lot of big-name employers to settle these lawsuits.

And that creates a vicious cycle. Plaintiffs' attorneys know that employers are more likely to settle when a class action lawsuit provides for statutory damages, so they file more lawsuits.

How can you make sure you don't join the list of businesses hit with an FCRA lawsuit? Most lawsuits arise from two go-to violations:

1. Failure to provide a compliant background check disclosure and authorization form, which is a fancy way of saying a consent form.
2. Failure to follow the three-step adverse action process the FCRA requires anytime an employer intends to take unfavorable action (like deciding not to hire or promote) based on the results of a background check.



Elizabeth McLean

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NOTE

This guide offers suggestions and information, but don't use it as legal advice. Always consult your own counsel if you have legal questions related to your specific practices and compliance with applicable laws.

1

Non-Compliant Disclosure

The FCRA states that an employer can't obtain a background report unless a clear and conspicuous disclosure has been made in writing to the consumer in a document that consists solely of the disclosure.

What does this mean?

It means you have to inform your applicants in writing that a background check will be run for employment purposes. And you have to do that in a very clear way:

- You shouldn't provide this disclosure within a job application
- You shouldn't provide it in small font
- You shouldn't sandwich it between information related to the duties of the job

The disclosure **MUST** be provided in a document that contains only information about the background check. You can obtain authorization, or a signature, on this same page, but you shouldn't include any information that's unrelated to the background check.

Many lawsuits filed against employers allege that the disclosure wasn't clear and conspicuous and wasn't provided in a stand-alone document due to the presence of "extraneous language."

For example, Nine West was sued because its consent form contained information related to work hours and at-will employment. Many companies are also sued because of the presence of a single release of liability clause. It seems silly that a class of applicants could be awarded statutory damages for these things. But these "hypertechnical" violations of the FCRA are real threats.

Disclosure Compliance

Take a moment to review your background check consent forms. Make sure:

- Your consent forms aren't sandwiched in the middle of an application package**
- The disclosure doesn't contain a release of liability or any information unrelated to the background check itself**
- No state law disclosure is listed on the consent form – put it in a separate document**

Several states require specific notices be provided to applicants before running a background check. Until recently, most employers and CRAs included these state law notices in the same document as the disclosure and authorization. And it made sense. The rights were related to the background check, so you'd think that they couldn't be considered "extraneous."

But, in 2019, the 9th Circuit Court of Appeals settled this question in *Gilberg vs California Check Cashing Stores*, ruling that California Check Cashing Stores violated the FCRA by including state-specific disclosure notices in the same document as the FCRA disclosure form.

2

Adverse Action Violations

The second most popular FCRA claim alleges a violation of the adverse action process. If an employer has obtained a background check from a CRA and intends to take unfavorable action against an applicant based on that check, it **MUST** follow what's called the "adverse action process."

Most of the time, lawsuits that allege adverse action violations are based on the employer's failure to send the pre-adverse notice or to wait five days in between the first and last notice.

The good news is that this process is simple and easy to follow. As a best practice, keep a record of all pre-adverse and post-adverse action notices sent along with the dates sent. If you're handling the process yourself and you haven't contracted with your CRA to send the notices on your behalf, you may want to consider sending these notices by certified mail, or electronically by email.

Adverse Action Compliance

- ✔ **Send out a pre-adverse action notice.**
This is just a letter that informs the applicant that the background check is under review and a decision is pending. You have to provide a copy of the background report and what's called "a Summary of Rights" along with the notice. The Summary of Rights is a document provided by the Consumer Financial Protection Bureau, and you can find it on their website.
- ✔ **Wait five business days.**
After providing the pre-adverse notice, you must provide time for the candidate to respond (to dispute the information, for example). Five business days is usually considered adequate.
- ✔ **Send the final adverse action notice.**
After waiting five days, if you still want to reject the applicant, you must send the final adverse action notice. This notice must:
 - Inform the applicant of the adverse action (denial of employment)
 - Notify the applicant that the decision was based, at least in part, on the background check
 - Contain the contact information for the CRA that performed the background check and a statement that the CRA was not the decision maker
 - Inform the applicant of his or her right to request a free copy of the report within 60 days and of the right to dispute inaccurate information

If you leave out any of these requirements in the final notice, you're in violation of the statute. So review these notices and audit them annually to make sure they comply with what the law currently requires.



Other Risks To Watch

A special exception to the FCRA lets an employer run a post-hire background check on an employee *without* obtaining consent. This can only be done if the report is run as part of an investigation into employee misconduct. It's not an exception that's widely used.

Many employers require **drug screening** as part of the hiring process. Keep in mind that drug tests can only be performed *after* a conditional offer is made to a candidate.

New Laws Restrict Credit Check Use

Credit reports are consumer reports, just like background checks. Federal regulations on using credit reports and criminal background checks in the hiring process are the same: the FCRA applies.

This means you must get compliant disclosure and authorization just as you would for a background check and you must follow the adverse action process if you take unfavorable action against a candidate based on information in a credit report.

But credit reports are recently creating more compliance challenges for employers because states are passing their own laws that regulate the use of credit checks for employment purposes. Like most employment screening laws, these state-level credit reporting restrictions vary by location.

The common theme in the states that have enacted credit report restrictions is that the use of credit history is PROHIBITED unless the employer or employee falls into a special category. These categories are usually those in which an applicant would:

- Handle large amounts of money
- Work in a managerial capacity
- Have access to trade secrets
- Work in a field (such as financial services) in which regulations require credit reports

Research your state's laws and make sure you're familiar with any credit report restrictions.

Don't forget to check for city regulations. New York City, for example, has a very stringent law. The Stop Credit Discrimination in Employment Act (SCDEA) prohibits most employers from running credit reports on their applicants. An employer found in violation of that credit restriction can be fined up to \$250,000.

Other locations provide for civil penalties, injunctive relief, and even "private right of action," which means you can be sued in court for damages.

Consult your counsel if you have questions about state and local regulations that apply.



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Increased Enforcement Of Title VII

The Equal Employment Opportunity Commission (EEOC) has taken action against companies in some very high profile cases lately.

Since 2012, the Commission has been focused on increasing its enforcement efforts against employers for violations of Title VII of the Civil Rights Act of 1964. This statute prohibits employer discrimination based on race, color, religion, sex, or national origin. There are two types of discrimination in Title VII claims:

- **Disparate treatment**, in which an employer intentionally discriminates against a protected group
- **Disparate impact discrimination**, in which an employer's actions result in unintended discrimination against a protected group

When it comes to background screening, the EEOC has alleged disparate impact discrimination against employers whose screening policies result in disproportionate adverse treatment toward a protected group, usually a racial minority.

In fact, the EEOC's 2012 enforcement guidance specifically states: "With respect to criminal records, there is Title VII disparate impact liability where the evidence shows that a covered employer's criminal record screening policy or practice disproportionately screens out a protected group and the employer does not demonstrate that the policy or

practice is job related for the position and is consistent with business necessity."

Two recent high-profile cases resulted in very different outcomes:

EEOC v. Freeman

The Commission alleged that the use of background checks and credit checks led to disparate impact discrimination for which there was no business necessity. The 4th Circuit Court of Appeals threw out the case and chastised the Commission for lack of evidence and sweeping claims.

This caused many people to believe the EEOC would lighten up on background screening discrimination cases. But that's not what happened.

EEOC v. BMW

In September of 2015, the EEOC won a huge victory against BMW. The Commission alleged the company's background screening policy resulted in disparate impact discrimination. After rounds of litigation, BMW entered into what was effectively a settlement. They had to pay \$1.6 million in damages to the class of claimants who were terminated from their jobs at the car factory as a result of the background screening policy.

EEOC Compliance

This win may mean that the EEOC will continue to try cases based on background screening policies. This means you need to follow best practices so that you aren't contacted by the EEOC.

Background screening policies that result in discrimination can be compliant as long as you can demonstrate business necessity and relevance to the job. To demonstrate this:

✔ Consider the “Green factors.”

Named for the case (*Green v. Missouri Pacific Railroad*) in which they were announced, Green factors include:

- The nature and gravity of the offense
- The time elapsed since the offense
- The nature of the job sought

Even if you determine the applicant is not a good fit, documenting this process can help protect you from a Title VII suit.

✔ Perform individualized assessments for any applicants who have criminal records.

This means you should:

- Ask for more information about the offense to get context
- Give them the opportunity to explain

✔ Limit the scope of your background screenings to 7 to 10 years.

Many employers request all available criminal record information, but that makes it more difficult to demonstrate that your policy is based on necessity. Misdemeanors from 20 years ago aren't going to be very relevant if the applicant has had no criminal conduct since that time.

✔ Remove the criminal conviction inquiry from your job applications.

Many states have adopted ban-the-box laws that require employers to remove this question from their applications, and it's just a matter of time before your jurisdiction catches up. Removing it now saves you from a rush to do so after a law has been passed in your state.



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“
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HOT

Ban-The-Box Legislation

The ban-the-box movement aims to give ex-offenders a better chance at employment. These laws typically require employers to remove the box that asks applicants about their conviction history from their employment applications. The hope is that the protections given under ban-the-box laws will reduce recidivism.

Ban-the-box laws vary by state, county and city. Some legislation restricts only public employers, some restricts both public and private employers. Some only prohibit employers from asking for criminal record history on the application. Other states go further and require employers wait until after the first interview or after a conditional offer to inquire into criminal history. Some locations require employers to send specific notices or reasons as to what led to an adverse action.

Ban-The-Box Compliance

As of November 2020, thirty-six states have passed ban-the-box legislation, and many of these currently impose restrictions on private employers. Even privately owned small businesses need to pay attention to this trend. Follow these best practices for ban-the-box awareness and compliance:

- ✓ Check the [ban-the-box](#) guide from NELP as a first step to find out whether you're in a ban-the-box location.
- ✓ Remove questions about prior convictions from your applications.
- ✓ If you must keep the question on your application, provide room for the applicant to explain any convictions and provide relevant information.
- ✓ Keep up with legislation. Using Google Alerts let you get daily updates about ban-the-box, EEOC, and FCRA developments in your email.

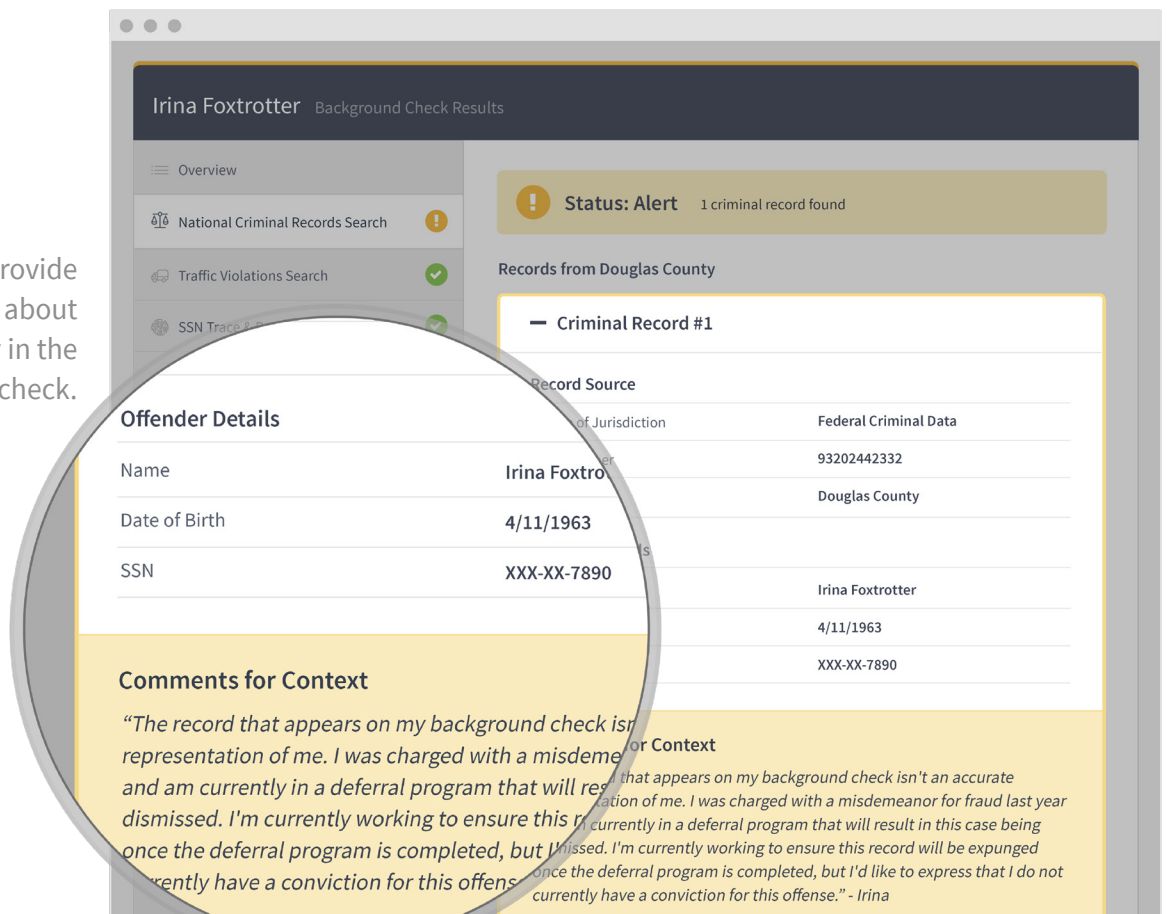
Candidate Experience

Help For Individualized Assessment

To comply with EEOC guidance, employers need to individually assess candidates in order to consider the age of the offense, relevance to the job, and other factors. The challenge for you is to do that in a way that not only complies with employment law, but also respects the person behind the record.

GoodHire's award-winning candidate experience lets candidates and employees save comments about their records directly to their background check results. **Comments For Context** helps you get the individualized context the EEOC requires, making it less likely your policies will be found to be overly broad and unrelated to business necessity. By empowering candidates to take ownership of their information, **Comments For Context** helps you and your potential hires hit it off from the start.

Candidates can provide more information about their records directly in the background check.



Irina Foxtrotter Background Check Results

Overview

- National Criminal Records Search
- Traffic Violations Search
- SSN Trace Search

Status: Alert 1 criminal record found

Records from Douglas County

Criminal Record #1

Offender Details	
Name	Irina Foxtrotter
Date of Birth	4/11/1963
SSN	XXX-XX-7890

Comments for Context

"The record that appears on my background check isn't an accurate representation of me. I was charged with a misdemeanor for fraud last year and am currently in a deferral program that will result in this case being dismissed. I'm currently working to ensure this record will be expunged once the deferral program is completed, but I'd like to express that I do not currently have a conviction for this offense." - Irina



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