

ADVERSE ACTION COMPLIANCE UNDER THE FAIR CREDIT REPORTING ACT

What is Adverse Action?

Adverse Action as it relates to employment screening is the process the hiring company takes when it **declines or withdraws an offer of employment**.

The FCRA (15 U.S.C. § 1681) is very specific about the actions that must be taken under the above circumstances.

How to Handle Adverse Action

The FCRA clearly places the responsibility on the employer to give the applicant the opportunity to make sure the information on the Consumer report or Investigative Consumer report is correct. In order to do this, the FCRA **requires that employers utilize a two step process** when declining applicants based on information contained in the pre-employment background check report. The two steps are:

1. Notice of Pre-Adverse Action
2. Notice of Adverse Action

Step 1 – Notice of Pre-Adverse Action

The FCRA Requirements under Sec 604(b)(3)(A) states, “in using a consumer report for employment purposes, **before taking any adverse action** based in whole or in part of the report, the person intending to take such adverse action shall provide to the consumer to whom the report relates

- (i) a copy of the report; and
- (ii) a description in writing of the rights of the consumer under this title, as prescribed by the Federal Trade Commission under section 609(c)(3)”.

This notice is to be provided to the applicant when the hiring company determines that adverse action **may be taken**. This is to be done BEFORE the applicant is declined or has an offer withdrawn.

You should also direct the applicant to contact us at 888-588-2525 if the applicant wishes to dispute any of the information contained in the background check.

This Pre-Adverse Action letter allows the applicant to review the report and provide any details or documentation that would show the report to be inaccurate.

The Dispute Process

If the applicant does not agree with the accuracy of the report, the applicant may contact First Check and dispute anything contained in the report. First Check will discuss the details of the report with the applicant and re-verify and reinvestigate the items in question. Once First Check has completed the investigation, an updated report will be issued that either reaffirms the original report or contains corrections to the report.

Once the report is re-issued, the employer is able to make a final decision on the applicant. If that decision is to decline the applicant or withdraw the offer of employment, the second step of the process can be taken which is the actual taking of adverse action.

Step 2 – Adverse Action

Sec. 615(a) of the FCRA details duties of users **taking adverse action** on the basis of information contained in a consumer report. “If any person takes any adverse action with respect to any consumer that is based in whole or in part on any information contained in the consumer report, the person shall,

- (1) provide written, or electronic notice of the adverse action to the consumer;
- (2) provide to the consumer in writing, or electronically
 - (A) the name, address, and telephone number of the consumer reporting agency (including a toll free telephone number established by the agency if the company complies and maintains files on consumers on a nationwide basis) that furnished the report to the person; and
 - (B) a statement that the consumer reporting agency did not make the decision to take the adverse action and is unable to provide the consumer the specific reasons why the adverse action was taken; and
- (3) provide to the consumer a written, or electronic notice of the consumer’s rights
 - (A) to obtain under Sec. 612 [15 U.S.C. 1681j], a free copy of a consumer report from the consumer reporting agency referred to in paragraph (2), which notice shall include an indication of the 60 day period under that section for obtaining such a copy; and
 - (B) to dispute, under Sec. 611 [15 U.S.C. 1681i], with a consumer reporting agency the accuracy or completeness of any information in a consumer report furnished by the agency”.

The Importance of the Two Steps

It’s important to follow the two step rule to remain compliant with the Fair Credit Reporting Act (FCRA). This gives the applicant a chance to dispute any information contained in the report. Although the FCRA does not say how much time should be allowed between the Pre-Adverse Action notice and the Adverse Action notice, the Federal Trade Commission has suggested that five (5) business days be allowed for the applicant to respond to the Pre-Adverse Action notice.

Questions

The importance of this process can not be overstated both for fairness to all parties involved and the potential exposure represented by not adhering to the steps required under the FCRA. If you have questions, please contact us at 888-588-2525.

Disclaimer

This document is not intended to be legal advice. It is merely a guideline on how to handle the adverse action process. Our clients should seek their own legal counsel on this topic.