



FMCSA PRE-EMPLOYMENT SCREENING PROGRAM UNDER THE FCRA

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The Federal Motor Carrier Safety Administration (the “FMCSA”) launched its pre-employment screening program service (the “PSP Service”) in May 2010. The PSP Service compiles information regarding driving records of commercial drivers for use by motor carriers in making employment decisions. The PSP Service is operated by National Information Consortium Technologies, LLC (“NICT”).

Essentially all employment background screening of any kind is subject to the Fair Credit Reporting Act (the “FCRA”), and the PSP Service is not exempted from the general rule. For example, the trucking industry standard Drive-A-Check Reports (commonly, “DAC Reports”), purchased through HireRight,¹ are consumer reports that are subject to the same FCRA requirements as the PSP Service. Therefore, if any background screening tools have been used in the past, the PSP Service does not require anything particularly new. However, compliance with the FCRA in hiring processes is extremely important as failure to comply could subject employers to both civil lawsuits and penalties enforced by the Federal Trade Commission (“FTC”).

The Fair Credit Reporting Act

The name of the FCRA is misleading in that it implies that the law covers only credit reports used by lending institutions in making loans. In fact, the scope of the FCRA is much broader and covers any process whereby a third-party compiles information on individuals and sells those reports to other businesses, including companies that perform background screening on potential employees.² These reports are defined as “consumer reports” and the entities that distribute the consumer reports are defined as “consumer reporting agencies.”³

¹ DAC Reports were formerly purchased through US Investigation Services (“USIS”).

² The FCRA allows consumer reports to be transmitted if the end user will use “for employment purposes.” 15 USC § 1681b(a)(3)(B). It should be noted that this has been held to apply even under a typical trucking industry situation where the driver is actually considered an independent contractor rather than an employee.

³ The three large credit bureaus (Experian, Transunion, and Equifax) are by far the most well-known consumer reporting agencies, but any company that meets the definition is subject to the FCRA.

The FCRA controls the use of consumer reports for employment purposes in two primary ways: (i) employers must get written consent of the applicant to obtain a report, and (ii) employers must inform the applicant if adverse action is taken due to the report.

Written Consent of Applicant

Generally, prior to obtaining a consumer report, an employer must first make a written disclosure to the job applicant that the employer intends to obtain a consumer report, and must obtain a written authorization to do so.⁴ The disclosure and authorization must be clear and conspicuous and must be on its own separate document (as opposed to being a part of the employment application).

The employer must also certify to the consumer reporting agency that the employer will comply with the FCRA,⁵ although this is more of a burden on the agency than the employer. The FMCSA accomplishes this requirement by using the “Monthly Account Holder FCRA Employer Certification” form included in the PSP application.

Interestingly, the trucking industry obtained an exemption from the requirement that the disclosure and the authorization have to be written when a driver applies for a job.⁶ Rather, the disclosure and authorization could be by oral or electronic means. Specifically, the exemption applies to applications for positions “over which the Secretary of Transportation has the power to establish qualifications and maximum hours of service pursuant to the provisions of section 31502 of title 49, or a position subject to safety regulation by a State transportation agency,” and only where the applicant applies by some means other than in person.⁷ This exception would appear to cover all consumer reports under the PSP system, as all such reports would be on driver applicants who are governed by the Secretary of Transportation. Presumably, this exemption was in recognition of the fact that truck drivers are often on the road and have no access to mail or fax machines.

Even more interesting is that the FMCSA unilaterally dispensed with the statutory exemption by contractually requiring that the motor carrier employers obtain a written authorization from the applicant to obtain a PSP report.⁸ Therefore, even if motor carrier employers previously relied on oral authorization to pull an applicant’s consumer report (e.g., for DAC Reports), in order to obtain a PSP report, employers must obtain written consent. Furthermore, pursuant to the same contract, the written consents must be kept on file and are subject to audit by the FMCSA (or its designees) at any time.

⁴ 15 USC § 1681b(b)(2)(A).

⁵ 15 USC § 1681b(b)(1).

⁶ 15 USC § 1681b(b)(2)(B).

⁷ 15 USC § 1681b(2)(C).

⁸ See Terms and Conditions of Monthly Account Holder Agreement required to sign up for the PSP Service.

Adverse Action

Generally (but see partial exemption below), prior to taking any adverse action against the applicant (e.g. deciding not to hire the applicant, or assigning the applicant for remedial training in orientation) which is based in whole or in part on information obtained from the consumer report, an employer must first provide a “pre-adverse action” notice to the applicant.⁹ This pre-adverse action notice must provide a copy of the consumer report and provide a description of the applicant’s rights under the FCRA in a form promulgated by the FTC. This notice allows time for the applicant to challenge or correct any errors in the consumer report before final adverse action is taken.

If after providing the pre-adverse action notice, the employer does, in fact, take adverse action against the applicant based on the consumer report, then the employer must provide notice of the adverse action to the applicant within three (3) business days of taking such action.¹⁰ This notice must contain the following:

- (i) the name, address, and telephone number of the consumer reporting agency,
- (ii) a statement that the agency did not make any decision and cannot provide any reasons why the adverse action was taken,
- (iii) notice of the applicant’s right to obtain a free copy of the consumer report,¹¹ and
- (iv) notice of the applicant’s right to dispute the accuracy or completeness of the information in the report.

While the adverse action notice can be oral, written, or electronic, given the need to satisfy each of the conditions above, it is recommended that a written notice be used to document that all necessary information was conveyed.

Special Exemption for Trucking Industry

As with the written consent requirement, the trucking industry obtained a special exemption for taking adverse action.¹² Motor carrier employers may dispense with the pre-adverse action requirement if the driver applicant applies by means other than in person (i.e. mail, telephone, computer, or other similar means). Instead, the motor carrier employer can simply proceed with the adverse action and send the adverse action notice. However, if the applicant requests a copy of the consumer report from the employer, the employer must comply with the request within three (3) business days, as well as provide a copy of the FTC’s notice of consumer’s rights form (which should be provided by the agency when the report is sent).¹³

⁹ 15 USC § 1681b(b)(3)(A).

¹⁰ 15 USC § 1681m(a)

¹¹ In the employment context, this requirement is a bit redundant as the employer must generally provide a copy of the report to the applicant prior to taking adverse action. Of course, if the applicant wants to verify the authenticity of the report, the applicant is entitled to do so. More likely, this redundancy is inadvertent. Whether redundant or not, employers must still comply with the statute. In the motor carrier context, the pre-adverse action notice is generally not required, so there is no redundancy anyway.

¹² 15 USC § 1681b(b)(3)(B).

¹³ 15 USC § 1681b(b)(3)(B)(ii).

Employers using PSP reports must be particularly careful with the “in part” requirement. For example, the PSP report may reveal a small blemish on a driver’s safety record which slightly affects the decision to hire a different applicant without any blemishes, but the primary reason is that the other applicant is much more experienced. The employer must still follow the adverse action requirements.

Unlike the written consent requirement, FMCSA does not require motor carriers to contract out of the adverse action statutory exemption in order to participate in the PSP program.

Therefore, if the applicant does not apply in person, the pre-adverse action notice is not required when taking adverse action based on a PSP report. Instead, the motor carrier employer can simply take the adverse action (e.g. not hiring the applicant) and send the adverse action notice in a form similar to the notice attached hereto as Exhibit A. A cover letter expressing any sentiments such as thanking the applicant for applying, etc. should be set forth separately.

If the applicant does apply in person, the pre-adverse action notice is required (including a copy of the PSP report and a copy of the FTC notice of rights). Also, if adverse action is taken, the same notice attached as Exhibit A is required, along with an extra requirement that the applicant be informed of their right to obtain a copy of the PSP report from the FMCSA as well.

Other laws

Obviously, the FCRA is not the only law that employers must comply with when obtaining the PSP report. Rather employers must comply with all other employment and privacy laws with regard to the PSP report.

FMCSA Disclosure and Authorization Form

The FMCSA provides a template disclosure and authorization form with the PSP application (the “Important Notice Regarding Background Reports from the PSP Online Service”). The disclaimer at the bottom of the page suggests that employers not rely on this form, but instead consult legal counsel regarding the proper form to be used. While it is true that the FMCSA “stamp of approval” is not necessarily binding on a court or the FTC, using the form promulgated by the FMCSA could be of some benefit. For example, if the FMCSA performs an audit, it would be hard-pressed to criticize a form that it promulgated. On the other hand, any changes to the language or form could be scrutinized by the FMCSA to determine whether such language sufficiently complies with the FCRA.

For the most part, the form provided by the FMCSA appears to be in line with the FCRA as written. However, the form appears to ignore the ability of the motor carrier employer to forego the pre-adverse action notice, when the application was made by mail, telephone, or other means other than in person. In those circumstances, the motor carrier employer may want to delete the sentence beginning “If the Prospective Employer uses any information” as this sentence suggests that notification will be received prior to adverse action being taken. In fact, if the motor carrier employer wants to take advantage of the ability to forego the pre-adverse action

notice, then it should certainly delete this sentence from the form. Otherwise, the form appears to comply with the FCRA requirements.

EXHIBIT A
YOUR LETTERHEAD HERE

ADVERSE ACTION NOTICE UNDER THE FAIR CREDIT REPORTING ACT

This notice is to inform you, pursuant to the Fair Credit Reporting Act (“FCRA”), that adverse action was taken on the basis of information contained in a consumer report provided by one of the following:

1. The Federal Motor Carrier Safety Administration (the “FMCSA”) and National Information Consortium Technologies, LLC (“NICT”) under their Pre-Employment Screening Program (“PSP”);
2. HireRight background checks; and
3. {{{other services}}}

Collectively, these reports are referred to as the “Consumer Reports.” You have the right to request a copy of your consumer reports by contacting us at

Commented [1]: Or you can provide them with this letter

[insert contact information].

Upon your providing proper identification, we will provide a free copy of your Consumer Reports, along with a copy of your rights under the FCRA as set forth by the Federal Trade Commission (“FTC”) within three (3) business days.

You also have the right to dispute incomplete or inaccurate information in your Consumer Reports.

1. The PSP database is maintained by the FMCSA, and only the FMCSA, not NICT, is authorized to receive proposed corrections to the PSP database or determine if such information is in need of correction. You may contact the FMCSA to dispute any information at

Federal Motor Carrier Safety Administration
1200 New Jersey Avenue SE, Washington, DC 20590
(800) 832-5660, TTY (800) 877-8339

Or by visiting

<https://dataqs.fmcsa.dot.gov>

2. HireRight (**provide contact information**)

3. **Other Contact info here**

None of these providers of Consumer Reports made any decisions with regard to taking adverse action and will be unable to provide you with any specific reasons why adverse action was taken.

Sincerely,

GREENVILLE 1395413