



Taking Adverse Action: How to Stay in Compliance

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Legal Disclaimer

The information presented in this webinar should not be construed as legal advice, guidance or counsel. Employers should consult their own attorney about their compliance responsibilities under federal and applicable state laws.

Things to Remember

- **The Fair Credit Reporting Act (FCRA) governs background screening. The FCRA is a consumer protection law. Job applicants are considered consumers in this scenario.**
- **Judges and juries are likely to view FCRA suits from the perspective of the applicant putting the burden on the employer to demonstrate compliance.**
- **You should always consider the perspective of the applicant. Put yourself in their shoes and consider what you think would be fair.**
- **The background screening process should be transparent and this especially includes the adverse action process.**

Taking Adverse Action – How to Stay in Compliance

The FCRA requires certain actions from employers when taking adverse action based on a background screening report.

- Adverse action examples:
 - failure to hire an applicant, or
 - denial of retention or promotion of an existing employee.

Taking Adverse Action – How to Stay in Compliance

Any time information in a background report is the basis for the adverse decision means you must follow adverse action procedures. Including:

- Denying employment due to the applicant providing inaccurate information on the job application.
 - Example: You must follow adverse action if you are not hiring an individual because they did not disclose a criminal record - even if the criminal record itself would not prevent you from hiring that person.
- Information also includes non-criminal information in the report that was evaluated and determined to be the basis for not hiring.
 - Sometimes, employers think adverse action only applies to criminal histories.

Legal Landscape

- Employers not following adverse-action procedures is a common basis for lawsuits, including class action lawsuits.
- Starbucks is the most recent nationwide employer to be hit with a lawsuit.
- Due to a recent Supreme Court decision, plaintiffs are less likely to be successful with lawsuits based on disclosure/authorization violations and plaintiff's attorney's will turn to other tenets of the FCRA whose violations are common, thus potentially lucrative.
- Fines for violating the FCRA can reach up to \$1,000 per occurrence. This amount adds up quickly in a class action suit.

Adverse Action Process

The adverse action process consists of two parts: Pre-adverse action and Adverse Action.

- Pre-adverse action procedures:
 - Send a pre-adverse action letter, copy of the consumer report, copy of “*A Summary of Your Rights Under the FCRA*,” and any state-specific letters.
 - Notice to applicant of their right to provide additional information or to dispute the information in the report.
- Adverse action procedures:
 - Take place after the applicant has been allowed adequate time to request a reinvestigation. At least 5 business days.
 - Send an adverse action letter, and we recommend sending a copy of the consumer report, and a copy of “*A Summary of Your Rights Under the FCRA*,” and any state-specific letters.

Adverse Action Process

Following adverse action procedures is important for reasons beyond legal requirements:

- Most “errors” in reports are not the fault of the CRA (i.e. Corporate Screening) or the applicant.
 - Instead, most errors are because of inaccurate information from the reporting source, i.e. school, employer, court records/research.
- Following adverse action procedures helps ensure that you receive the best information, which in turn helps you find the best candidates.
- You have already invested time and money into recruiting, interviewing and screening the applicant. Likely, the last thing you want to do is deny your preferred candidate from employment and have to start the process over from the beginning. By following adverse-action procedures, you are not only complying with your legal responsibilities, but you are benefiting your company’s bottom line if it turns out the reason you were denying employment was due to an error in the report.

Adverse Action – Making the Decision

Before you take action, you have to decide if the action is warranted.

How do you decide to take adverse action?

- Do you have a process?
- Is your process consistent?
- Is your process documented?

Adverse Action – Making the Decision

- **Do you have a process?**
 - If you don't have a process, you should immediately take the steps to put together a process.
- **Your process should consist of 3 major components**
 - Who makes the decision.
 - How is the decision made.
 - How are the decision and subsequent notices documented.

Who Makes the Decision

Who makes the decision?

Note: At this point in the process you are making a preliminary decision based on the available information. As you will see, there will be an opportunity for the applicant to respond. That response may require additional assessment by your organization.

- Some employers have a committee that reviews each situation and makes a decision.
- Some have in-house or outside counsel review decisions.
- Generally, the fewer people tasked with making a decision, the better chance for compliance.
 - If you have 20 hiring managers and they all have the authority to make the adverse hiring decision, it can be difficult for the organization to maintain a compliant program.

How Decision Is Made

How is the decision made?

For an employer, this is the most complicated part of the process as there is a lot to consider when making the decision.

- EEOC Guidance
- State laws regarding the use of criminal information in hiring
- State/federal laws prohibiting hiring individuals with certain offenses.
- Company policy

How Decision Is Made - EEOC Guidelines

2012 U.S. EEOC guidelines. EEOC recommendation for use of criminal background checks:

- Employer's selection criteria regarding history should consider the following:
 - Ban the box
 - Remove criminal history question from applications
 - Consider how employers evaluate criminal history
 - Green Factors
 - No bright line policy
 - This means you should avoid policies like “We don't hire anyone with a felony record”

How Decision Is Made - EEOC Guidelines

- Although the EEOC has lost some recent cases (i.e. *EEOC vs. Freeman*), there is no sign that it will slow its pursuits on this issue.
- EEOC position on use of criminal background checks:
- Certain information has a “disparate impact” on minority groups (specifically, arrest records and credit information).
- Argues that people of certain races and national origins are arrested more frequently than others outside of those groups and/or have negative credit information; thus, employers using such information inappropriately causes a disparate impact on certain minority groups.
- EEOC Guidelines promote an Individualized Assessment when considering criminal history in a hiring decision.

How Decision Is Made - EEOC Guidelines

Employer's assessment criteria regarding criminal history should consider the following:

- Green factors
 - Nature/gravity of the offense
 - What is the offense? Is it a violent or non-violent crime?
 - Age of the offense
 - How long ago did the offense occur? Is it a recent felony or an old misdemeanor? What is the applicant's work history after the offense?
 - Job relatedness
 - Does the offense effect the position the applicant is applying for? A Driving Under Suspension conviction likely does not relate to non-driving position.

How Decision Is Made – State/Local Laws

Some states have enacted laws that regarding the use of criminal history in the hiring process.

- Some have grown out of the ban-the-box movement that not only removes criminal history questions from initial job applications but places additional requirements on employers when using the information to deny employment.
 - The additional requirements do not always perfectly align with FCRA requirements.
 - Areas that have additional requirements include: Los Angeles, CA; San Francisco, CA; Massachusetts; New York State; New York City; Seattle, WA.

How Decision Is Made – State/Local Laws

On the flipside of laws designed to limit the use of criminal history in making hiring decisions, there are some laws or regulations that prohibit the hiring of individuals in certain positions who have a particular criminal conviction.

- This commonly occurs in positions where individuals work with a vulnerable population, i.e. children or the elderly.
- If you are an industry that services these areas of the population, you should be aware of the hiring restrictions within your industry.
- These laws may not relieve you of the responsibility of conducting an individualized assessment.

How Decision Is Made – Company Policy

- You should have a process in place that ensures decision makers are following company guidelines when it comes making the hiring decision.
- While you should avoid “bright line” policies discussed earlier, you can create guidelines to assist the decision-makers in the process.
 - For example, you may create a list of offenses and criteria that your organization deems minor enough to move forward with candidates, i.e. candidates with non-violent misdemeanors more than 7 years old can move forward in the hiring process.
- You may also create a list of offenses that trigger the individualized assessment. It should be clear in your policy and in practice that those convicted of crimes on the list are not automatically disqualified.
- This helps create consistency in your program so you are not denying one candidate that has the same or similar offense for another candidate you denied.

How Decision is Made – Company Policy

Some employers also base adverse decisions on inconsistencies between the job application and the background screening results related to an applicant's employment or education history.

- These decisions should also be reviewed as there may be reasonable explanations for the inconsistencies that are not the result of the applicant consciously attempting to mislead.
- Examples may include:
 - An applicant listing a rate-of-pay that includes bonus or shift differential; most employers only supply base pay when confirming a rate-of-pay
 - An applicant included time with a temporary agency in their employment dates for a particular employer.
 - An employer changed ownership and the current owner only provided the employment dates when the applicant was their direct employee, even though the applicant may not have even moved desks during the transition.

Pre-Adverse Action

Once you have made your preliminary decision based on the background report, you must notify the applicant of your potential adverse decision.

- This must be done in writing via the *Pre-Adverse Action letter* advising the applicant of:
 - The potential adverse decision
 - Their right to dispute the accuracy of the report with the background screening company and the contact information for the screening company.
 - Notice that the applicant may provide additional information to assist the employer in making the decision.
 - If the applicant provides additional information it must be evaluated when making the hiring decision. This information may include documentation of rehabilitation or additional character information.

Pre-Adverse Action

The letter must be sent along with:

- Copy of the background report
- *Summary of Rights Under the FCRA* (attached to report)
- State specific notices, if applicable.
 - **Note:** *Some cities require the employer to note the specific information in the report that the potential decision is based. Including San Francisco and Los Angeles.*
 - New York City, among other responsibilities requires a specific form be provided to the applicant related to how the decision was made.

Note: *Some employers will call or email applicants to try to remedy a potential problem with a report quickly before providing the pre-adverse notice. While, in spirit, you may feel you are acting in the applicant's best interest, if you are notifying them of the potential adverse decision without providing them the notices and information noted above, you may be in violation of the FCRA.*

Pre-Adverse Action

- Once the Pre-Adverse notice is sent, you must provide the applicant a reasonable amount of time to respond.
- While the time period is not dictated in the FCRA, general consensus is that you should give the applicant a minimum of 5 business days to respond.
- Applicants have a right to dispute the accuracy of the report.

Pre-Adverse Action – Dispute Process

- An applicant may contact the employer or the background screening company to dispute their results.
- An applicant may provide documentation that contradicts the result of the background. This may include copies of transcripts or diplomas, W2s or paystubs or court documents.
 - You do NOT need to accept these documents at face value. If an applicant provides documents that dispute the information in the background report, this information should be forwarded to the background screening company for reinvestigation.
 - While most applicants are not attempting to defraud potential employers, it does happen on occasion that applicants provide fraudulent documents in an attempt to gain employment.

Pre-Adverse Action – Dispute Process

- If an applicant contacts you to dispute their report, you should immediately notify the screening company of the dispute and provide any information and documents supplied by the applicant.
- Conversely, if the applicant notifies Corporate Screening of a dispute, the employer will be notified of the dispute.

Pre-Adverse Action – Dispute Process

- Once a dispute is initiated, Corporate Screening has 30 days to reinvestigate the disputed information.
 - CS endeavors to complete reinvestigations as soon as possible, and a majority are completed within 2-5 days.
- If the results of the reinvestigation confirm that the initial information was inaccurate, the background report will be adjusted to reflect the accurate information.
 - As the employer, you should treat the initial information as if it never existed.
- If the information is reconfirmed upon the reinvestigation, the report will remain as initially supplied.
- Also, if the information cannot be reconfirmed, it must be removed from the report.
- No matter the result, the employer and applicant will be notified of the result.

Adverse Action

If the applicant does not respond to the *Pre-Adverse* notice within the allotted time period or you have evaluated the additional information they provided and/or the results of the dispute and you determine to go forward with the adverse decision, you must notify the applicant of your final decision.

- This is accomplished via the *Adverse Action* notice:
 - The notice notifies the applicant of the final decision.
 - Notes that the background screening company did not make the decision and cannot supply the applicant with the reason for the adverse decision.
 - We also recommend you re-send a copy of the report and any other required state notices.

Document Your Process

Each time you deny employment based on the background screening report, you should document the process thoroughly.

- This includes:
 - Documenting the date notices were sent to applicants
 - Copies of the notices
 - Documents related to the individualized assessment
 - Documents and notes related to the decision based on the assessment.
- Corporate Screening offers an Adverse Action Workflow tool to assist clients with this documentation.

Recommendations

- **Have a documented policy and procedure in place for making hiring decisions based on background results.**
- **Review your policy and procedure with legal counsel.**
- **Regularly train and notify staff of their role in process.**



Questions?

Thank you for joining the webinar!

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