

Employment Background Checks: Observations of Erroneous Data and Noncompliance with Federal Law Based on Complaints Received by the PRC

Comments by:
Beth Givens, Director
Privacy Rights Clearinghouse

April 14, 2010

Submitted to the Federal Trade Commission
Privacy Roundtables - Comment, Project No. P095416

The Privacy Rights Clearinghouse (PRC) appreciates the opportunity to submit the following comments on the employment background check process to the Federal Trade Commission (FTC) as part of the agency's deliberations for the Privacy Roundtables series. The PRC is a nonprofit consumer advocacy organization based in San Diego, California, and established in 1992.

We base our comments about employment screening practices on the many complaints we have received from individuals who have contacted us via our web-based contact form, email, and phone.

The PRC's attention was first drawn to the problem of inaccurate and inappropriate data in employment background checks by individuals who contacted our hotline. Consumer-initiated contacts on the subject of employment background checks increased dramatically in the early 2000s, spiking sharply after 9/11. Such inquiries have remained at a high level ever since. The "hits" to our online educational materials on this topic increased at an even faster rate and also remain high. In fact, our jobseeker's guide to employment background checks has been the first- or second-ranked page on our website for several years. <http://www.privacyrights.org/fs/fs16-bck.htm>

We have learned from consumers that subjects of flawed background checks were denied employment, sometimes for years, or they lost jobs at which they had performed successfully, again, sometimes for years. The problems arose from inaccuracies in data reported or the failure of employers and consumer reporting agencies (CRAs) to follow provisions in the Fair Credit Reporting Act (FCRA) as well as proper procedures.

Following are some of the most common situations the PRC hears from consumers who have been denied employment because of something in a background check. These examples are documented in our complaints database.

- State criminal records report an arrest but not the case disposition.
- The subject is the victim of criminal identity theft.

- The person's name appears as an alias in court records even when a mistake has been corrected.
- A criminal conviction is reported even though a period of probation or deferred adjudication was served with the understanding that a conviction would not result.
- Convictions that were expunged or believed sealed appear on background checks.

In addition, many individuals have reported to the PRC that they were not given a pre-adverse action notice as required in the FCRA when denied a job.

The inclusion of employment screening provisions in the Fair Credit Report is imperfect and outdated at best. We would support changing the FCRA to separate employment background reports from other FCRA concerns, thus giving this matter an opportunity to receive the attention it deserves, as well as expanding the provisions in the FCRA that pertain to employment screening. Employment reports are like no other consumer reports covered by the FCRA. The consequences of an inaccurate employment report can be dire and permanent.

A consumer who, for example, finds a mistake on their credit report can dispute the information with the credit bureau. Bureaus have in place a mechanism to verify information with creditors. This is not the case with a faulty employment background check as many problems with employment checks are associated with inaccurate criminal records. When faced with an erroneous criminal record, a job applicant has no choice but to resort to correcting the problem through the court system. This often requires hiring an attorney, an expense many jobseekers can ill afford.

Even when corrected, a person's name attached to a public criminal record may still appear on a background check with notations that the matter has been dismissed or expunged. Even if a jobseeker can prove to the employer who has rejected him or her that the criminal record is erroneous, it is usually too late. We have learned from many such individuals that the employer has since closed the application process and will not reconsider that person's application.

Moreover, a consumer who is denied credit or insurance can always shop around for other products, even at less favorable terms. Not only that, but consumers have an opportunity to recover from a poor credit history, even one that is accurate. Public criminal records, by contrast, are permanent records, and the FCRA allows reporting indefinitely. At the very least, the law should be amended to prohibit credit history reviews for jobs that do not relate to finance. Three states currently have such laws on the books: Hawaii, Oregon and Washington.

If the FTC has not already done so, it might want to study the Attorney General's June 2006 *Report to Congress on Criminal History Background Checks*. It contains many constructive suggestions for improving the quality of data reported in background reports, and improving reporting standards in the industry in general. www.usdoj.gov/olp/ag_bgchecks_report.pdf

A footnote to the report quotes Representative Gallagher, in introducing the House version of the original FCRA in 1969, noting the intention to prevent outmoded information, including criminal records, from being included in consumer reports. "I have long been concerned that one derogatory item could 'damn a person to the grave,' that an early mistake could haunt a man all

throughout his adult life, and that redemption is in the process of being programmed out of American society.” www.usdoj.gov/olp/ag_bgchecks_report.pdf (page 106, footnote 83)

We at the PRC have spoken with many individuals who are indeed living the nightmare described by Representative Gallagher four decades ago. But jobseekers today face an even more daunting challenge in that employment screening companies are able to comb through vast public records resources, provided by online information brokers, in order to compile employment reports. An error in criminal records that finds its way into the scores of such resources is extremely difficult to remove. Only the most reputable background check companies confirm criminal record information found in online resources by visiting the appropriate court and seeking the source records.

The PRC submitted comments to the U.S. Attorney General prior to its 2006 report to Congress in which we outlined many of the problems consumer have experienced with employment background checks. See: *Groups Warn of Privacy Risks in Employment Screening, August 5, 2005*, www.privacyrights.org/ar/DOJbackgrd.htm.

Following are examples from the PRC’s files included in that report:

- **False information reported.** A 49-year old engineer was fired from his job because a background check report said there was an outstanding warrant for his arrest. After many hours spent trying to find the source of this inaccurate information, he learned a background checking company had confused him with a much younger man with a similar name but of a different race. The background checking company refused to change its report; the court refused to change the file because the record did not belong to the engineer; and the employer refused to take him back because it sensed trouble. The best this victim could do was to obtain a letter, which he must carry with him at all times, from the state Attorney General saying there is no outstanding warrant for his arrest.
- **Delayed access to report.** A young father from a mid-Western state secured a badly needed job. He was fired after a short time with only the vague explanation that there was something "wrong" with his background check. Not having seen the report, he could only guess that the "problem" may have been from a minor offense for which he was offered and completed a period of probation with the understanding that a recorded conviction would not result. When advised of his rights by PRC staff to see his report, this individual received a copy of the report from the employer and was rehired.
- **False information reported.** An applicant at a major department store chain was not hired for a job because a national background screening company mixed his identifying information with that of another person. Even when the mistake was reported, the chain withdrew its job offer.
- **Identity theft victim.** Karen first learned she was a victim of criminal identity theft when she couldn't get a job or rent an apartment. She has been unable to resolve the matter and regain her good name, even after visiting several police departments in jurisdictions

where her imposter was arrested.

- **Impersonation by a family member.** Tina was the subject of a background check conducted for a job she applied for at a southern university. The report included nine pages detailing criminal activity. She believes her sister stole her identity and used it when arrested. She has been frustrated in her efforts to resolve the problem because she has been unable to get the cooperation of either the AG's office or law enforcement to help her clean up the erroneous record.

In conclusion, we believe that the employment screening process is a critical area of consumer protection that deserves the increased attention of the Federal Trade Commission. We strongly encourage the FTC to expand its efforts and resources regarding employment background checks. The FTC's Sentinel database likely contains numerous complaints from individuals about job-seeking situations in which errors in background checks and noncompliance with the FCRA have resulted in loss of employment. If the FTC has not already done so, we encourage it to analyze such complaints and, if appropriate, investigate background screening industry practices.

Further, we believe that both the general public and the background screening industry would benefit considerably by the FTC posting extensive information on its website to raise awareness about the provisions in the FCRA that pertain to employment screening. Consumers and industry would welcome an information resource similar in scope to the excellent materials about identity theft in the FTC's "Take Charge" campaign.

<http://www.ftc.gov/bcp/edu/pubs/consumer/idtheft/idt04.pdf> (accessed April 14, 2010)

Privacy Rights Clearinghouse
3100 5th Ave., Suite B
San Diego, CA 92103

Web: www.privacyrights.org

Contact: <https://www.privacyrights.org/contact/Beth+Givens>