

Summary of Hiring Process & FCRA Compliance

Following are the key steps that an employer must take to obtain a background report on an applicant/employee.

1. Initial Notice - Optional

Initial Notice is making it known to all employees and applicants that the employer conducts background screening. If Initial Notice is used, it must be provided to all employees and applicants in order to not appear discriminatory. It is recommended that such notice occur prior to requesting written authorization for background screening.

Some methods for Initial Notice include:

- Signs in Human Resources
- Letters or notices to current employee
- Statement on the company's website
- Statement in advertising, job postings, or other recruiting tools

2. Disclosure to Applicant/Employee - Required

- **Employer discloses in writing to applicant/employee that he/she will be the subject of a background report as part of the employment selection process.**
- Before a background report for employment purposes may be procured from a background screening company by the employer, disclosure must occur. Disclosure is the act of informing the applicant/employee that s/he will be the subject of a background investigation. The disclosure must be in writing
- The employer must retain the original document. It is recommended that the applicant/employee be offered a copy of the document. Although not required, "A Summary of Your Rights under the Fair Credit Reporting Act" may be provided to the applicant/employee at this time. However, note that the *Summary of Rights* document must still be provided to the applicant/employee whenever a copy of the background report is provided to the applicant/employee.
- A "Consumer Report" deals with facts while an "Investigative Consumer Report" also includes opinions. If the background report to be procured is an "Investigative Consumer Report," special language must be included in the disclosure. Per the FCRA, the document must clearly and accurately disclose to the applicant/employee that inquiries about "*...information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable, may be made...*"
- The applicant/employee must be notified no later than three days after the employer requests an Investigative Consumer Report that such report has been requested from the screening company. The notification must include the fact that s/he has the right to obtain additional information as to the nature and scope of the investigation requested and must include "A Summary of Your Rights under the Fair Credit Reporting Act."
- Many employers include the Investigative Consumer Report language in their standard disclosure document, thereby eliminating the need for a second disclosure. If the employer is going to wait a significant amount of time between the disclosure and requesting an Investigative Consumer Report, a second disclosure is recommended.

3. Written Authorization - Required

- Employer obtains signed authorization for preparation of a background report from applicant/employee.
- As noted above, the FCRA permits the authorization be combined with the disclosure. Further per the FTC, the disclosure and authorization may also be used to collect identifying information about the applicant/employee. Regardless of whether combined with the disclosure or as a standalone document, the authorization must be signed by the applicant/employee before a background report may be procured from a background screening company.
- The employer may wish to include language in the authorization which states the authorization is valid throughout the term of employment. This allows the employer to procure background reports on the employee without obtaining a new authorization for each background report. This is particularly helpful for those employers who conduct annual checks such as driving or criminal.
- The employer may be required to provide a copy of the authorization (or combined disclosure and authorization) to the background screening company when requesting a background investigation. The FTC has opined that the background screening company is not required to have a copy of the authorization in their possession. From a practical standpoint, however, the background screening company is likely to need to supply a copy of the authorization to one or more information sources. For purposes of efficiency, most background screening companies will recommend the authorization be provided at time of background screening request.

4. Subject Notification - Optional

- A Subject Notification is a notice advising the applicant/employee that a background check has been ordered. This notification is not required under federal law, however, it is recommended in cases when significant time has elapsed between disclosing to and obtaining authorization from the applicant/employee and the initiation of the background. If Subject Notification is provided, it is recommended that the employer also use the notice to remind the applicant/employee that s/he previously received disclosure and provided authorization.

5. Background Report Conducted - Required

- Employer provides information about the applicant/employee to the background screening company and requests background screening.
- Background screening company conducts the background checks which were requested by employer and prepares background report.
- Employer reviews completed background report and determines if any information will adversely impact employment decision. If no adverse impact results from information in the background report, the employer will proceed with other steps in the employment process.

NOTE: Steps 6-9 are used only when an employer is considering an adverse employment action.

6. Pre-Adverse Action - Required

If employer is considering an adverse employment action based in whole or part on information in the background report, the employer: a) notifies applicant/employee, b) provides a copy of the background report, and c) provides "A Summary of Your Rights under the Fair Credit Reporting Act." (This process is sometimes called "Pre-Adverse Action" or "Preliminary Adverse Action" or "First Notice.")

An adverse employment action includes not hiring an applicant, not promoting an employee, not retaining an employee, or any other action which has an adverse impact on the individual's employment status. Whenever an adverse action is being considered based in whole or part on information in the background report, no actual adverse action may be taken until the applicant/employee is so advised. In doing so, the employer must inform the applicant/employee that adverse action is being considered.

Further, the employer must provide the applicant/employee with a copy of his/her background report, a copy of "A Summary of Your Rights under the Fair Credit Reporting Act," and a reasonable period of time to dispute the accuracy or completeness of information in the report.

The FCRA does not specify how long an employer must wait after the pre-adverse action notice before actually taking adverse action. According to the FTC, employers should *"...keep in mind the clear purpose of the provision to allow consumers to discuss reports with employers or otherwise respond before adverse action is taken."* Thus, the applicant must have a meaningful opportunity to review the information and to respond.

The FTC has suggested five business days as a reasonable amount of time. If the employer falls under the auspices of the US Department of Transportation, three business days should be allowed.

Although not required by the FCRA, it is recommended that the pre-adverse action notice be provided to the applicant/employee in writing. The Summary of Rights must be in substantially the same form as that designed by the FTC.

7. Applicant Dispute - Required if Applicable

- Applicant/employee contacts background screening company if s/he disputes any information in background report.

8. Reinvestigation - Required if Applicable

- Background screening company re-investigates any disputed items of information and issues updated report to employer and applicant/employee.

9. Adverse Action Procedures - Required

Employer reviews updated report and makes final employment decision. If the final employment decision is adverse, a notice of adverse action is sent to applicant/employee. (This process is sometimes called "Final Adverse Action" or "Second Notice.")

If the employee/applicant is denied employment, promotion or is dismissed based in whole or in part on information contained in the background report, s/he must be given a written notice of adverse action. This notice may be given only after the employer has followed the required pre-adverse action process and the applicant/employee has had the opportunity to dispute.

The adverse action notice does not need to include the specific reason for the adverse action, but must:

- State that the adverse action is based either in whole or part on information contained in the background report provided by the background screening company
- State that the Consumer Reporting Agency (the background screening company) did not make the adverse employment decision and does not know the basis for the decision.
- Include the name, address, and toll free number of the background screening company.
- State that the applicant/employee has the right to obtain another free copy of his/her background report within the next 60 days.

Note: If a background report is obtained without disclosure and authorization because of suspected wrongdoing and adverse action is taken, only a summary of the background report need be provided and certain sources may be redacted.

The FTC has opined that a background screening company may fulfill the employer's adverse action notification duties and send adverse action notices on behalf of the employer. However, the employer remains responsible for any duty imposed by the FCRA and may be subject to liability if the duties are not performed by the background screening company.