

# ADVERSE ACTION COMPLIANCE UNDER THE FAIR CREDIT REPORTING ACT

## HIRE-SAFE Investigative Consumer Report

### What is Adverse Action?

As it relates to background investigations for the purposes of screening an applicant prior to hire, the term “adverse action” refers to the hiring company taking the action of **declining** an applicant or **withdrawing an offer** of employment. The use of the term **adverse action** in the remainder of this discussion refers to both options.

### The Basics of Handling Adverse Action – A Two Step Process

It is very important to remember that the *Fair Credit Reporting Act* (FCRA) clearly places a burden on the employer to give the applicant reasonable opportunity to make sure that the information reported in any Consumer Report or Investigative Consumer Report is correct. In order to ensure this, the FCRA requires that employers utilize a two (2) step process when declining applicants on the basis of information contained in a pre-employment background investigation report. Those steps are generally referred to as:

1. Notice of Pre-Adverse Action, followed by the
2. Notice of Adverse Action

### A Key Assumption

Critical to this discussion is that all actions are related to the screening of an individual for the purpose of considering the person for employment. Either the person does not currently work for your company or the person has been offered employment contingent upon your company receiving a report which contains information acceptable to your company’s hiring standards. ALL offers of employment or the allowing of a person to actually begin employment should be made with appropriate contingency language acceptable to your company’s legal counsel.

### STEP 1 – Notice of Potential or Pre- Adverse Action

As a key protection to the applicant, the FCRA requires that BEFORE an employer declines an applicant or withdraws an offer of employment, the employer has the responsibility to place the applicant on notice that the employer has received information on the applicant which could lead to the employer taking adverse action.

This notice is referred to as a “Notice of Pre- Adverse Action”.

This notice is to be provided to the applicant at the point in the process where the hiring company determines that adverse action **may be taken** - in other words, PRIOR TO adverse action being taken (i.e. **BEFORE** you decline the applicant or withdraw the offer). At the point of potential adverse action, the hiring company has the responsibility to deliver to the applicant:

1. A letter advising the applicant that adverse action is being considered (available from HIRE-SAFE)
2. A copy of the report on which the adverse action is being considered (available from HIRE-SAFE)
3. Direction to contact HIRE-SAFE if the applicant wishes to dispute any of the information contained in the report – along with our toll-free number: (888-792-4473)

This allows the applicant the opportunity to provide any additional information or dispute the validity of their Consumer Investigative Report before action is actually taken on the part of the hiring company.

### The Dispute Process

If the applicant does not agree with the accuracy and/or completeness of the report, the applicant has the option of calling HIRE-SAFE and disputing anything contained in the report. HIRE-SAFE will discuss all aspects of the report with the applicant and make note of any exceptions which the applicant takes to the contents. HIRE-SAFE will then reinvestigate any disputed aspects of the case and either correct or reaffirm the report as it was originally issued. In either case, an “Updated HIRE-SAFE Consumer Investigative Report” will be issued to the client.

The timing of the updated report will depend on the issues involved in the dispute. However, because of the obvious level of importance to all parties, it is HIRE-SAFE’s policy to give immediate and prompt attention to any dispute. In the case of the original disputed report being based upon the HIRE-SAFE Instant National Criminal Profile, the standard county court search fee’s for all disputed aspects of a report will apply and will be invoiced to the client’s account.

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## Follow-up to the Dispute Process

Once the report is reissued as a result of the dispute process, the employer is then in the position to make a final decision. If that decision is to decline the applicant or withdraw the offer of employment, THEN the second step of the process can be taken – which is the actual taking of adverse action.

## STEP 2 – Notice of Adverse Action

The second step in the process is when the adverse action is actually taken. It is critical to understand that prior to this step, NO action adverse to the applicant has been taken. At the point which adverse action is taken, the company is required under the FCRA to issue the following to the applicant:

1. A letter or notice advising the applicant of the adverse action being taken. Typically, this would be the declining of the applicant or withdrawing of the offer of employment. However, if the applicant actually started employment, then that would typically involve a notice of termination. (available from HIRE-SAFE)
2. A copy of the final HIRE-SAFE Investigative Consumer Report on which the decision was based.
3. A copy of “A Summary of Your Rights Under the Fair Credit Reporting Act” and any state requirements

## The Importance of the Two Steps

The simple answer to the importance of following a two step approach is easy – it is required by law under the FCRA. However, there is another key reason why any company must take both steps. The report on the applicant is based on information from many sources. Given the nature of the many sources to which an investigation company has to go for information, it is possible that information may not be current. Or, information supplied for the background (e.g. the application or waiver, etc) may have been misread. Also, anyone in the process of developing the report may simply make a mistake. There is any number of reasons that a report may have incorrect information. However, the vast majority of disputes relate to public court record information which has been correctly reported but which the applicant believes is not valid. The most common example is where the applicant believes a criminal record should have been expunged or dismissed when the public court record shows no such expungement or dismissal. In these situations, the report typically is reissued as reinvestigated showing the same results.

Regardless of the outcome of any dispute, the first step of the adverse action process is designed to place the applicant on notice that something in the report appears sufficiently negative to deprive the applicant of the opportunity of employment. However, at the point of **Notice of Potential Adverse Action**, since **NO ACTION HAS YET BEEN TAKEN** to decline or withdraw an offer, the applicant has not yet been damaged. By providing the applicant the opportunity to correct a report which contains incorrect information, it gives everyone the opportunity to base decisions on the correct information. **Skipping the first step is not only against the requirements of the FCRA, it exposes all parties to a high degree of legal risk.**

On the other hand, if the process is followed as prescribed, it affords everyone the opportunity to make a properly informed decision and, if anything was originally wrong with a report, the report can get corrected before the applicant is placed in a position of being damaged.

## Questions

The importance of this process being followed can not be overstated both for fairness to all parties involved and the potential exposure represented by not adhering to the steps required under the FCRA. If you have any questions, please contact your Client Representative at: 888-792-4473.

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