



## Using Credit History in Hiring: What Every Credit Union Should Know

*Written by Marianne Oyaas, HRValue Group, LLC*

Credit unions often struggle with decisions about hiring new employees with “bad credit”, or those who are in bankruptcy or who have filed at some point in the past. Some credit unions don’t use credit checks at all. How is a credit union supposed to deal with these situations in a legal manner and one which is in the best interest of the credit union? Here are the important points to know.

Credit checks are appropriate with positions that have financial responsibilities, especially cash handling or exercising financial discretion.

As an employer, you must consider several legal concerns when conducting credit checks on applicants. You can obtain three types of financial information about an applicant: 1) credit history; 2) bankruptcy status; and 3) financial information voluntarily revealed by the applicant.

### **Credit Reports**

Compliance with the federal Fair Credit Reporting Act (FCRA) is required. FCRA allows private employers, including credit unions, to conduct credit checks on potential employees. The Act does not, however, give you complete discretion on how you use this information. Instead, FCRA puts forth substantial obligations and specific procedures when soliciting and using credit report information for employment.

The FCRA covers all reports from a consumer reporting agency that discloses information on areas requested by the credit union, including the applicant’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living. For purposes of employment, many credit unions request only the past credit history and then apply some type of guideline as to what constitutes an acceptable credit history. Under FCRA requirements, to use a consumer report for employment, you must comply with ALL of the following conditions:

1. Before obtaining a consumer report, certify to the credit reporting agency (“CRA”) that you are in compliance with FCRA’s consumer disclosure requirements; that you will provide adverse action notification to the applicant if it becomes necessary; and that you will not use the information in violation of any federal or state employment law or regulation. In most cases, the CRA will provide the credit union with the certification form.
2. The CRA must include, along with the consumer report, a summary of the applicant’s rights under FCRA. A copy of this summary can be found at the Federal Trade Commission’s website (<http://www.ftc.gov/bcp/online/edcams/fcra/summary.htm>).



3. *Before obtaining the report*, you must make a clear, conspicuous, written disclosure to the applicant (with nothing else contained in the document), declaring that a consumer report may be obtained for employment purposes and for making employment decisions. Note that the disclosure cannot be included on the application form with other information—it must be on a separate document.
4. You must obtain written authorization from the applicant to order the consumer report. The disclosure statement (mentioned above) and authorization forms can be combined, but nothing else can be on the combined form.
5. Before taking any adverse action against the prospective employee (i.e., not hiring the applicant) based on the report, you must provide the prospective employee a copy of the consumer report and a description of his rights under FCRA. There is no legally-defined waiting period; however, it is important to remember to balance business necessity and the risk of having a problem employee on staff.
6. After taking the adverse employment action based on the consumer report, you must provide the (no-longer) applicant an adverse action notice. This notice should include the name, telephone number, and address of the CRA that supplied the report, a statement that the CRA that supplied the report did not make the adverse decision and cannot give the specific reasons for it, and a notice of the individual's right to dispute information contained in the report and their right to obtain a free copy of the report from the CRA within 60 days. *Note:* The applicant disputes the information with the CRA—not the employer.

If you fail to comply with the federal FCRA, the result can be state or federal enforcement actions, as well as private lawsuits. Damages can include punitive damages for willful violations and attorney fees.

It is very important to note that FCRA *does not prohibit* an employer from taking an adverse employment action based on an employee's or an applicant's consumer credit report. As such, if you provide all of the necessary notices and disclosures under FCRA, you can refuse to hire a prospective employee based upon the information obtained in the credit report.

You do not have to provide information as to the reason you did not hire the employee, as long as the FCRA requirements were diligently followed. All you must disclose in the pre-adverse action disclosure is that you may take adverse action regarding the employee's application, based in whole or in part on information contained in a consumer report. Keep in mind, however, that other state or local laws might restrict your ability to take action on the credit report.

Also note that there may be certain legal requirements in addition to the FCRA obligations for your state. Please check with your legal counsel on this matter.

## **Bankruptcy Status**

This is the area that we find the most concerns about in credit unions and a real “red flag” in terms of compliance. The purpose of the Bankruptcy Act provisions is to ensure that the applicant’s bankruptcy does not prevent him/her from finding employment.

Provisions of the Bankruptcy Act prohibit employers, including credit unions, from terminating or refusing to hire any individual who is or has been a “debtor” under the Act. The provisions are more complex; however, the fact is that a credit union cannot reject an applicant solely because he/she was bankrupt or because they are currently filing for bankruptcy. Further, you must avoid employment questions that relate to an applicant’s past, current or potential for bankruptcy. If you learn of an applicant’s bankruptcy status, you cannot deny employment based solely on the bankruptcy.

Sometimes credit unions want to refuse to hire based on poor credit history without regard to their bankruptcy status. This can still be risky, but certain steps can be taken. First, have a policy stating what you are looking at in a credit report and what constitutes unacceptably poor credit information (obviously, there will be no reference in the policy to bankruptcy). The criteria should be as objective as possible and applied equally in all situations. Following these steps, you should be able to point to the criteria—say objectively that the applicant does not meet it, with no regard for the bankruptcy—and show evidence that that is the case based on the criteria and how they were applied.

## **Financial Information Voluntarily Provides Revealed by the Applicant**

As long as the credit union does not actively solicit certain information, you may always listen to anything that a prospective employee offers during an interview or during an application process. As an employer, however, you must remain cautious in making an adverse employment decision based solely on a prospective employee’s voluntary offer of information.

As previously discussed, an employer may not deny employment based solely on a prospective employee’s bankruptcy status. Even if an employee voluntarily indicated a past bankruptcy, federal law prohibits you from refusing to hire the prospective employee solely based on that single factor.

Additionally, applicants may voluntarily suggest some past problems with their credit histories. When applicants start volunteering such information, and in most cases such information will indicate they might be in a protected group (comments such as, “Just so you know, I plan to soon have children.” or “I should tell you I’ve been recently treated for cancer.”), you should interrupt immediately and tell them that while you appreciate their honesty, you do not consider such information in your employment decisions and would prefer that they only answer the questions they are asked. When you do get the information, you can probably choose not to hire the person based on the credit history, as long as you continue a standard practice of obtaining a consumer credit report through FCRA’s practices and procedures.



## **Conclusion and Final Suggestions**

Under the specific laws discussed above, you may not refuse to hire prospective employees *solely* because they were bankrupt or are currently filing for bankruptcy. You can refuse to hire a prospective employee based on the information provided in a consumer credit report, as long as the strict requirements of FCRA are followed. Finally, if you do not solicit certain information and remain cautious, you can make an employment determination based on a prospective employee's voluntary disclosure of financial information.

Two other policy suggestions: First, have all applicants for every position sign a FCRA consent form as part of the application process. The form should state that it applies to the application process and remains in effect throughout employment, if the applicant is hired. That way the employer has the consent on file if it ever wants or needs to obtain a consumer report.

Second, have a policy about when you will obtain reports—on all applicants, on all applicants for certain positions, on all finalists for a positions, etc. Reports should not just be obtained on a random or arbitrary basis. Then you should be careful about how you use the information for all of the reasons discussed above.

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