



## HINDSIGHT IS NOT YOUR FRIEND

Everyone has had one of those 'woulda, coulda, shoulda' moments where we reflect back on a missed opportunity or to put it another way, "If hindsight was foresight then it would be insight" and insight is the holy grail of making good decisions.

Background screening has become an integral part of the hiring process and a recent National Association for Professional Background Screeners (NAPBS) study reported that 96% of firms conduct some form of background check. With background screening being so ubiquitous it unfortunately has also caught the attention of plaintiff attorneys looking for a big payday by finding violations of the Fair Credit Reporting Act (FCRA) which is the primary law that govern the background screening process.

The recent annual report on the top news stories about background checking that appeared in the leading newsletter for the background screening industry, *The Background Buzz*, in 2016, showed that the level of class action lawsuits against employers and background screening providers continued to climb and individual suits were also high. Fisher Phillips recently reported in the article 'Employment Background Checks: In a State of Flux, but Still Worth Doing' that FCRA cases filed in the U.S. have increased by 20% at a rate of approximately 300 new cases each month.

This trend is very troubling for employers, but even more troubling is the fact that the vast majority of these cases usually involve allegations that an employer used defective background check authorization / disclosure forms and/or violated simple FCRA rules and procedures. Most of these situations could have been easily avoided.

The T.V. program 'South Park' features a superhero named Captain Hindsight. This fictional character has a natural gift for pointing out the obvious and stating what should have or could have been done to prevent the incident with some prior analysis or foresight.

The "South Park" fan wiki describes him best as "a superhero who 'helps' people in need by appearing at the scene to tell them about what they did wrong to get into a certain situation and what methods they could have used to avoid it, instead of actually rescuing them." It's humorous when he offers his two cents, almost immediately after something has gone awry.

As hiring managers, human resource and background screening professionals, hindsight is not a talent to be celebrated, nor is it a laughing matter. Just like Captain Hindsight, after a lawsuit is filed, an investigation will show what went wrong, leading you to say how it should have or could have been prevented. It's a bitter pill to swallow when it's something that could have easily been addressed.

Let's be clear, when a company or background screening professional needs to use hindsight it means there was an oversight in the background screening process that should have been identified before a problem arose. The consequences of not doing this is the proliferation of the multi-million dollar class action lawsuits that are flourishing today.

It is imperative for employers to work with a background screening firm that regularly monitors not only their own processes, but also their clients processes as well and has well established quality processes in place. Note this is a cornerstone of earning accreditation through NAPBS.

Your background screening provider should also offer training to all personnel who are involved in the hiring and background screening process regarding how to legally use the information found in a background check and to appropriately implement the companies background screening policy and procedures. All new hires that will be involved with the background screening process should be thoroughly trained before they start handling cases and experience staff should undergo periodic training to ensure their knowledge and skills are up to date. Having an established training protocol and procedures is another strong tenet of earning accreditation.

Simply waiting until something happens to say, "we should have had training on this," or "we could have avoided this if we did something this way," makes your company vulnerable to lawsuits and makes plaintiff attorney's very happy.

Because of the growing lawsuits and the importance of background screening employers need to work with a proactive background screening provider that will engage them in a front-end approach to ensuring that their processes are fully compliant with FCRA requirements.

In her article, 'Pre-Employment Background Screening 101 – Mitigate Your Risk,' Montserrat Miller, one of the leading attorneys in the U.S that handles background screening cases says, "Under the Fair Credit Reporting Act (FCRA) (15 U.S.C. § 1681 *et seq.*) employers have two critical responsibilities when using the services of a third-party background screening firm to request background checks on prospective employees.

1. Employers must provide prospective employees a **clear and conspicuous disclosure** regarding the fact that you will conduct a background check AND you must get the individual's **written authorization** to conduct such. This is typically called the disclosure and authorization notice and it must be in a stand-alone document. The FCRA requires that when an employer requests a background check (aka a "consumer report") for employment purposes they must provide "a clear and conspicuous disclosure" in writing "before the report is procured or caused to be procured, in a document that consists solely of the disclosure" and "the consumer has authorized in writing..." (15 U.S.C. § 1681b(b)(2)(A)(i)-(ii))
2. Employers must follow the adverse action process, which is potentially a two-step process. The first step is typically referred to as the "**pre-adverse action step**" and you cannot send a final "no hire" letter until you complete this step. So, hypothetically speaking, after completing step 1 above you receive the results of a background check from your background screening vendor. The report indicates a criminal history or some other adverse item of information. Based on this information, you may decide not to hire the individual.

Now what? Before you take any final adverse action you must first provide the individual with a copy of the report you are reviewing and a [summary of their rights](#) as prescribed by the Consumer Financial Protection Bureau. This allows the prospective employee to review the report and alert you if any information contained therein is inaccurate or incomplete and also to act on that incorrect or incomplete information with the background screening company. You should wait at least five business days before taking any final adverse action although realize that in some states and cities, Fair Chance laws and ordinances (aka Ban the Box laws and ordinances) may impose greater time periods.

At a minimum, employers must follow above two steps to comply with the FCRA. Depending on what state or city you are in there may be additional requirements, but these are the basics when doing pre-employment background checks on prospective employees."

## Getting It Done

An accredited background screening firm will have a Compliance Officer and you should have them examine your processes for compliance with the FCRA. They will review your background screening program—your policies and procedures—and then go step by step through the hiring process to understand where you may have deficiencies and need to shore up your compliance. For instance— if your FCRA disclosure and authorization has a lot of "extraneous language" such as a release of liability language, they will advise you to remove the language.

Remember willful violations of the FCRA are eligible for statutory damages of \$100 to \$1,000 per violation (each employee impacted counts as a violation), plus punitive damages and attorney's fees.

While I have been really hard on hindsight, the truth is all of us have hindsight moments. Its' inevitable. The key is to 'flip the script' on hindsight by working with a proactive background screening firm that will point out what should and can be done; and to help you take the necessary steps to ensure your background screening process is FCRA compliant. This is why background screening firms need to be nemeses of Captain Hindsight by pointing out potential problems ahead of time to protect their clients and themselves from unnecessary lawsuits.

## About the Author



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