

Adverse Action Notice Protocols in Compliance with the FCRA

A white paper on compliance with FCRA background screening requirements and FCRA adverse action protocols in order to prevent costly civil liability issues

Hundreds of companies have recently been subject to significant financial penalties and civil lawsuits as a result of their failure to properly notify applicants or employees who were subject to some form of adverse action based upon information obtained from background checks.

Pre-adverse and adverse notifications are strictly required by the Fair Credit Reporting Act (FCRA) as a consumer protection, and the FCRA also provides a list of best practices for companies with regard to fulfilling their adverse action notification requirements.

This white paper examines the potential issues that can occur when the proper FCRA procedures for any adverse action following a background check are not performed. It also provides a brief overview of the proper FCRA adverse action notification protocols.

Introduction and Background

In recent years, the process of employment screening has become more complex and challenging than ever before due to an ever increasing volume of job applications and a global economy. With increasing security risks and workplace violence incidents, assessing an applicant based on their relevant and recent criminal background is essential so that employers can reduce their liability.

Employers frequently use background check services to gain information about a job applicant or employee with the intention of hiring honest, safe and trustworthy employees. However, any adverse decisions such as a termination, rescission of a job offer or promotion, or a demotion based upon the results of a background check must be performed in the appropriate manner as required by the FCRA, or a company may be subject to significant civil liability.

In recent years, there have been hundreds of lawsuits per month with claims of procedural violations of the FCRA, Fair Debt Collection Practices Act (FDCPA), Telephone Consumer Protection Act (TCPA), and other consumer protection laws. A few of these cases will be outlined in this white paper but only touch the surface of the increasing number of lawsuits that have been initiated due to improper adverse action protocols.

Hiring departments that are not familiar with FCRA best practices and procedures or consistent with implementing them are exposing their companies to unnecessary liability. This white paper also provides a brief overview of these procedures and explains why it's so critical to execute them properly to protect a company from the very real potential of civil action.

FCRA Notice & Disclosure Requirements

Prior to ordering a background check, applicants must be notified in writing that the company may obtain a consumer report for employment purposes. This notice must be a clear and completely separate document as required by the FCRA, which means it can't even be included in a packet. This is known as the Disclosure to Employment Applicant Regarding Procurement of a Consumer Report. Failure to provide this notice has resulted in several recent lawsuits.

Written Authorization is Needed Prior to a Background Check

Employers are also required to obtain written authorization from the applicant or employee before performing a background check. The FCRA does not require the written authorization to be separate from the Notice and Disclosure, however the Notice and Disclosure/Written Authorization must be a distinct and separate document from the rest of the documents in an employment packet.

FCRA Pre-adverse Action Notice Requirements

The FCRA has two notice requirements in regards to adverse actions: a Pre-Adverse Action Notice and an Adverse Action Notice. It's important for hiring departments and professionals to be fully aware of both requirements and their proper protocols, as mistakes made with either of them can be costly.

A Pre-adverse Action Notice must be sent when any applicant or employee's background shows any type of undesirable behavior in their past. This is a preliminary notice to notify the applicant of information in his or her background report that may cause the revocation of an employment opportunity.

The notice must contain:

- A copy of the applicant's background report
- A copy of "A Summary of Your Rights under the Fair Credit Reporting Act"
- State specific pre-adverse action notifications (for certain states and circumstances)

The FCRA allows a pre-adverse action notification to be delivered in writing, orally or electronically. However, it's a best practice to deliver the notification in writing as evidence of compliance with the FCRA, especially when a state specific notification needs to be delivered.

State-specific Notifications

Nine states require one or more state specific separate notices to be delivered with the standard FCRA Pre-Adverse Action Notice requirements. Most of these documents are linked below, but there may be specific hiring situations that require other documents for a particular state. It's critical to seek expert legal counsel for state-specific protocols.

- California Statement of Consumer Rights*
 - Disclosure Concerning Consumer Credit Report – (Must be modified)
 - Notification of Rights and Security Freeze for California Consumers
 - California Investigative Consumer Reporting Agencies Act (ICRAA)
- Maryland Summary of Rights
 - Maryland Notification of Rights and Security Freeze
- Massachusetts Summary of Rights**
 - Massachusetts Notification of Rights and Security Freeze
 - Massachusetts Criminal Record Information Policy
- Nevada Summary of Rights
 - Nevada Notification of Rights and Security Freeze
- New Jersey Summary of Rights
 - New Jersey Notification of Rights and Security Freeze
- New York Notification of Rights and Security Freeze***
 - New York Correction Law Article 23-A
- Texas Notification of Rights and Security Freeze
- Vermont Summary of Rights
 - Vermont Notification of Rights and Security Freeze
- Washington Summary of Rights
 - Washington Notification of Rights

*California requires employers to submit the California Statement of Rights with their Pre-adverse Action Notices as well as a Disclosure and Acknowledgement Concerning Consumer Credit Report. Employers must also be familiar with the requirements of the ICRAA.

**Massachusetts has some of the strictest laws in the country regarding background investigations and adverse actions for applicants with a criminal history. The state has a unique protocol for adverse action based on an applicant's criminal history, and it is partially outlined in the Massachusetts Criminal Record Information policy.

***New York Pre-adverse Notices should include a copy of Correction Law 23-A, which explains the applicants right and protections if they have a prior criminal conviction.

Timing is Essential

Many companies have been subject to lawsuits because they delivered their adverse action notices too soon or too late as perceived by the plaintiffs. A waiting period of 5 business days was suggested by Congress (FTC Opinion Letter, Lewis, June 11, 1998) as a reasonable amount of time before sending an adverse action notification, in order to allow the applicant time to respond to dispute any inaccuracies or reply. If after 5 business days there has been no response from the applicant, the employer can then proceed with an adverse action notification.

FCRA Adverse Action Notice Requirements

FCRA Adverse Action Notice requirements are very important and specific. The employer must notify the applicant that an adverse action has been taken based on the background report information. The notice must include the following and none of these obligations can be overlooked:

- A statement that the adverse action is based in part or in whole on information provided in the background report obtained from the Consumer Reporting Agency (CRA).
- The address, name and phone number of the CRA that provided the report.
- A notice of the applicant's rights to obtain a free copy of their report upon request from the CRA within 60 days.
- A statement that the CRA did not take the adverse action and is unable to provide the reasons why the action was taken.
- A notice that the applicant has the right to dispute the accurateness of the report written adverse action notices are also recommended as a best practice by the FCRA for the purpose of evidence documentation.

Recent FCRA Lawsuit Cases

Pre-adverse and adverse action notification requirements may seem relatively straightforward, but the reality is that thousands of companies regularly fall short in implementing them.

All types of employers across the United States, from the smallest to some of the most well-known companies have been the subject of FCRA Consumer Protection lawsuits related to their pre-adverse and adverse action protocols and many millions of dollars are paid in settlements each month. Just a few of the most recent high profile cases are outlined below but only touch the surface of the vast number of FCRA employment lawsuits that are frequently occurring.

January 2016 - Wells Fargo FCRA Class Action Suit:

In January of 2016, Wells Fargo Bank agreed to a \$12 million class action lawsuit settlement that claimed violations of the FCRA after improper adverse action protocols were taken based on the results of a background check.

October 2014 - Dollar General FCRA Class Action Suit:

In October of 2014, Dollar General agreed to pay \$4 million to settle a class action lawsuit claiming violations of the FCRA which included providing outdated adverse action notices or providing them too late.

January 2013 - Kmart FCRA Class Action Suit:

In January of 2013, Kmart Corporation ("Kmart") agreed to a \$3 million class action settlement stemming from allegations that it violated the FCRA when using background checks for employment decisions and not following up with the proper adverse action procedures

Conclusion

A company that consistently adopts and implements the proper adverse action notification procedures will be much less likely to face litigation or enforcement action, although litigation can always occur in spite of excellent adverse action notification protocols.

However, a large volume of job applications combined with lax protocols at some companies opens up the potential for numerous mistakes with adverse action notifications and expensive legal problems.

Expert legal counsel should always be sought in regards to modifying employment screening protocols to be compliant with the FCRA and other consumer protection laws. It's also crucial that employers provide adequate and ongoing education to their human resource managers and recruiters and encourage consistency to ensure that they abide by the correct adverse action protocols, and thus reduce the company's legal and financial risks.

About Pre-employ

Headquartered in Northern California, Pre-employ is a national leader in the screening industry. For more than 20 years, Pre-employ has provided cost-effective solutions that deliver quality employee background screening services, industry best practices, and valuable resources to help minimize risk and enhance the hiring process. For two years in a row, Pre-employ was named to Business News Daily's Best Background Check Services.

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