



WHITE PAPER

BACKGROUND SCREENING: NAVIGATING THE ADVERSE ACTION PROCESS



Most companies use some form of pre-employment screening to protect against hiring risks. Pre-employment screening allows employers and prospective employers to check for prior criminal convictions, verify employment records, get employment references, and more. The goal is to create a safe (and more productive) workplace that lends itself to a positive employer brand and work environment. Often, employers will outsource background screening to a third-party background screener to perform the background check and perhaps also to provide related support services to the employer. These employment background checks are “consumer reports” that are regulated by the federal Fair Credit Reporting Act (FCRA)¹ and analogous state laws. Employers have specific obligations under the FCRA, including requirements with respect “adverse actions.” This paper² examines employer adverse-action-related obligations under the FCRA. While this paper focuses solely on FCRA requirements related to adverse actions in the employment context, it is worth noting that state and local law may impose additional requirements in the form of “ban-the-box”, “fair chance” or other laws, regulations or ordinances, depending on where the employer operates.

WHAT IS ADVERSE ACTION?

In short, adverse action in the employment context means a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee.³ This could mean denying employment to an applicant or terminating an employee, but can also mean other actions, such as denying a promotion or transfer.

So what happens when the background screening company finds information about a candidate that might cause a company to deny employment? In today economy, you are most likely interviewing and screening more candidates than ever before. This comes along with a higher risk for adverse action complaints based on employment rejection. Additionally, an offer to one candidate, often means turning down many other equally-qualified candidates.

The FCRA requires that employers provide notice to individuals before any adverse decision is made based in whole or in part on information from a consumer report and a separate notice is required if an adverse action actually is taken against the individual. “Pre-Adverse Action” or “Pre-Decision” notices are processes that inform the applicant or employee that the company is considering not moving forward with the employment process or is altering its original offer or employment conditions in response to undesirable information in a consumer report and gives the applicant or employee an opportunity to respond before an adverse action is taken.

If an adverse action ultimately is taken a second notice is required to inform the consumer of this and provide certain additional information required by the FCRA. This latter notice often is referred to simply as an “Adverse Action” notice. These employer responsibilities arose from a concern that inaccurate or incomplete information in a consumer report could cause applicants to be denied jobs or cause employees to be denied promotions.

As an employer, your background screening process must be thorough and compliant in order to minimize legal and reputational risks.



WHERE LEGAL RISK COMES IN

As an employer, if you use employment screener to assess an individual's suitability for employment, and the process turns up information that may result in your decision not to hire the candidate, there are specific rules you must follow under the FCRA, as noted above. Failure to comply with the FCRA's pre-adverse and adverse action requirements can expose an employer to regulatory enforcement actions and, in some cases, private litigation including class actions. This is true not only with respect to the adverse-action related notices discussed in this paper, but also other employer obligations under the FCRA, such as those pertaining to disclosure to, and obtaining authorization from, an individual before obtaining a consumer report for employment purposes.

What does the FCRA require with respect to "pre adverse" and "adverse" action notices?

PRE-ADVERSE ACTION DISCLOSURES

Before taking any adverse action based in whole or in part on the basis of the consumer report, an employer is required to provide to the consumer to whom the report relates with a copy of the report and a description in writing of consumer rights under the FCRA published by the Consumer Financial Protection Bureau.⁴ This process is intended to alert the consumer to potentially adverse information before an adverse action is taken so that the consumer has the opportunity to alert the employer to any errors that there may be in the report.

ADVERSE ACTION NOTICE

If the employer ultimately takes an adverse action based in whole or in part on the contents of a consumer report, a second notice is required. This notice must include the following information:

- The name, address, and phone number of consumer reporting agency that supplied the report.
- A statement that the consumer reporting agency that supplied the report did not make the decision to take the adverse action and cannot give specific reasons for it.
- A notice of the individual's right to dispute the accuracy or completeness of any information the consumer reporting agency furnished.
- A notice of the individual's right to an additional free consumer report from the consumer reporting agency upon request within 60 days.⁵

Adverse action notices can be provided in written, oral, or electronic form, although it is best practice to provide written or electronic notice so there is a record that can be used to demonstrate compliance.

LITIGATION AVOIDANCE

There are no fail-safe solutions to avoid litigation, but the employer can take steps to ensure compliance and mitigate risk. Part of the compliance problem may be that company employees who are tasked with initiating the notices are uncertain as to when notices are required or what must be in those notices. The problem can be further exacerbated by having insufficient tools with which to track the timing, delivery and receipt of such notices. Some employers are understandably cautious about outsourcing this function.

The FCRA makes it absolutely clear that the employer is ultimately responsible for compliance in this area, but this function is often best outsourced to the consumer reporting agency performing the background, and is the practice that Civeo recommends. When contemplating an outsourced arrangement, the employer should consider the following:

1. Defined Scope Of Work

A clear and conspicuous statement of work should be included in the service agreement that spells out the notification requirements and the duties of both the employer and the party to whom the predecision/adverse notification function is outsourced.

- a. There should be agreement on the form and content of the notices.
- b. The employer should stipulate a mechanism to verify that the most recent form of the prescribed CFPB Summary of Rights is delivered to the applicant in accordance with the FCRA and analogous state statutes.

2. Defined Triggers

Both parties should agree upon the triggers for the notifications, and agree who is responsible for each triggering action:

- a. Items to consider include whether the sending of the pre-adverse action notices should wait until:

- (i) all leads on a case are completed, (all the employment and education verifications, all criminal record checks and any other elements of the background are completed), or
- (ii) completion of a major section of the background investigation (such as all of the criminal record checks).

- b. Will a matrix be used to determine relevancy of potentially adverse information, or will anything other than “clear” result where no record is found trigger a predecision action? If a matrix will be used, has it been reviewed by legal counsel to the employer for content and the consumer reporting agency for practical applicability? A relevancy matrix is recommended for Equal Employment Opportunity law purposes to screen out those offenses which are not job relevant and therefore should not be considered or reported to the end user, and to identify any convictions which may create statutory bars to employment for a specific position.
- c. Once the pre-decision notice has been sent, there should be systemic controls in place to prevent a decision from being made or an adverse action notice being sent, until sufficient time has passed to allow the candidate time to receive and to respond to the pre-adverse action notice.

3. Transmission & Record Keeping

Regardless of how pre-decision and adverse notices are delivered, detailed logs of each event should be kept. The further advantage of electronic notification, where possible, is that not only do you have the opportunity to log outgoing events, but you can also log views and receipts to positively track delivery. (Some employers have attempted to confirm mail delivery using registered or overnight mail. Not only are those options very expensive, but it is the experience of the authors that such delivery is often refused by candidates who are not expecting it and are suspicious of unexpected “official” mail delivery). Finally, electronic delivery is the fastest means of delivery allowing employers and candidates to quickly resolve outstanding issues and fill positions faster, while those positions are still available.



DISPUTES & INDIVIDUAL ASSESSMENTS

Employers should make it easy for candidates to either file a dispute of any information contained in the report, or to initiate an individual assessment of the factors recommended for consideration by the Equal Employment Opportunity Commission (“EEOC”) in its April 2012 guidance⁶ on the use of arrest and conviction information. It is therefore strongly recommended that along with the required and prescribed documents delivered in compliance with the FCRA pre-adverse action notification that appropriate forms and instructions are provided to the candidate to facilitate any dispute or statement they wish to make. Once again, this is most efficiently done when electronic notification guides the candidate to a secure site and then guides the candidate through the dispute process and/or allows the entry of information in support of an individual assessment using the factors recommended in the EEOC guidance.

Providing online forms not only makes the process easier for candidates, but it also speeds up the process ensuring that the employer can fill positions as quickly as possible. Providing the forms or a method for the candidate to communicate is only the first step. Any dispute must be thoroughly investigated and documented by the consumer reporting agency, and the individual assessment must be thorough and documented by the employer. An adverse action, if any, and subsequent notice of that adverse action should not be taken until any investigation or assessment is complete. Should either the dispute investigation or the assessment result in a positive employment action, (a hire, retention or promotion), then the systemic control should be in place to eliminate the final adverse action notification step. For this process to work properly there needs to be a tight integration between the screening provider and the employer to ensure that steps are not missed or taken prematurely.

CONCLUSION

There is no foolproof way to avoid litigation or enforcement action, but establishing and enforcing strict compliance procedures can certainly reduce exposure. The challenge that many companies face when it comes to complying with FCRA FCRA notification requirements is that the pre-adverse action notification is a triggered event that is not required for every employment background (it only comes into play if an adverse action is possible based in whole or in part on the contents of the report), and the final adverse action notification is also a triggered event that is not required for every pre-adverse action notification, only in cases where an adverse action ultimately is taken.

Not covered in this paper but worthy of careful consideration are effects of various ban-the-box laws, Fair Chance, and other similar state and local requirements that can alter the period to respond to adverse information that an applicant has, which can as a result alter the timing of any final adverse action letter.

Proper sequencing of these events also requires close coordination with the employer’s screening provider. Because of the irregularity of these events and the coordination required, employers can find it challenging to execute them properly, and decision makers such as recruiters and managers are often not fully aware of the employer’s responsibility. Education of decision makers helps. However, proper execution requires that they have the tools to comply. The best tools contain systematic, gated controls implemented by electronic workflow that recognize the triggers and guide those responsible through the compliance process. These tools exist today and employers should aggressively engage in evaluation, selection, and implementation of the right tools to realize compliant pre-decision and adverse notification and avoid expensive and brand-destroying class-action litigation.

¹ 15 U.S.C. § 1681 et. seq.

² This paper is provided for informational and educational purposes only. It is not legal advice. Employers should consult with their legal counsel with any questions about compliance with FCRA or other applicable law.

³ 15 U.S.C. § 1681a(k)(1)(B)(ii).

⁴ 15 U.S.C. § 1681b(b)(3)(A). Certain employers subject to the Department of Transportation, including trucking companies, are subject to special rules for pre-adverse and adverse action communications which are not covered here.

⁵ 15 U.S.C. §§ 1681 m(a). Additional requirements adverse action notice requirements when an adverse action is based in whole or in part on a credit score are omitted here, as credit scores are not used for employment purposes.

⁶ Equal Employment Opportunity Commission, “Consideration of Arrest and Conviction Records in Employment Decisions Under Title VII of the Civil Rights Act of 1964” (April 2012) (available online at: https://www.eeoc.gov/laws/guidance/arrest_conviction.cfm#VB2).



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