



## **Step-By-Step Guide to Conducting Background Checks Using Third Party Background Check Companies**

When using a third-party background check company, there are specific steps you must follow to ensure compliance with federal and state law. Employers are required to provide applicants and employees with specific notices and obtain authorizations for background checks conducted. Background checks do not only include criminal background checks but may also include routine screening conducted by third parties, like reference checks or employment verifications.

Below are the steps for notice and authorization for a background check through a third-party background check company known as Consumer Reporting Agency (CRA). Remember, these steps apply when a third party conducts the check, but not if the employer or its staff performs the check.

In all cases, maintaining documentation is essential, so we recommend providing all notices in writing (hard copy or electronic).

### **I. Before Requesting the Report**

#### **a. Basic Consumer Report**

The Fair Credit Reporting Act (FCRA) and New York's General Business Law (GBL) both require employers to provide and obtain pre-background check disclosures and authorizations before requesting a report from a CRA.

The disclosure must be clear and conspicuous. It must be its own form, separate from any employment application. If the CRA provides you with a standard disclosure and authorization form, we encourage you to check with your legal counsel to ensure the form complies with federal and state law.

#### **b. Investigative Consumer Report**

Sometimes it may be necessary to obtain a more detailed report regarding an individual. For instance, you may wish to find out about an individual's character or reputation. An Investigative Consumer Report (ICR) obtains this information through the use of personal interviews with neighbors, former employers, friends, and others.

If you want to obtain an ICR, you must provide a special written notice to the individual advising them that an ICR may be requested. The individual must be notified that



information about his or her character, general reputation, personal characteristics, and mode of living may be collected as part of this report. The disclosure must also:

- 1) notify the individual that they have the right to request additional information about the nature of the investigation;
- 2) notify the individual that they have the right to receive a copy of the report by contacting the CRA; and
- 3) provide the individual with the CRA's name and address furnishing the report.

Finally, if the ICR is requested in connection with an offer of employment, the employer must provide the individual with a copy of Article 23-A of New York's Corrections Law.

The employer has three (3) days from the date it requests an ICR to notify the individual an ICR may be obtained, unless the individual was already notified in the initial disclosure. After the disclosure is provided, the individual may request additional information about the report's contents. If the individual makes such a request, the employer has five (5) days to respond substantively. In addition to its response, the employer must also provide the requesting individual with a copy of the Fair Trade Commission's "A Summary of Your Rights Under the Fair Credit Reporting Act."

Provide Certification to the CRA: Before it can obtain a report, the employer must certify to the CRA that it will use the report for a permissible purpose and comply with applicable federal and state law.

## **II. After Receiving the Report**

### **a. Notice Where The Report Contains Criminal Conviction Information**

Whenever a consumer report contains criminal conviction information regarding the individual, the employers must provide a copy of Article 23-A of New York's Corrections Law to the individual. This is required regardless of whether the employer intends to take adverse action based on the criminal conviction information contained in the report.

### **b. Making an Employment Decision Based on Criminal Conviction Information**

If an employer makes an employment decision based on the individual's criminal conviction information, the following 8 factors must be considered:

1. New York’s public policy encouraging the licensure and employment of persons previously convicted of one or more criminal offenses;
2. The specific duties and responsibilities necessarily related to the employment sought;
3. The bearing, if any, the criminal offense or offenses for which the person was previously convicted will have on his or her fitness or ability to perform one or more such duties or responsibilities;
4. The time which has elapsed since the occurrence of the criminal offense or offenses;
5. The age of the person at the time of occurrence of the criminal offense or offenses;
6. The seriousness of the offense or offenses;
7. Any information produced by the person, or produced on his or her behalf, regarding his rehabilitation and good conduct; and
8. The legitimate interest of the public agency or private employer in protecting property and the safety and welfare of specific individuals or the general public.

Making a determination using these 8 factors can be complex and is fact-specific. Accordingly, we recommend you consult with legal counsel before taking employment action based on pending arrests or prior criminal convictions.

Certificate of Relief From Disabilities or a Certificate of Good Conduct: If the individual provides the employer with a certificate of relief from disabilities or a certificate of good conduct, such certificate creates a presumption of rehabilitation regarding the offense or offenses.

Sealed Conviction Records, Including Youthful Offenders: It is unlawful under New York State law to take adverse employment action against individuals who have previously been adjudicated as youthful offenders or whose criminal conviction records have been sealed.

c. Procedure for Taking Adverse Action Based on the Report

If the employer plans to take adverse action (e.g., fire an individual or decide not to hire or promote them) because of information contained in a report, the employer must comply with the following notice requirements for **before and after** the action is taken. These steps must be taken even if the background check is only one of several reasons for the adverse action.

Pre-Adverse Action Notice: The pre-adverse action notice must:

- Provide the individual with a copy of the report along with the FTC’s “A Summary of Your Rights Under the Fair Credit Reporting Act;” and



- Advise the individual that it is their responsibility to contact the employer if they believe the report contains any inaccurate or incomplete information.

The FTC does not provide a precise amount of time an employer must wait before taking adverse action based in whole or in part on information contained in a report. However, employers are obligated to wait a reasonable period of time.

Post-Adverse Action Notice:

- Timing: Employer must provide oral, written, or electronic notice within three (3) business days that adverse action has been taken
- Next Step: If the individual requests a copy of the report after receiving the post-adverse action notice, the employer has three (3) business days to provide it along with the FTC's Summary of Rights document.