

Lessons for Employers from the NAPBS Conference



**HOW TO PARTNER WITH YOUR
BACKGROUND CHECK COMPANY TO
FACILITATE LEGAL COMPLIANCE**

Checkr recently participated in the National Association of Professional Background Screeners (“NAPBS”) Mid-Year Legislative and Regulatory Conference in Washington, D.C. The three-day conference provided guidance regarding industry best practices under the Fair Credit Reporting Act (“FCRA”), as well as recent trends in legislation and regulatory enforcement. The FCRA regulates the creation and use of background check reports (a type of “consumer report”) provided by background check companies (also known as “consumer reporting agencies” or “CRAs”) to end-users of those reports. End-users can only request a background check report for certain “permissible purposes,” such as pre-employment, credit, or tenant screening. Because the FCRA imposes additional legal obligations on end-users who use consumer reports for making employment decisions, this paper focuses on the relationship between employers and their background check companies.

As an employer, understanding the best practices for your background check company will help you evaluate and partner with CRAs who are committed to compliance. Not only does a focus on compliance help minimize legal risk, but working with a compliance-focused CRA like Checkr can also enhance the experience of your applicants during the hiring process. Lastly, understanding the recent trends in legislative and regulatory enforcement can help you better navigate the landscape and assess legal risk, and partnering with a compliance-focused CRA like Checkr can assist in keeping up-to-date on these trends.

Proper Handling of Disputes To Reduce Your Risk

For most employers, handling applicant disputes is fairly simple. When an applicant disputes their background check report, you, as the employer can forward the dispute to your background check provider. This makes sense given that most dispute and reinvestigation responsibilities belong to CRAs like Checkr. However, the fact that a dispute exists undeniably causes friction in the hiring process for both the applicant and the employer. Understanding how disputes operate and the best practices for handling them can help employers identify which CRAs to partner with—compliance-focused CRAs like Checkr can better serve applicants in a time of frustration and reduce the employer’s overall risk exposure.

» **What is a dispute?** A dispute is a notification (communicated either directly to the CRA or through the employer) by an applicant that information in a background check report is inaccurate or incomplete. Disputes are usually communicated via phone, email or letter from the applicant. Common examples of disputes from applicants include:

- 1) incorrect record;
- 2) wrong crime classification (e.g., felony vs. misdemeanor);
- 3) reporting of juvenile crimes; or
- 4) reporting of un-reportable crimes based on the consumer laws of the applicant’s state.

» **When in doubt, open a dispute.** Not all applicant communications are clear and concise, and disputes can be difficult to spot. The safest path is to give the applicant the benefit of the doubt and assume that his or her communications/questions about their background check report is a

valid dispute. Employers should pass along these communications to the CRA, which has trained professionals to handle disputes. As a general rule: When in doubt, open a dispute with the CRA.

- » **Use empathy in messaging to the applicants raising a dispute.** Once a CRA receives notice of a dispute, the FCRA gives CRAs 30 days to conduct a reasonable reinvestigation of the disputed information. But the last thing a frustrated applicant who has just identified a problem with their background check wants to hear is that the problem could take up to a month to fix. Showing empathy to a frustrated applicant by calmly informing them of the dispute and reinvestigation process can keep applicants engaged during the hiring process.
- » **Gather information and documentation about the dispute from the applicant.** Gathering adequate information at the outset of a dispute is essential to a speedy resolution. Vague disputes communicated through employers can further frustrate applicants when CRAs, like Checkr, subsequently reach out directly to the applicant for more details. If applicants directly dispute their background check report with employers, employers should ask the applicant to identify the specific piece of information in dispute and to clarify what is inaccurate or incomplete. While the applicant does not need to provide any documentation to support a dispute, it can be helpful in expediting the review process. For example, if the applicant has court documentation to support his or her claim that a criminal case has been dismissed, then that information can be provided for consideration in the reinvestigation.
- » **Maintain a culture of compliance.** Both CRAs and employers have legal obligations under the FCRA. To reduce your legal risk, employers—like CRAs—should develop a culture of compliance. Employers should ensure that their employees understand their obligations to channel disputes to CRAs. They should also regularly consult legal counsel to ensure their background check process complies with FCRA and applicable state laws. Maintaining an overall culture of compliance can help reduce your risk.

Maintaining a Compliance-Focused Partnership with your Background Check Company

When working with a background check provider, employers should develop a compliance-focused partnership to facilitate legal compliance for both parties. Doing so minimizes legal risk and also helps both parties preemptively remedy potential issues. Specifically, the FCRA provides that end-users can only access consumer reports for certain permissible purposes, for example, pre-employment screening. CRAs like Checkr are tasked with the responsibility of maintaining “reasonable procedures” to ensure that consumer reports are being used only for permissible purposes.

To facilitate compliance with these legal obligations, CRAs and end-users should maintain open communication, including working with one another on the following best practices:

- » **Obtaining end-user certifications for FCRA compliance.** At the outset and throughout the duration of the contractual relationship, CRAs should obtain certifications from employers that they are requesting background reports for permissible purposes. Periodic certifications ensure continued

compliance and can also serve as reminders to employers and other end-users of their own legal obligations under the FCRA and state consumer reporting law. For example, for end-users who use reports for employment decisions, the FCRA requires the end-user to provide clear and conspicuous disclosures, adequate authorizations, timely adverse action notifications, and any applicable state and local notices.

- » **Conducting continuous dialogue and follow-through.** As a best practice, CRAs should monitor and conduct periodic audits of employers and other end-users to ensure that consumer reports are being obtained for permissible purposes. If Checkr learns from its auditing that reports are being used impermissibly, Checkr will promptly notify the end-user of the violations. Prompt notification enables the employer to remedy the problem and also allows Checkr to work collaboratively with the employer on an action plan to prevent future abuses. Maintaining an open dialogue will also keep both parties compliant and accountable in following through on any plans for remediation.
- » **Dispute rate monitoring.** The dispute process can be a stressful experience for job applicants, but a collaborative relationship between CRAs and employers can lead to improvements in the process. CRAs should monitor the dispute rates on a per-client basis—if an employer’s dispute rate is disproportionate as compared to other users, the CRA should notify the employer. Together, the CRA and the employer can work on identifying and remedying the causes of the disproportionately high rate. For example, applicants may be filing disputes to provide additional context regarding a specific offense, rather than disputing the accuracy of the offense. Checkr can assist the employer in clarifying communications and messaging to applicants regarding how to submit this information.
- » **Reviewing order activity.** CRAs should continuously monitor their employers’ order activity—sudden increases in order volume or frequency may indicate unauthorized account use or a change in the client’s use of consumer reports. By notifying an employer of any abnormal spikes in activity, CRAs like Checkr can help alert the employer of potential abuse by an employee, of which the employer was not aware. And if the employer’s business or purpose for seeking reports has changed, Checkr can also work with the employer to determine whether the employer could be better served by other products or services, which may trigger additional certifications under the FCRA.

The Changing Regulatory and Legislative Landscape

The Federal Trade Commission (FTC) and the Consumer Financial Protection (CFPB) share enforcement authority under the FCRA, while the CFPB has primary rulemaking authority under the FCRA. Both federal agencies are led by individuals appointed by the President. With a new administration, as well as a Republican-controlled Congress, industry watchers have predicted certain shifts in enforcement and legislative priorities. Understanding these shifts will help employers better navigate the current landscape around background checks.

A CHANGE IN FEDERAL ENFORCEMENT PRIORITIES

- » **FTC.** The FTC is led by five commissioners, including a head that is selected by the President. President Trump will have the opportunity to fill three commission seats, and it is expected that he will appoint commissioners who will take a more hands-off approach to enforcement actions, including those brought under the FCRA.

» **CFPB.** The CFPB is led by a single director, whose term is set to expire in July 2018. The single-director structure is currently being challenged in federal court, and Congress is also considering proposed legislation that would limit the director's authority. Regardless of whether the single-director structure is modified, President Trump will have the opportunity to appoint a new director in July 2018, and it is expected that a new director will adopt a more hands-off approach to both rulemaking and enforcement actions. A more hands-off approach may result in lessened federal scrutiny under the FCRA.

A SHIFT TO STATE ENFORCEMENT ACTIONS

Given the change in administration, industry watchers predict that President Trump's appointments to the FTC and CFPB are likely to shift the agencies' priorities, perhaps taking a less aggressive approach to enforcement and regulatory actions. Numerous states have indicated that they will step up their policing efforts, which may result in increased consumer enforcement actions at the state level. Employers should remain vigilant of their legal obligations under both the FCRA and applicable state and local consumer reporting laws in light of this shift to increased state enforcement.

LITIGATION REFORM

Several bills are advancing in the new Congress that would impact class action lawsuits. Specifically, proposed legislation would increase the standards plaintiffs have to meet in order to file a class action, as well as limit the venues in which class actions could be brought. Simultaneously, NAPBS is lobbying to limit damages that could be awarded under the FCRA. (Unlike other consumer protection laws, the FCRA is unique in that it contains no cap on damages awardable.) These developments suggest that the current Congress is open to limiting the ability of plaintiffs to file class actions. Employers should continue to monitor these legislative developments, which will impact employer liability and litigation risk under the FCRA.

Key Takeaways

CRAS ARE YOUR PARTNERS

Given the highly regulated area of employer background checks, employers should seek to partner with a compliance-focused CRA like Checkr. An open and collaborative partnership not only facilitates compliance with legal obligations, but it can also lead to a better applicant experience during the hiring process.

CONTINUE TO MONITOR CHANGES IN THE LEGAL LANDSCAPE TO REDUCE YOUR LITIGATION RISK

The constantly changing legal and regulatory landscape surrounding background checks impacts employer liability and litigation risk. A compliance-focused CRA like Checkr can help keep you updated with resource libraries and a customer success team that is familiar with the constantly changing landscape.