



**REFERENCE SERVICES INC**

The Professional Background Screening Company

# 30 minute Lunch & Learn Webinar Series

## Compliance

JANUARY 25, 2024

# Legal Disclaimer

- The information and opinions expressed are for educational purposes only and are based on current practice, industry related knowledge and business expertise. The information provided shall not be construed as legal advice, express or implied.

# Presenters



**Alicia Barker**

Operations / Compliance  
Manager



**Stephanie Pier**

Compliance / Special  
Projects Manager



**Heather  
Halbrook-Fraser**

Client Relations Specialist

# Agenda



## Our people

Presenters

Alicia Barker

Stephanie Pier

Heather Halbbrook-Fraser



## Compliance

Why Bother?

Negligent Hiring - Comprehensive screening

FCRA End-User Obligations

Permissible Purpose / End-User Certification

Adverse Action Process

Authorization Forms – requirements

UDAAP

CRA Reporting

SSN Trace – Credit Header Data

Adverse Action Process

State Challenges

Sharing Reports with third party



## Closing

Questions and Answers

[sales@referenceservices.com](mailto:sales@referenceservices.com)

# Background checks...why bother?

- A total of **786,838** people are listed on state **sex offender registries** as of February 2023.
  - 3% increase from 2022
  - source: safehome.org*
- Checkster Research / Feb 2020
  - 78% of candidate misrepresent themselves on a resumes
- Indeed – Feb 2021
  - estimate 40% of people flat out lie on a resume
- Quest Diagnostics
  - 4.6% of drug test came back positive in 2022. Increase of 31.4% from the all time low of 3.5% in 2010-12.

# Background checks...why bother?

Industry began largely due to claims of Negligent Hiring or retaining an individual who subsequently engages in violence

**Negligent Hiring** is “the failure of the employer to investigate a job applicant’s work experience, character, criminal history and other relevant data prior to the hiring of an employee.”

- ◆ Employers are responsible for what they do know *and what they should have known about their employees.*
- ◆ *Employers lose approximately 79% of negligent hiring cases with average claims over \$1 million, and climbing.*

*“Just last year, a jury awarded one of the largest verdicts in American history against a cable operator for the murder of an elderly woman who was killed by one of its service technicians in her home. This negligent hiring verdict was for more than \$7 billion.”*

# Negligent Hiring

## CASES WELL OVER \$1 MILLION

- PBSA now reports that plaintiff lawyers are no longer simply asking whether your company ran a background check
- *They now want to know how “comprehensive” the background check was*
  - *There is an assumption that some type of background check was performed*

# Comprehensive Criminal Screening

- **Nationwide Criminal with Alias** name search – *2200+ databases*
  - *incl. Sex Offender Registry*
- **Nationwide Patriot Search (PS)** – *OIG, OFAC, Terrorist watchlist, FBI/DEA/DHS most wanted, Medical exclusions list*
- **Social Security Trace** – address history and alias names
- **County Criminal** – 7 year address history
  - *Or Statewide Criminal, if available*
- **National Federal Criminal** – *Crimes brought by federal district courts. Drugs across state lines, identity theft, medical fraud, financial fraud, etc.*



# End-User Obligations Under the FCRA

## ALL RSI CLIENTS ARE CONSIDERED END-USERS OF CONSUMER REPORTS

- All End-Users must have permissible purpose, provide certifications, and follow specific adverse action procedures
  - Additional, specific authorization and disclosure requirements when obtaining
    - Reports for **employment** purposes
    - **Investigative consumer reports**
      - Regarding character, general reputation, personal characteristics and/or mode of living
      - Obtained through personal interviews by a CRA

## NOTICE TO USERS OF CONSUMER REPORTS: OBLIGATIONS OF USERS UNDER THE FCRA

# Permissible Purpose

## END-USER CERTIFICATION

- Under the FCRA, CRAs can provide a consumer report to users only with permissible purpose
- **CRAs are required to obtain Client Certification of FCRA Compliance, including Permissible Purpose**

- For example:

By requesting a background check report you certify the following:

- You have provided the job applicant/volunteer with a clear and conspicuous disclosure advising them that a background check report may be obtained for employment/volunteer purposes and have received their written authorization to obtain the report;
- You will comply with any adverse action requirements as described in the Fair Credit Reporting Act, if applicable (15 U.S.C. §§ 1681b(3) and 1681m(a));
- You will not use information contained in the background check report in violation of any applicable Federal or State equal employment opportunity law or regulation; and
- You have permissible purpose for obtaining consumer reports in accordance with the FCRA, and you certify this purpose to be in connection with an employment/volunteer application submitted by the consumer.

# Adverse Action

## ADVERSE ACTION IS DEFINED IN THE FCRA AS:

*“denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee . . .” 603(k)(1)*

*“an action taken or determination that is (i) made in connection with an application that was made by, or a transaction that was initiated by, any consumer, ...and (ii) adverse to the interests of the consumer.” 603(k)(1)*

- SO . . . not just termination – it includes anything that could be viewed negatively by the employee, or cast them in a negative light
- It also includes adverse outcomes of tenant screening, such as denying an application or requiring a higher security deposit

# Adverse Action Process

## FCRA REQUIRES A MULTI-STEP ADVERSE ACTION PROCESS

- 1. Pre-adverse action notice:** this notice is provided to the consumer along with a copy of the report and a summary of the consumer's rights under the FCRA to give the consumer the opportunity to dispute information on the report
- 2. Waiting period:** a waiting period (generally 5 business days) is required by the FCRA in order to give the consumer time to dispute the report
- 3. Post-adverse action notice:** this notice is provided to the consumer after the waiting period (and/or after a dispute reinvestigation is complete, if applicable), and it must include contact information for the CRA, the summary of consumer rights, and a statement that the CRA did not make the decision to take adverse action

*Customized Adverse Action letters and supporting documents are built in to the RSI platform*

# Authorization Forms

1. Acknowledgement and Authorization for Background Check
2. Background Information – name, address, DOB, etc.
3. Disclosure Regarding Background Investigation
4. “Summary of Your Rights Under the Fair Credit Reporting Act”
  - Revised document released March 19, 2023 – changes pertain to formatting or new contact information, and not substantive legal changes.
  - **Comply by April 20, 2024**

## Requirements:

- Separate Pages
- Shorter is better
- Separate disclosure requirements for certain jurisdictions: CA / NYC / LA notice / SF notice

## The RSI Portal can capture these forms in our applicant invitation process

- Forms can be customized
- Client responsible for obtaining parent signature for minors
  - RSI portal will not accept a second required signature

# SSN Trace Information

## NOT TO BE USED IN HIRING DECISIONS

- **No Address History seen on Background Check**
  - Used solely as a tool to populate other/alias names and jurisdictions to search
  - Information is based on credit header data
    - **Not an FCRA product and cannot be used for an employment decision**
  - Informational messages may provide insight as to whether an updated SSN is needed to increase the accuracy of a background check

*The CFPB is currently considering changes to how credit header data is interpreted under the FCRA.*

# UDAAP

## UNFAIR, DECEPTIVE, OR ABUSIVE ACTS OR PRACTICES

- The Dodd-Frank Act prohibits UDAAPs against consumers (applicants)
  - For example, not providing required FCRA disclosures or failing to maintain adequate data security may be considered a violation
- It does not matter if the act is intentional or unintentional
- A company can be fully compliant with the FCRA and other consumer protection laws, and still violate UDAAP laws
- There is an obligation to protect consumers and keep their best interests in mind

# CRA reporting

## STANDARD SCOPE, STATE LAW

- **Some states have employer use laws, not CRA reporting laws**
  - **Federal Rule**
    - Convictions – reportable forever
    - Non-Convictions / Pending / Deferral – reportable 7 years from charge or file date, whichever is earlier
    - Never report sealed or expunged records
  - **State Rules**
    - Standard is to follow CRA reporting laws as applicable
  - **Special Considerations: Let us know if you need customized reporting.**



# State Challenges

## CLEAN SLATE LAW – REMOVING PII – TECHNOLOGY CHANGES/FAILURES

- Current states of interest include:
  - Kansas
  - Michigan
  - South Carolina
  - California
- RSI Monitors orders daily to identify potential “problem” jurisdictions and get issues resolved quickly
  - You will be notified if any issues are affecting your orders
  - ETAs are added/updated in the system in some cases

# Sharing Reports with Third Party

- PEOs / Hiring Agencies
  - If you are sharing reports, the courts may consider you a CRA which requires you to follow FCRA
    - Dispute reconciliation, etc.
  - Best process is to “Certify” that the applicant / employee passes the HR policy of your third party
    - Authorization Form says the CRA and End User are the only parties authorized to view the report
- If necessary for third-party to view
  - Separate End User agreement with CRA
  - Add third party to Authorization form

# Key Takeaways



- Make sure the RSI team is aware of any special instructions you have for reporting
- Don't share reports with third-parties
- Make sure your team is aware of Adverse Action requirements
- Review your Authorization Forms and update the Summary of Rights
- [Compliance@referenceservices.com](mailto:Compliance@referenceservices.com)



Thank you

[sales@referenceservices.com](mailto:sales@referenceservices.com)