

## Background Checks On Current Employees – A Risk Assessment

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The employer community generally understands its right to obtain criminal background reports on job applicants from a consumer reporting agency (CRA) and base hiring decisions on any reported information. However, many businesses may believe that federal and/or state law prohibits them from obtaining updated criminal record information (specifically, any arrests or criminal convictions that occurred during employment) on current employees. Similarly, such employers may believe that written consent must be obtained from a current employee each time a CRA compiles and reports such information to the business or that criminal information reported by a CRA on a current employee cannot be used as the basis for adverse employment actions. While there are certain limitations that may apply in some states, federal law does not per se prohibit employers from obtaining or using such information as a basis for employment decisions.

**In fact, regularly obtaining such information and ensuring that current employees have no pending criminal proceedings or convictions during employment may assist employers in defending negligent retention actions based on alleged conduct of its employees.** Since employers do have the ability to directly obtain information regarding new and ongoing criminal proceedings involving their employees, below we summarize relevant legal and practical considerations.

### Continuing Consent – Don't I Need To Obtain A New Written Consent Each Time A CRA Conducts A Search?

If a CRA provides criminal background information regarding a current employee, the report provided is a consumer report as defined by the federal Fair Credit Reporting Act (FCRA). Under the FCRA, a written continuing consent signed during the hiring process or at the inception of employment provides the employer with the legal basis to obtain criminal background information through a CRA throughout the employment relationship. No additional consent, written or verbal is required as long as the initial consent form was in full compliance with the FCRA. The far majority of states does not have mini-FCRA laws and also pose no additional consent requirement.

Approximately one dozen states have mini-FCRA laws and of those jurisdictions only a subset poses a potential issue with utilizing a continuing consent. Some states, such as Minnesota and Oklahoma, require an employer to provide the subject of the check an opportunity to check a box to receive any report provided by a CRA. Arguably, if the employer provides any report obtained in all instances an employer is complying with the letter and spirit of such laws. California does pose an issue. Under California law, an employer is required to advise the subject of the exact scope of the check prior to any check being conducted. Accordingly, the use of a continuing consent is not permitted in California; however, an employer may require its employees to regularly consent to checks as a condition of continued employment.

### CRA Reporting Limitations - What About Limitations On A CRA's Ability To Provide Relevant Information On Current Employees?

While the FCRA generally prohibits CRAs from providing arrest information that is more than 7 years old, such limitation does not impact the obtaining of recent records, if any, regarding a current employee. While some state laws prohibit CRAs from providing arrest information for non-pending proceedings that did not result in convictions or impose 7 year reporting limitations for convictions, such laws generally do not prohibit the reporting of recent convictions or arrests pending disposition. As with any report, a CRA must ensure that any information provided to an employer is as accurate as possible at the time of reporting or, to the extent allowed by applicable state law, send a letter to the subject advising that public record information that may not be up to date was provided to his/her employer. With that said, some CRAs have developed integrations with court systems which allow the CRA to provide exact up to date information from court records to its employer clients.

## Use of Information Contained In The Reports – We Can’t Use The Reports For Retention Decisions? Can We?

Should an employer obtain information regarding a recent arrest pending disposition or conviction of a current employee, the business must ensure it can lawfully use the information and, if it can (which is generally the case), follow the procedural steps mandated by the FCRA and state mini-FCRA laws.

Federal law does not per se prohibit any employer from using conviction or arrest information for employment purposes. With that said, the federal Equal Employment Opportunity Commission is aggressive in initiating actions if it believes that the use of such information has a disparate impact on employees within certain protected classifications. Further, some states, such as New York, only permit employers to implement employment actions based on criminal convictions if the conviction is job-related. Practically, what does this mean? Simply, that **upon receiving any report with information regarding recent convictions or arrests pending disposition, the employer should have a conversation with the employee to analyze job-relatedness.** In doing so, if the employer acts on the information, it has put itself in the most defensible position should a claim arise as it engaged in an individualized job-related analysis. If an employer learns of an arrest pending disposition through a report and, following a discussion with the employee, decides not to implement an employment action, the employer generally can require the employee to keep it apprised of the status of the proceeding since an employer’s decision whether to act may change if the arrest turns into a conviction or if the employee is required to miss work for lengthy pre-trial proceedings or a trial. At all times state law must be reviewed to ensure an action can be based on an arrest pending disposition, however, the far majority of states do not proscribe the use of such information.

With applicants, a best practice is to ask a detailed lawful question regarding criminal background on an employment application to maximize an employer’s ability to disqualify based on a misrepresentation or omission if the initial pre-employment check reveals information that the candidate did not disclose. While some state laws may pose impediments, employers can consider implementing a similar concept with employees. Employers can generally require employees as a condition of employment to advise the company if they are arrested or convicted of a crime during employment. The failure to disclose an arrest or conviction as confirmed by a background check can, standing alone, be the basis for an adverse employment action. Out of an excess of caution, similar to the conversation discussed above regarding job-relatedness that we recommend precede any decision-making, we recommend a similar conversation to provide the employee with an opportunity to explain why he/she did not report the arrest or conviction per company policy.

*Whether to run checks on current employees as a matter of policy is a business decision. It is not mandated and may not be consistent with an organization’s corporate culture. However, a decision not to implement such checks should not be based on a belief that doing so is illegal or unmanageable.*

## Procedural Requirements

Consistent with the process utilized with candidates, should an employer wish to take action based on a report provided on a current employee, the FCRA mandates that prior to making a final decision the employer must provide the employee with a copy of the report and a description of his or her FCRA rights, published by the federal government. This is often a procedural formality since the purpose of this process is to provide the subject with the right to challenge the accuracy of the purported disqualifying information and not the decision itself. If the employee acknowledged the arrest or conviction as part of the recommended discussion with the employee, there typically will be no challenge to accuracy. The statute does not provide any guidance as to how long an employer must wait before implementing a final disqualification decision if the employee timely challenges the accuracy of the report, but a period of at least 5 days is recommended.

If the subject does not timely contest the accuracy of the information or is unable to timely present information to the CRA that allows the CRA to issue a revised report, an employer may implement its disqualification decision. In order to do so, the employer must provide the employee with the following: (i) an oral, written or electronic notice of the adverse action; (ii) the name, address and telephone number, either orally, in writing or electronically, of the CRA that furnished the report; (iii) a statement that the CRA did not make the decision to take adverse action and is unable to provide the employee with the specific reasons why the adverse action was taken; and (iv) an oral, written or electronic notice of the employee’s right to obtain a free copy of the complete consumer report from the CRA, if requested within sixty days, as well as information regarding the consumer’s right to dispute the information with the CRA. A subject retains the right to request that the CRA issue a revised report for an extended period of time.

Further, as noted earlier, even if no adverse action is implemented, certain state laws require the employer to provide copy of any report acquired from a CRA to the subject.

## Corporate Headquarters

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