

ADVERSE ACTION

When an employer receives a Consumer Report and intends not to hire the applicant based on the report, the applicant then has certain rights. If the “adverse action” is intended as a result of a Consumer Report, then the applicant is entitled to certain documents, see FCRA Section 604. Before taking the adverse action, the employer must provide the following information to the applicant –

- A copy of the consumer report
- The FTC document “A Summary of Your Rights Under the Fair Credit Reporting Act.” This document is usually provided by the screening service.

The purpose is to give an applicant the opportunity to see the report with the information being used against them. If the report is inaccurate or incomplete, the applicant then has the opportunity to contact the Consumer Reporting Agency to dispute or explain what is in the report. Otherwise, applicants could be denied employment without knowing they were the victims of inaccurate or incomplete data.

Pre-Adverse Notice Sample Letter

Dear Applicant,

A decision is currently pending concerning your application for employment at (the above employer)(this company). Enclosed for your information is a copy of the consumer report that you authorized in regard to your application for employment, together with a “Summary of Your Rights Under the Fair Credit Reporting Act.”

If there is any information that is inaccurate or incomplete, you should contact this office as soon as possible so an employment decision may be completed.

Sincerely Yours,

List the Consumer Reporting Agency’s name, address and phone number below, including toll free numbers

As a practical matter, by the time an applicant is the subject of a Consumer Report, an employer has spent time, money, and effort in recruiting and hiring. Therefore, it is in the employer’s best interest to give an applicant an opportunity to explain any adverse information before denying a job offer. If there was an error in the public records, giving the applicant the opportunity to explain or correct it could be to the employer’s advantage.

If there are other reasons for not hiring an applicant in addition to matters contained in a consumer report, the adverse action notification procedures still apply. Whether the intended decision was based in whole or in part on the Consumer Report, the applicant has a right to receive the report. In fact, these rights apply even if the information in the consumer report is not negative on its face. For example, an applicant may have a perfect payment record on his or her credit report, but an employer may be concerned the debt level is too high compared to the salary. The applicant is still entitled to a notice of pre-adverse action because it is possible the report is wrong about the applicant’s outstanding debts. In a situation where the employer would have made an adverse decision regardless of the background report, following the adverse action procedures is still the best practice for legal protection.

A question that arises is how long an employer must wait before denying employment based upon information contained in a Consumer Report. The Fair Credit Reporting Act is silent on this point. However, many legal authorities advise an employer should wait a “reasonable” period of time before making the final decision. This period should be the time needed for an applicant to meaningfully review the report and make known to the employer or the Consumer Reporting Agency any inaccurate or incomplete information in the Consumer Report. A Consumer Reporting Agency should be able to assist employers in complying with these requirements. This does not mean an employer is required to hold the job open for a long period of time. After the first notice is given, and the applicant has had an appropriate opportunity to respond, an employer may either 1) wait until there has been a reinvestigation, or 2) fill the position with another applicant.

As a practical matter, most employers find this provision of law does NOT impose any hardship or burden. While in rare situations an employer may question on how to proceed, the clear advantages of pre-employment screening far outweigh any complications that can theoretically arise from compliance.

If, after sending out the documents required in Step 3, the employer intends to make a final decision not to hire, the employer must take one more step. The employers must send the applicant a Notice of Adverse Action informing the job applicant that the employers has made a final decision, and must provide a copy of the FTC form "Summary of Your Rights under the Fair Credit Reporting Act."

Many employers find it difficult to believe that Congress intended an applicant to be notified twice, both before an adverse action and after. The law clearly requires two notices. This is also the interpretation of the Federal Trade Commission staff. The purpose is to give job applicants the maximum opportunity to correct any incomplete or inaccurate reports that could affect their chances of employment.

A special problem arises when an employer brings a worker on premises before the background check is complete, only to later find the background report uncovers negative information that may have disqualified the person. An employer may be tempted to simply call the person in, hand them the report, a final paycheck, and both letters at the same time. However, this does not give the applicant a reasonable time to review, reflect, and respond to the report. If the background report was incomplete or incorrect, there is not a meaningful opportunity for the applicant to exercise their rights under the FCRA. The best procedure is to follow the FCRA by providing the worker with their report, a statement of rights, the first letter and an opportunity to offer any response. The second letter should be delayed until a reasonable time has passed for an applicant to respond. Although it is administratively more difficult than giving two letters at once, two letters at once may violate an applicant's rights.

Notice of Adverse Action Sample Letter

Dear Applicant,

In reference to your application for employment, we regret to inform you that we are unable to further consider you for employment at this time. Our decision, in part, is the result of information obtained through the Consumer Reporting Agency Identified below.

The Consumer Reporting Agency did not make the adverse decision, and is unable to explain why the decision was made.

You have the right to obtain within 60 days a free copy of your consumer report from the Consumer Reporting Agency as identified below and from any other consumer reporting agency which compiles and maintains files on consumers on a nationwide basis.

You have the right to contact the Consumer Reporting Agency listed below to dispute any information contained in the report that you believe may be inaccurate or incomplete. A copy of your rights under the "Fair Credit Reporting Act" is enclosed, entitled "Summary of Your Rights under the Fair Credit Reporting Act."

Sincerely Yours,

List the Consumer Reporting Agency's name, address and phone number below, including toll free numbers.