



Adverse Action Mandatory Process

Organizations turn to employment background checks to protect against a myriad of hiring risks. Through employment screening, hiring managers can check for prior criminal behavior, verify employment records, test for substance abuse, obtain employment references, and much more. The net result is the ability to create a safer and more productive workforce that builds an organization's competitive edge.

But what happens when a background check yields information about a candidate that, if true, would cause the employer to deny employment to the individual? How does an employer handle such a situation in a fair and legally compliant manner? It wasn't long ago that the challenge facing employers was how to hire all the workers they needed to fill demand for their products and services. Today the challenge has turned to knowing how to turn many desperate workers away – both legally and gracefully. Many times, an offer to one individual means saying no to many other often equally-qualified candidates.

Today's economy brings with it a heightened risk for adverse action complaints. After all, if an individual makes it as far as becoming a finalist for your open position and is then denied the position due to information in a background report that individual may be disappointed or disgruntled enough to try to pursue legal avenues.

As an employer, if your process isn't "buttoned up" you face significant risks when it comes to defending against a complaint.

Your Adverse Action Duties:

Employers face the prospect of an adverse action complaint when denying employment to an individual on the basis of a background check. As an employer, if you use employment screening to assess an individual's suitability for employment and the process turns up information that would result in your decision not to hire the candidate; there are specific rules you must follow. Broadly defined, the Fair Credit Reporting Act says any decision that is adverse to the interests of the current or prospective employee is an adverse action. Employers who use outside employment screening services are bound by FCRA regulations concerning pre-adverse and adverse action notices.

It's important to remember that these requirements are designed to promote fair standards for denial of employment on the basis of a background report and are therefore both legally and morally the right thing to do.

According to the Federal Trade Commission, the Fair Credit Reporting Act is first and foremost designed to "protect the privacy of consumer report information and to guarantee that the information supplied by consumer reporting agencies is as accurate as possible." In 1997 amendments were made to the FCRA that bolstered the legal obligations of employers who use consumer reports. These increased employer responsibilities centered on a concern that inaccurate or incomplete consumer reports could cause applicants to be denied jobs or cause employees to be denied promotions unjustly. The amendments require that employers make individuals aware that consumer reports (criminal background checks, credit checks, employment verifications, etc.) may be used for employment purposes and they must agree to such use. Furthermore, the regulations state that individuals must be notified promptly if information found during the course of the background screening process (consumer report) may result in a negative employment decision.

Your duties under FCRA when using a third party consumer reporting agency, or background screening company, to conduct your employee background checks are as follows:

- Provide written notice and gain authorization. Before you order an employment background check on a particular candidate, that individual must be notified in writing and the individual must agree to the background check via written authorization.
- Provide a Pre-AdverseActionNotice. If you plan to take adverse action on the basis of your findings in the background report, you are required to provide pre-adverse action notification to the affected individual and offer a reasonable amount of time for the individual to respond.
- Provide an AdverseActionNotice "After the adverse action has taken place". In other words, after you've decided not to hire someone because of a finding in their background check, you'll need to provide oral or written notification that the action has taken place.

Adverse Action Notices are a Matter of Timing

One of the keys to maintaining compliance with the FCRA as it relates to adverse action is the timing of required notifications. There are three important time-related concerns:

1. Send the Pre-Adverse Action Notice BEFORE Making a Final Decision

A pre-adverse action notification is sent to the affected individual before adverse action is taken. The point of the pre-adverse action notice is to inform your applicant or employee that you may make an adverse decision (such as denying employment or a promotion). This is an opportunity to allow the individual a reasonable opportunity to explain or dispute the details of the information contained in the background report. As part of this pre-adverse notification you must provide the individual with a disclosure that includes a copy of the individual's background report and a copy of the FTC document, "A Summary of Your Rights Under the Fair Credit Reporting Act." It's important that this notice is sent before you've made a final decision.

2. Wait a Reasonable Amount of Time:

Employers often ask how long to wait between pre-adverse and adverse action notices. The Fair Credit Reporting Act does not give a firm answer to this question. However, since the goal of a pre-adverse action notice is to give the individual time to respond or correct the adverse information, employers should allow a reasonable length of time.

The FTC did craft an opinion letter that offered some direction to employers as to what might be a reasonable amount of time. The letter stated that employers should consider the nature of the job, how the employer does business, and other factors such as holiday and weekend time.

3. Send the Adverse Action Notice after the Fact

Adverse action notifications are sent to the affected individual after the action has taken place. Verbal or written notification must include the following:

- The name, address, and phone number of the CRA that supplied the report.
A statement that the 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 agency furnished.
- A notice of the individual's right to an additional free consumer report from the agency upon request within 60 days.

All in all, when complying with these regulations may seem daunting, the effort is well worth the benefits a background screening program provides. When you take the time to check your employees' pasts you'll find yourself with a safer and more productive workforce that results in significant benefit to the organization as a whole.

In addition to current background screening services, Quick Search can also provide Pre-Adverse and Adverse Action letters as an additional service. Please contact Greg Hodgens at ghodgens@quicksi.com or 469-443-4455 for more information.